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WHEN: Tuesday, February 12, 2013
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Washington, DC 20002

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Presidential Documents

Title 3—

The President

Proclamation 8929 of January 31, 2013

American Heart Month, 2013

By the President of the United States of America

A Proclamation

Heart disease is the leading cause of death among American men and women, claiming well over half a million lives annually. While no one is immune to heart disease, everyone can take steps to reduce their risk. During American Heart Month, we make a commitment—for ourselves and our families—to staying healthy and keeping our hearts strong.

Although genetic factors likely play a role in cardiovascular disease, there are also several controllable risk factors, including: blood cholesterol levels, high blood pressure, diabetes, poor diet, obesity, tobacco use, and physical inactivity. Any one of them can lead to heart disease, and additional factors magnify the risk. That is why a heart-healthy lifestyle is so important. Certain improvements to daily routines—like eating healthy, not smoking, limiting alcohol use, and getting routine health screenings—can lower several of these risk factors and set the stage for a long and healthy life.

My Administration is committed to helping Americans achieve and maintain heart health. Under the Affordable Care Act, many insurance plans must cover certain preventive services like blood pressure screening and obesity screening at no out-of-pocket cost to the patient. In 2014, a new Health Insurance Marketplace will make affordable health insurance available to millions of men, women, and children—including those with pre-existing conditions. We are also working to prevent heart disease through efforts like First Lady Michelle Obama's *Let's Move!* initiative, which encourages young people and families to eat healthy and get active. And throughout the Federal Government, we are partnering with communities, health care providers, organizations, and other stakeholders to make care more accessible and prevent more heart attacks than ever before. To learn more, visit www.HealthCare.gov.

On Friday, February 1, Michelle and I invite all Americans to join in marking National Wear Red Day. By wearing red, we pay tribute to men and women affected by heart disease, recognize dedicated health care professionals, honor researchers working toward tomorrow's breakthroughs, and demonstrate our personal commitment to a heart-healthy lifestyle.

In acknowledgement of the importance of the ongoing fight against cardiovascular disease, the Congress, by Joint Resolution approved December 30, 1963, as amended (77 Stat. 843; 36 U.S.C. 101), has requested that the President issue an annual proclamation designating February as ''American Heart Month.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim February 2013 as American Heart Month, and I invite all Americans to participate in National Wear Red Day on February 1, 2013. I also invite the Governors of the States, the Commonwealth of Puerto Rico, officials of other areas subject to the jurisdiction of the United States, and the American people to join me in recognizing and reaffirming our commitment to fighting cardiovascular disease.

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

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Presidential Documents

Proclamation 8930 of January 31, 2013

National African American History Month, 2013

By the President of the United States of America

A Proclamation

In America, we share a dream that lies at the heart of our founding: that no matter who you are, no matter what you look like, no matter how modest your beginnings or the circumstances of your birth, you can make it if you try. Yet, for many and for much of our Nation's history, that dream has gone unfulfilled. For African Americans, it was a dream denied until 150 years ago, when a great emancipator called for the end of slavery. It was a dream deferred less than 50 years ago, when a preacher spoke of justice and brotherhood from Lincoln's memorial. This dream of equality and fairness has never come easily—but it has always been sustained by the belief that in America, change is possible.

Today, because of that hope, coupled with the hard and painstaking labor of Americans sung and unsung, we live in a moment when the dream of equal opportunity is within reach for people of every color and creed. National African American History Month is a time to tell those stories of freedom won and honor the individuals who wrote them. We look back to the men and women who helped raise the pillars of democracy, even when the halls they built were not theirs to occupy. We trace generations of African Americans, free and slave, who risked everything to realize their God-given rights. We listen to the echoes of speeches and struggle that made our Nation stronger, and we hear again the thousands who sat in, stood up, and called out for equal treatment under the law. And we see yesterday's visionaries in tomorrow's leaders, reminding us that while we have yet to reach the mountaintop, we cannot stop climbing.

Today, Dr. King, President Lincoln, and other shapers of our American story proudly watch over our National Mall. But as we memorialize their extraordinary acts in statues and stone, let us not lose sight of the enduring truth that they were citizens first. They spoke and marched and toiled and bled shoulder-to-shoulder with ordinary people who burned with the same hope for a brighter day. That legacy is shared; that spirit is American. And just as it guided us forward 150 years ago and 50 years ago, it guides us forward today. So let us honor those who came before by striving toward their example, and let us follow in their footsteps toward the better future that is ours to claim.

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 February 2013 as National African American History Month. I call upon public officials, educators, librarians, and all the people of the United States to observe this month with appropriate programs, ceremonies, and activities.

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

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Presidential Documents

Proclamation 8931 of January 31, 2013

National Teen Dating Violence Awareness and Prevention Month, 2013

By the President of the United States of America

A Proclamation

This year, it is estimated that 1 in 10 teens will be hurt intentionally by someone they are dating. While this type of abuse cuts across lines of age and gender, young women are disproportionately affected by both dating violence and sexual assault. This month, we stand with those who have known the pain and isolation of an abusive relationship, and we recommit to ending the cycle of violence that affects too many of our sons and daughters.

Whether physical or emotional, dating violence can leave scars that last a lifetime. Teens who suffer abuse at the hands of a partner are more likely to struggle in school, develop depression, or turn to drugs or alcohol. Victims are also at greater risk of experiencing the same patterns of violence later in life. These tragic realities tug at our conscience, and they call upon us to ensure survivors of abuse get the services and support they need.

We also have a responsibility to make dating violence an act that is never tolerated in our communities, among those we know, or in our own lives. That is why my Administration has made preventing abuse a priority. We continue to support educators, advocates, and organizations who are advancing outreach and education, and we are harnessing the power of technology to get the message out under Vice President Joe Biden's *1is2many* initiative. Last June, we built on those efforts by launching a new public service announcement that features professional athletes and other role models speaking out against dating violence. And in the months ahead, we will keep working to empower all Americans in the fight against abuse. To learn more, visit www.WhiteHouse.gov/1is2many.

Each of us has an obligation to stand against dating violence when we see it. This month, as we remember that important lesson, let us rededicate ourselves to making its promise real. I encourage all Americans seeking immediate and confidential advice regarding dating violence to contact the National Dating Abuse Helpline at 1–866–331–9474, by texting ''loveis'' to 77054, or by visiting www.LoveIsRespect.org. Additional resources are available at www.CDC.gov/features/datingviolence.

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 February 2013 as National Teen Dating Violence Awareness and Prevention Month. I call upon all Americans to support efforts in their communities and schools, and in their own families, to empower young people to develop healthy relationships throughout their lives and to engage in activities that prevent and respond to teen dating violence.

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

[FR Doc. 2013–02758
Filed 2–5–13; 8:45 am]
Billing code 3295–F3

Presidential Documents

Memorandum of January 31, 2013

Delegation of a Reporting Authority

Memorandum for the Secretary of Transportation

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to you the functions and authority conferred upon the President by section 1306 of the Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, to make the specified reports to the Congress.

You are authorized and directed to notify the appropriate congressional committees and publish this memorandum in the *Federal Register.*

THE WHITE HOUSE,
Washington, January 31, 2013.

[FR Doc. 2013–02760
Filed 2–5–13; 8:45 am]
Billing code 4910–9

Rules and Regulations

Federal Register
Vol. 78, No. 25
Wednesday, February 6, 2013

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

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

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1738

RIN 0572–AC06

Rural Broadband Access Loans and Loan Guarantees

AGENCY: Rural Utilities Service, USDA.

ACTION: Final rule.

SUMMARY: The Rural Utilities Service, an agency delivering the United States Department of Agriculture's (USDA's) Rural Development Utilities Programs, hereinafter referred to as the Agency, is adopting as final, with change, an interim rule (published at 76 FR 13770 on March 14, 2011) for its regulation for the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program).

DATES: This final rule is effective on February 6, 2013.

FOR FURTHER INFORMATION CONTACT: David Villano, Assistant Administrator, Telecommunications Program, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue SW., STOP 1590, Room 5151–S, Washington, DC 20250–1590. Telephone number: (202) 720–9554, Facsimile: (202) 720–0810.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be economically significant and was reviewed by the Office of Management and Budget under Executive Order 12866. In accordance with Executive Order 12866, an Economic Impact Analysis was completed, outlining the costs and benefits of implementing this program in rural America. The complete analysis is available from the Agency upon request. The following is the discussion of the Economic Benefits section of the Analysis.

Economic Benefits of Broadband Deployment In Rural Areas

Bringing broadband services to rural areas does present some challenges. Because rural systems must contend with lower household density than urban systems, the cost to deploy fiber-to-the-home (FTTH) and digital subscriber line (DSL) systems in urban communities is considerably lower on a per household basis, making urban systems more economical to construct. Other associated rural issues, such as environmental challenges or providing wireless service through mountainous areas, also can add to the cost of deployment. Notwithstanding these challenges and obstacles, a recent analysis by USDA's Economic Research Service concluded that broadband investment in rural areas yields significant economic and socio-economic gains:

Analysis suggests that rural economies benefit generally from broadband availability. In comparing counties that had broadband access relatively early (by 2000) with similarly situated counties that had little or no broadband access as of 2000, employment growth was higher and nonfarm private earnings greater in counties with a longer history of broadband availability. By 2007, most households (82 percent) with in-home Internet access had a broadband connection. A marked difference exists, however, between urban and rural broadband use—only 70 percent of rural households with in-home Internet access had a broadband connection in 2007, compared with 84 percent of urban households. The rural-urban difference in in-home broadband adoption among households with similar income levels reflects the more limited availability and affordability of broadband in rural settings.

Areas with low population size, locations that have experienced persistent population loss and an aging population, or places where population is widely dispersed over demanding terrain generally have difficulty attracting broadband service providers. These characteristics can make the fixed cost of providing broadband access too high, or limit potential demand, thus depressing the profitability of providing service. Clusters of lower service exist in sparsely populated areas, such as the Dakotas, eastern Montana, northern Minnesota, and eastern Oregon. Other low-service areas, such as the Missouri-Iowa border and Appalachia, have aging and declining numbers of residents. Nonetheless, rural areas in some States (such as Nebraska, Kansas, and Vermont) have higher-than expected broadband service, given their population characteristics, suggesting that policy, economic, and social factors can overcome common barriers to broadband expansion.

In general, rural America has shared in the growth of the Internet economy. Online course offerings for students in primary, secondary, post-secondary, and continuing education programs have improved educational opportunities, especially in small, isolated rural areas. And interaction among students, parents, teachers, and school administrators has been enhanced via online forums, which is especially significant given the importance of ongoing parental involvement in children's education.

Telemedicine and telehealth have been hailed as vital to health care provision in rural communities, whether simply improving the perception of locally provided health care quality or expanding the menu of medical services. More accessible health information, products, and services confer real economic benefits on rural communities: reducing transportation time and expenses, treating emergencies more effectively, reducing time missed at work, increasing local lab and pharmacy work, and providing savings to health facilities from outsourcing specialized medical procedures. One study of 24 rural hospitals placed the annual cost of not having telemedicine at $370,000 per hospital. (See *http://www.ers.usda.gov/Publications/ERR78/ERR78.pdf,* at pages iv and 24.)

Most employment growth in the U.S. over the last several decades has been in the service sector, a sector especially conducive for broadband applications. Broadband allows rural areas to compete for low- and high-end service jobs, from call centers to software development, but does not guarantee that rural communities will get them. Rural businesses have been adopting more e-commerce and Internet practices, improving efficiency and expanding market reach. Some rural retailers use the Internet to satisfy supplier requirements. The farm sector,

a pioneer in rural Internet use, is increasingly comprised of farm businesses that purchase inputs and make sales online. Farm household characteristics such as age, education, presence of children, and household income are significant factors in adopting broadband Internet use, whereas distance from urban centers was not a factor. Larger farm businesses are more apt to use broadband in managing their operation; the more multifaceted the farm business, the more the farm used the Internet.[1]

An analysis based on approximately $1.8 billion in approved loans in the Farm Bill Broadband Program (based on multiple technology platforms) yielded the following results (numbers have been rounded):

- Number of communities funded: 2,800
- Average cost per community: $640,000
- Total subscribers: 1.3 million

Most recently, the agency has concluded funding the American Recovery and Reinvestment Act (Recovery Act) Broadband Initiatives Program (BIP) that financed the same types of facilities and entities that are funded under this Farm Bill program. The Recovery Act authorized RUS to issue loans and grants to projects that extend broadband service to unserved and underserved rural areas. The funding provided by the Recovery Act is increasing the availability of broadband and stimulating both short- and long-term economic progress. RUS BIP completed two funding rounds, making a significant investment in projects that will enhance broadband infrastructure in scores of rural communities. This represents a critical investment, designed to rebuild and revitalize rural communities. Without this funding, many communities could not cover the costs of providing broadband service to homes, schools, libraries, healthcare providers, colleges, and other anchor institutions.

RUS awarded $3.4 billion to 297 recipients in 45 States and 1 U.S. territory for infrastructure projects. Eighty-nine percent of the awards and 92 percent of the total dollars awarded are for 285 last-mile projects ($3.25 billion), which will provide broadband service to households and other end users. Four percent of the awards and five percent of the total dollars awarded are for 12 middle-mile projects ($173 million) that will provide necessary backbone services such as interoffice transport, backhaul, Internet connectivity, or special access to rural areas. The projects funded will bring broadband service to 2.8 million households, reaching nearly 7 million people, 364,000 businesses, and 32,000 anchor institutions across more than 300,000 square miles. These projects also overlap with 31 tribal lands and 124 persistent poverty counties, traditionally the most costly to serve areas.

As noted in the ERS study, rural areas with dispersed populations or demanding terrain generally have difficulty attracting broadband service providers because the fixed cost of delivering broadband service can be too high. Yet broadband is a key to economic growth. For rural businesses, broadband gives access to national and international markets and enables new, small, and home-based businesses to thrive. Broadband access affords rural residents the connectivity they need to obtain healthcare, education, financial, and many other essential goods and services.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) number assigned to this program is 10.886, Rural Broadband Access Loans and Loan Guarantees. The Catalog is available on the Internet and the General Services Administration's (GSA's) free CFDA Web site at *http://www.cfda.gov.*

Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require a consultation with State and local officials. See the final rule related notice entitled, ''Department Programs and Activities Excluded from Executive Order 12372'' (50 FR 47034).

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), the information collection for this program has been approved by the Office of Management and Budget under OMB Control Number: 0572–0130.

National Environmental Policy Act Certification

The Administrator has determined that this rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Regulatory Flexibility Act Certification

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because the Agency is not required by 5 U.S.C. 551 et seq. or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted, no retroactive effort will be given to this rule, and, in accordance with Sec. 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. Sec. 6912(e)), administrative appeal procedures, if any, must be exhausted before an action against the Department or its agencies may be initiated.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments for the private sector. Thus, this rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

USDA has undertaken a series of regulation Tribal consultation sessions to gain input by Tribal officials concerning the impact of this rule on Tribal governments, communities, and individuals. These sessions will establish a baseline of consultation for future actions, should any become necessary, regarding this rule. Reports from these sessions for consultation will

[1] Broadband Internet's Value for Rural America. Peter Stenberg, Mitch Morehart, Stephen Vogel, John Cromartie,Vince Breneman, and Dennis Brown.

be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

E-Government Act Compliance

The Agency is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Background

A. Introduction

The Agency improves the quality of life in rural America by providing investment capital for deployment of rural telecommunications infrastructure. Financial assistance is provided to rural utilities; municipalities; commercial corporations; limited liability companies; public utility districts; Indian tribes; and cooperative, nonprofit, limited-dividend, or mutual associations. In order to achieve the goal of increasing economic opportunity in rural America, the Agency finances infrastructure that enables access to a seamless, nationwide telecommunications network. With access to the same advanced telecommunications networks as its urban counterparts, especially broadband networks designed to accommodate distance learning, telework, and telemedicine, rural America will eventually see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. The Agency shares the assessment of Congress, State and local officials, industry representatives, and rural residents that broadband service is a critical component to the future of rural America. The Agency is committed to ensuring that rural America will have access to affordable, reliable, broadband services and to provide a healthy, safe, and prosperous place to live and work.

B. Regulatory History

On May 13, 2002, the Farm Security and Rural Investment Act of 2002, Public Law 107–171 (2002 Farm Bill) was signed into law. The 2002 Farm Bill amended the Rural Electrification Act of 1936 to include Title VI, the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program), to be administered by the Agency. Title VI authorized the Agency to approve loans and loan guarantees for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities. Under the 2002 Farm Bill, the Agency was directed to promulgate regulations without public comment. Implementing the program required a different lending approach for the Agency than it employed in its earlier telephone program because of the unregulated, competitive, and technologically diverse nature of the broadband market. Those regulations were published on January 30, 2003.

In an attempt to enhance the Broadband Loan Program and to acknowledge growing criticism of funding competitive areas, the Agency proposed to amend the program's regulations on May 11, 2007 at 72 FR 26742 to make eligibility of certain service areas more restrictive than set out in the 2002 Farm Bill. In addition to eligibility changes, the proposed rule included, among others, changes to persistent problems the Agency had encountered while implementing the program over the years, especially regarding equity requirements, the market survey, and the legal notice requirements. As the Agency began analysis of the public comments it received on the proposed regulations, the Food, Conservation, and Energy Act of 2008, more commonly known as the 2008 Farm Bill, was working its way through Congress. The proposed rule and key aspects of the public comments were shared with Congress during its deliberations, and the majority of the proposed changes in the proposed rule were incorporated into the legislation, with some modifications. For instance, the proposed rule lowered the equity requirement from 20 percent of the loan value to 10 percent. Congress enacted that change.

Other changes the Congress incorporated included several new restrictions not found in the 2002 Farm Bill. These were in response to growing public criticism of federally funded competition. First, funding is restricted in areas that contain 3 or more incumbent service providers, which is defined as serving not less than 5 percent of the proposed service area for each existing service provider. Second, a requirement was added that at least 25 percent of the households in the proposed service area do not have access to more than one incumbent service provider. And third, for incumbent service providers that were merely upgrading the quality of broadband service in their existing service territory, the prior restrictions on competition (ie., 3 or more providers) would be waived.

In response to the debate on what was rural, the 2008 Farm Bill relaxed the restriction to allow urbanized areas that were not adjacent and contiguous to areas with a population of more than 50,000 inhabitants to be eligible for funding. And lastly, the 2008 Farm Bill incorporated the concept of not requiring market studies for applicants that relied on a penetration rate of less than 20 percent for the loan to be feasible.

In the public interest of having a Broadband Program in place to quickly address the needs of the hundreds of applications that were not funded under the Recovery Act, and in light of the fact that the great majority of changes herein are mandated by the 2008 Farm Bill, or have been proposed in the Agency's prior rule, put out for comment, the Agency proceeded forward with certain changes to the Broadband Loan Program by publishing an interim rule in the **Federal Register** at 76 FR 13770, on March 14, 2011.

C. Comments and Responses

In its Interim Rule, published in the **Federal Register** March 14, 2011 at 76 FR 13770, the agency requested comments regarding the new procedures implementing the 2008 Farm Bill. The agency received seven sets of comments from the following organizations/individuals:

- *National Cable & Telecommunications Association*
- *Eastern Rural Telecom Association*
- *United States Telecom Association*
- *The Associations (Western Telecommunications Alliance; Organization for the Promotion and Advancement of Small Telecommunications Companies; and National Telecommunications Cooperative Association)*
- *Monte R. Lee and Company*
- *XATel Communications*
- *Jaclyn Bee*

These comments have been summarized and addressed below:

Broadband Lending Speed

Comment: Several respondents took issue with the definition of Broadband Lending Speed. The respondents asserted that the differentiation in speeds proposed between wireline and wireless technologies is in violation of the agency's ''technology neutral'' mandate and should be eliminated.

Several respondents also stated that the initial speeds set forth in the Notice of Funds Availability (NOFA) are too low and must be increased to keep pace with the rapidly growing need for increased consumer bandwidth demands. One respondent said the bifurcation between wireline speed and wireless speed would create a ''rural—rural divide,'' subjecting some areas, mainly the most rural, to a lower standard.

Response: With regard to the charge that the agency is in violation of its ''technology neutral'' mandate, RUS believes, in fact, that it is protecting this mandate by establishing different performance thresholds based on the limitations of different technologies. Specifically, in the preamble to the interim rule published in the **Federal Register** March 14, 2011 (76 FR 13770), the agency states: ''In order to treat all emerging technologies equally, the Agency may designate a different broadband lending speed for fixed and mobile broadband service.'' Further, this policy is consistent with the statutory directive provided in the 2008 Farm Bill (Pub. L. 110–234): ''The Secretary shall not establish requirements for bandwidth or speed that have the effect of precluding the use of evolving technologies appropriate for rural areas.'' One of the intents of this provision, as interpreted by the agency, is to allow financing in areas where it is financially unfeasible to build wireline facilities, by allowing the agency to fund a more economical (if shorter term) solution, such as the expansion of mobile broadband service. To leave these areas stranded will clearly produce the undesirable effect of a ''rural—rural divide.''

With regard to the overall Broadband Lending Speeds being set to low (or slow), this definition establishes a minimum threshold, not a maximum. Further, the agency will continue to monitor and assess technological advances and bandwidth demands and adjust the definition accordingly.

Prioritization of Application Processing

Comment: One respondent recommended that the projects that exhibited the greatest ''scalability'' should be given the greatest priority in the processing queue—defining scalability as ''those [projects] that can be easily and relatively inexpensively upgraded to reflect increased consumer demand for more bandwidth.'' Another respondent objected to the prioritization section of the rule, stating that ''RUS should narrow the scope of the program by providing funding for only areas that are Priority 1 or 2.'' In addition, the respondent requests that RUS count all providers in a proposed service territory when determining eligibility and prioritization, not just those providers that responded to the public notice. Further, this respondent said ''RUS also should count new broadband services that *plan* [emphasis added] to launch within the next 12 months, *e.g., 4G wireless services.''*

Response: Achieving a fair and unbiased prioritization method is difficult at best, particularly in an industry as diverse in service providers and technologies as the broadband industry is. The agency has clearly placed the highest priority on applications proposing to serve unserved areas. Further, those areas where three-quarters of the households do not have access to broadband service are the 2nd level of priority. Beyond that, applications with a varying mix of unserved and served households and that are within the statutory requirements (between 25 percent and 74 percent served) will be processed as received. As can be seen, the agency has clearly established a prioritization regime that targets the greatest proportion of unserved households.

Regarding the issue of factoring ''scalability'' into prioritization process, the agency does not believe this is practicable in keeping with its ''technology neutral'' mandate. Specifically, different technologies have different degrees of evolution capabilities and hence different ''scalability'' requirements that are not comparable.

With regard to the number of incumbent service providers within a proposed service area, the agency intends to use all available resources to identify incumbents, including knowledge of the existing territory through field staff visits, as well as state and federal mapping resources, such as the National Broadband Map. When determining whether an area is eligible for financing, the agency will rely on responses to the applicants' proposed funded service area maps from incumbents. The agency through its own competitive analysis may identify other providers that did not respond to the public notice. In determining the feasibility of a project in such a situation, the agency would of course factor in all identified, non-respondent service providers.

Finally, attempting to consider future deployment of a certain level of broadband service is not practical. Relying on advertised deployment has proven to be inaccurate in many instances.

Public Notice Process (Notification)

Comment: One respondent objected to the 30-day notification window within which existing service providers can provide notice that they are providing services in the applicant's proposed service territory. Specifically, the respondent stated that 30 days was not sufficient enough time to conduct a manual search of the agency's database to determine on an ongoing basis if indeed an application had been filed to serve an existing entity's territory. The respondent recommends that either the agency increase the timeframe to 45 to 60 days or create an internet-based subscription service that would automatically alert subscribers to that service that an application had been filed in a particular service territory.

Response: The agency has established a subscription service. See *www.http://broadbandsearch.sc.egov.usda.gov/.*

RUS Protection of Previously Funded Entities

Comment: One respondent was supportive of the policy of ''not loaning against'' existing RUS borrowers. One respondent strongly opposed this policy, stating this ''* * * prohibition on funding areas served by existing RUS recipients demonstrates that the agency recognizes that subsidized entry has negative consequences for incumbent providers serving the same area.''

Response: The agency's policy of ''not lending against itself'' is primarily designed to protect taxpayer investment in publicly funded areas. However, borrowers are expected to maintain investment levels sufficient to ensure that borrowers provide modern broadband services. If it becomes apparent that previously funded borrowers are not providing adequate broadband service and meeting customer demands, the agency will revisit this policy. So, if necessary in order to expand access to an area where an RUS borrower is not providing adequate broadband service, the Agency may lend against its borrower. Similarly, this is the reason why the Agency may make loans where an existing entity is providing some broadband service but limits its service territory only to the more dense areas (in town). A loan that leverages in town customers revenues in order to expand service beyond town limits can achieve greater access for more sparsely populated rural areas.

Prompt Review of Loan Applications

Comment: One respondent called on the agency to ''review applications in a timely fashion.'' Specifically, the

respondent supported a 180-day deadline for application processing.

Response: The quality and ''completeness'' of applications play a vital role in the ability of the agency to promptly process loans. Those applications that are complete and contain all of the required supporting information and documentation can be processed more quickly. Applications with missing information, for example, cause major delays.

The Agency, through this rulemaking, has clearly established what constitutes a complete application. All other applications will be promptly returned. RUS strives to offer the best customer service and will continue its goal to provide shorter application processing times. Both the agency and the applicants share the responsibility for ensuring prompt application processing.

Additional Cash Requirement

Comment: One respondent, while recognizing ''the need to require additional constraints on newly formed and under performing companies,'' stated that allowing only 50 percent of the projected revenues as a contribution to the ''Additional Cash Requirement'' provision was too burdensome and most likely would result in infeasible applications. The respondent recommended that a leniency test should be established for existing companies that project negative cash flow for material reasons (such as tax planning, cash used for other businesses, etc.). In addition, the respondent expressed concern regarding the costs of video content, arguing that, for many rural providers, video service is not a revenue producer, but rather is offered as a means to increase overall subscriber penetration rates. As such the respondent proposed eliminating 50 percent of the expense projection associated with providing video service when determining the additional cash requirements.

Response: Rather than penalizing start-ups or companies experiencing shortages of cash flow, the additional cash requirement provision allows applicants that are in a weak financial situation to maintain eligibility by providing a method for augmenting their security for the project and increasing the likelihood that the project can be completed. Hence, it provides an avenue for moving less stable projects forward.

With regard to video expenses, the agency sees no reason to arbitrarily ''reduce'' any expense category. In fact, for the reason offered by the respondent, if revenues to be derived by the incurrence of such an expense are insufficient to cover that expense, decreasing the expense category in the pro forma only inflates or overstates profits in what may be an otherwise unprofitable proposal.

Government Subsidized Competition

Comment: One respondent objected strongly to what it referred to as the ''continuing problem of RUS subsidizing broadband deployment in areas where other providers already offer broadband service.'' The respondent argues that in a competitive environment, ''a program in which a government agency funds one set of competitors against other companies that have invested private capital to provide the same service in the same geographic areas is wholly inappropriate and should be terminated.'' The respondent recommended that a competitive award process be used to target unserved areas with grant funds—those being areas that cannot on their own support a business case to attract investment. The respondent also noted that loans were allowed to be made in areas where two existing providers are offering service, because the statute (Farm Bill) provides for such a scenario. Citing an extreme, hypothetical example, the respondent noted that even though one provider may be currently offering service to 100 percent of an area and the other provider is offering service to 25 percent of the same area, the provisions of the Farm Bill would enable a third provider to be funded in the same area. Finally, the respondent stated that ''RUS should amend the rules to make clear that [loans to companies for] upgrades [as opposed to new service territory] are subject to the same requirements as [for loans for] initial builds.'' The respondent requested that this perceived ''loophole'' be closed.

Response: At its base, the number of incumbent service providers merely establishes whether a proposed service territory is eligible or not. It in no way implies that funds would be awarded, since other factors affecting feasibility (like competition and service offerings) must also be considered. In the example offered (however impracticable), most likely a loan would not be feasible unless the incumbents' services were of such poor quality that a new entrant would be welcome and would easily take away subscribers. The respondent also recommends that the agency use grant funds to target those areas deemed undesirable and left unserved by incumbents, noting that a ''business case'' cannot be made for these areas. First, the 2008 Farm Bill does not provide any grant authority for the Broadband Program. This is precisely why it is permissible for applicants to be able to provide service where some service already exists. The Treasury rate government financing provides for continued, long-term investment while leveraging private capital in a fiscally responsible manner. The ability of an applicant to reach out to long ignored, unserved households outside ''the business case'' of incumbents relies on those applicants finding a balance between low cost and high cost service territories, which will create some duplicative (but necessary) service areas.

With regard to upgrades within an incumbent's own service territory, this allows those areas to keep pace with technology improvements and to upgrade facilities based on customer demand. Again, this (like the number of service providers) is an eligibility criterion. It does not guarantee funding. Should the competitive environment not support a new loan, the loan would not be made.

Discount USF and ICC Revenues in Feasibility Analysis

Comment: One respondent encourages the agency to ''reconsider how it evaluates the business case for applicants that are heavily dependent on high-cost universal service support and intercarrier compensation'' revenues. The respondent argued that ''the way that RUS considers USF receipts takes on even more urgency in light of the FCC's proposals to reform the high-cost universal service support regime.'' The respondent encourages RUS to discount the amount of any high-cost support when assessing financial feasibility. The respondent had similar concerns with respect to intercarrier compensation revenues. Further, the respondent encouraged RUS not to award any new loans until the interim rule is final and the FCC moves forward and presumably resolves the USF/ICC reforms.

Response: The Agency is working closely with the FCC to ensure that rural communities continue to receive access to broadband services. In light of recent actions by the FCC, the Agency is revising its underwriting procedures to correspond with new FCC principals regarding universal service revenues.

Navigant Study

Comment: One respondent asserts that ''the interim rules perpetuate many of the same problems that have plagued the Broadband Loan Program for the last decade and, absent changes, will not be an effective mechanism for achieving the national goal of universal broadband

activity.'' The respondent claims documentation in support of this in a report prepared by Dr. Jeffery Eisenach and Kevin Caves of Navigant Economics. The report was issued as an assessment of the American Re-investment and Recovery Act (Recovery Act) Broadband Initiatives Program (BIP). The respondent, in referencing the report, claims that ''RUS consistently has provided broadband funding to entities in areas where broadband already is made available by cable operators and other broadband providers without government subsidy.'' In addition, the report states that RUS, in its Recovery Act program, defined eligibility for BIP funding based on the percentage of geographic area that was unserved, rather than the percentage of households that were unserved.

Response: As the study was related to the BIP program, its findings are not applicable to this final rule proceeding. The BIP program was a one-time funding opportunity under the Recovery Act and has concluded. No new applications or financing will occur under that program. However, since the issues raised imply that the RUS, in its implementation of this final rule, is acting in a manner inconsistent with its statute implementing the Farm Bill program, we address the concerns raised in the report below.

The study, *Evaluating the Cost-Effectiveness of RUS Broadband Subsidies: Three Case Studies,* suffers from a number of fundamental flaws:

1. The study frequently misquotes, misinterprets, or misattributes statutory and regulatory language associated with rural broadband development.

2. The study creates a more lenient definition of what it considers ''served'' than is used by RUS, or the FCC to support its claim that BIP projects provide duplicative service.

3. The study relies heavily on data that became available only after the BIP application evaluation process had to be completed.

4. The study employs questionable metrics to determine key statistical data. These flaws, individually and when taken together, produce meaningful inaccuracies in both the evidence and arguments in the study. When claims within the study are compared to the relevant legislation and/or information, it is clear that the study's conclusion—that RUS' ARRA broadband program served areas that it should not have—is inaccurate. RUS complied with all applicable legislation using information available at the time of the application assessments.

1. Misrepresentation of ARRA's Goals

The study claims: ''ARRA requires that NTIA and RUS limit funding to 'unserved' or 'underserved' areas, and specifically instructs RUS to give priority to unserved areas'' (p. 2). The study goes on to state that BIP provides duplicative service to areas that already have broadband access, and therefore RUS did not limit funding to unserved and underserved areas.

The claim above misrepresents ARRA's requirements regarding broadband development and RUS' administrative role under BIP. ARRA does require that BIP funds be used to serve areas with limited access to broadband service, requiring that ''at least 75 percent of the area to be served by a project receiving funds, grants, or loan guarantees shall be in a rural area without sufficient access to high speed broadband service to facilitate rural economic development'' However, it does not limit funding to unserved and underserved areas.[2] In fact, ARRA explicitly allows up to 25 percent of the project area to be in areas that have broadband service. When evaluating BIP applications, RUS used available information to follow ARRA guidelines to ensure that all service areas complied with this requirement.

In addition, ARRA provides ''that priority for awarding such funds shall be given to project applications for broadband systems that will deliver end users a choice of more than one service provider.'' Awarding funds to provide a choice of more than one service provider will, by definition, involve funding projects in areas where some service already exists.

2. Lenient and Misattributed Definition of Unserved

The study exaggerates the extent of duplicative services by using a definition of broadband speed that is not consistent with ARRA's economic development goals.

The study applies a misleading label of ''RUS definition'' to the notion that an unserved housing unit is:

''an occupied housing unit not passed by (a) wireline-based broadband services (cable or DSL); or (b) fixed wireless broadband services.'' (p. 19)[3]

However, this definition is incorrect. BIP NOFAs #1 and #2 (74 FR 33104, 7/9/09 and 75 FR 3820, 1/22/10, respectively) offer different definitions of ''unserved'', but neither excludes mobile broadband:

NOFA #1 definition: ''composed of one or more contiguous census blocks where at least 90% of households lack access to facilities-based, terrestrial broadband service, *either fixed or mobile,* at the minimum broadband speed: [at least 768 kbps downstream and at least 200 kbps upstream to end users, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users].''[4]

NOFA #2 definition: ''a service area with no access to facilities-based terrestrial broadband service, either fixed or mobile, at the minimum broadband transmission speed [at least 768 kbps downstream and at least 200 kbps upstream to end users, or providing sufficient capacity in a middle mile project to support the provision of broadband service to end users]. A premises has access to broadband service if it can readily subscribe to that service upon request.''[5]

RUS' definitions of unserved are not based on technology, as implied by the incorrect definition stated in the study. Instead, RUS's funding decisions were based on a minimum broadband speed, below which an area is considered to be without ''sufficient access to high speed broadband service to facilitate rural economic development.''[6]

In developing the BIP program, RUS determined that broadband speeds below 768 kbps downstream and 200 kbps upstream to end users would not be suitable for economic development purposes.[7] BIP funding decisions were made using information available at the time of application review on the existence of service availability at speeds reaching at least this minimum level of service. The study's analyses, however, do not utilize data for service availability at this minimum speed. Instead, the study's analyses accept a 600 kbps threshold that does not meet the minimum speed determined to be suitable for economic development purposes. Tables Four, Six, and Eight of

[2] Unserved and underserved are not, as the report implies, Recovery Act terms. They were defined and used by RUS in BIP NOFAs 1 and 2.

[3] The study's mislabeling of the ''RUS definition'' of ''unserved'' does not reference either NOFA, both of which explicitly define the term. Instead, this misattributed definition is supported in footnote 7 of p. 3 of the study: ''The fixed wireless broadband services upon which we base coverage estimates satisfy the 768 kbps/200 kbps standard, and therefore are included in our analyses of households served under the RUS definition''.

[4] *See* **Federal Register**, 74 FR 33104, Notices, Department of Agriculture Rural Utilities Service RIN 0572–ZA01, *Broadband Initiatives Program,* definitions for ''unserved'' and ''broadband''. Hereafter referred to as NOFA #1.

[5] *See* **Federal Register**, 75 FR 3820, Notices, Department of Agriculture Rural Utilities Service RIN 0572–ZA01, *Broadband Initiatives Program,* definitions for ''unserved'' and ''broadband''. Hereafter referred to as NOFA #2.

[6] *See the American Recovery and Reinvestment Act of 2009.*

[7] This standard was established following the FCC's definition of ''Basic Broadband'' service, defined as a connection speed tier of between 768Kbps and 1.5Mbps. See FCC 08–88, June 12, 2008, Statement of Chairman Kevin J. Martin, Pg. 43.

the study and the associated Figures Three, Seven, and Ten are thereby all inaccurate because they count services at speeds under 768/200 kbps.

The study further asserts that 3G technology will soon be updated to exceed the FCC established 768 kbps threshold, and therefore should have been included in RUS' considerations regardless of the technology's current speed. However, a fair and reasonable evaluation of applications by RUS could not have been made using future, proposed, uncommitted investment possibilities.

3. Information Available After the BIP Application Evaluation Process

The following tables and figures cite information that became available after the BIP application evaluation process; these graphics are the foundation for the study's arguments and conclusions:

- Tables Four, Six, and Eight of the study make use of data from NTIA's *National Broadband Map* (NBM), which was not available at the time of the BIP application evaluation process.
- Figure Six cites the *Kansas Corporation Commission, Report to the Legislature Regarding the Availability of Broadband Services in the State of Kansas (January 2011),* which is after the BIP application evaluation process was complete.
- *Warren's Cable Factbook* is cited for Figures 2, 3, 5, and 7. The study does not include the date of the edition used. The latest edition for 2011 was released in December 2010.

Information that became available after completion of the application evaluation process is not relevant for comparison to BIP funding decisions, which were made using the information available at the time of application review. The latest information can help inform future funding decisions under other programs, but are not relevant for assessing the quality or results of the BIP decision making processes.

4. Questionable Analytical Methodologies

In order to estimate the cost of the BIP program to the taxpayer, the report uses a ''cost per incremental home passed'' metric. Costs did not involve only extensions of existing networks, for which a cost per incremental home passed metric might be appropriate. Instead, the entire scope of the BIP-funded network's coverage must be considered to accurately evaluate the cost per home passed. The ''cost per incremental home passed'' metric would only be appropriate if an applicant were an incumbent provider applying for funding to extend and/or enhance its network to reach unserved or underserved areas. However, none of the three awards examined in the study meet this condition.

Another approach the study uses to calculate the ''actual taxpayer cost'' is based on the interest rates charged to the awardees on the BIP loans. The study argues that the taxpayer is losing the difference in interest revenue between what could have been charged at the market rate and the actual interest rate being charged to awardees. The interest rate charged by RUS is ''equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity''.[8] This adheres to the ARRA requirement that loans carry the interest rate as defined in the Farm Bill 2008. The study's approach reinterprets the law and suggests that RUS could behave like a commercial lending institution by charging market rates on the BIP loans. By using a much higher interest rate to calculate the total taxpayer cost, the study thereby inflates the cost per household passed in Tables Five, Seven, and Nine. As it is, the cost per total household passed of each project in the study is lower than both the RUS and FCC benchmarks.

The study's method for estimating DSL boundaries is similarly faulty. Appendix 1 explains that DSL boundaries were determined by ''generating a 12,000 foot radius'' around ''the location of the dominant central office of each wirecenter.'' Such a projected radius model cannot be used to predict estimate the number of DSL subscribers that can be supported by in-place equipment. The 12,000 foot radius is technically arbitrary and no useful conclusions about potential service availability can be drawn from it alone. The study supplies no facts about DSL service availability, penetration rates, or connection speeds, nor does it supply any facts about route mileage, wire gauge, line bridging and tapping, or any other influencing technical elements.

To estimate service coverage for fixed wireless broadband and mobile wireless broadband, the study relies exclusively on carriers' advertised coverage maps. RUS opened and advertised a public comment period for any and all existing providers and other stakeholders to provide information on coverage within the areas proposed by BIP applicants. RUS received many public comment responses, however it did not take those comments from carrier providers or other stakeholders purely at face value. Instead, RUS also gathered on-the-ground data and observations. Moreover, the study's analytical approach did not differentiate between a service provided via a wireless carrier's owned-and-operated network and service that is provided through roaming agreements with third-party owned networks. This flaw undermines the study's conclusions that depend on various mobile wireless carriers' statements that 3G and 4G upgrades are a *fait accompli;* many of these rural networks' owners would likely have to find funding and develop business cases on their own before they could (or would) be upgraded.

5. Conclusion and Summary

The study's critique is seriously flawed. Despite an obvious effort to ''cherry pick'' three extreme case studies, the source material cited in this response demonstrates that the study did not successfully identify any inconsistencies between RUS' administrative decisions and the ARRA legislation or broadband availability data at the time of application evaluations.

Miscellaneous

Comment: One respondent, while noting the benefits of internet access, stated that they are benefits ''of a more affluent society that is not currently in trillions of dollars in debt.'' The respondent requests that, considering the high costs of program administration, implementation should be delayed.

Response: The agency appreciates the respondent's concerns. However, broadband deployment will increase economic development, raise revenues and create jobs. These benefits far outweigh the initial capital expenditures of building this critical infrastructure today.

Comment: One respondent took issue with MEConnect Authority in Maine.

Response: The respondent should contact the appropriate state officials responsible for administering that program. The Rural Utilities Service is not a regulatory agency.

List of Subjects in 7 CFR Part 1738

Broadband, Loan programs—communications, Rural areas, Telephone, Telecommunications.

Accordingly, the interim rule amending 7 CFR part 1738, which was published at 76 FR 13770 on March 14, 2011, is adopted as a final rule with the following change:

[8] *See* NOFA #1 and NOFA #2.

PART 1738—RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES

■ 1. The authority citation for part 1738 continues to read as follows:

Authority: Pub. L. 107–171, 7 U.S.C. 901 *et seq.*

■ 2. Amend § 1738.153 by revising paragraph (a) and the third sentence of paragraph (b) to read as follows:

§ 1738.153 Loan terms and conditions.

* * * * *

(a) Unless requested to be shorter by the applicant, broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, is equal to the expected composite economic life of the assets to be financed, as determined by the Agency based upon acceptable depreciation rates. Expected composite economic life means the depreciated life plus three years.

(b) * * * Principal payments will be deferred until two years after the date of the first advance of loan funds.

* * * * *

Dated: January 29, 2013.

John Charles Padalino,

Acting Administrator, Rural Utilities Service.

[FR Doc. 2013–02390 Filed 2–5–13; 8:45 am]

BILLING CODE P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 110

[NRC–2012–0278]

RIN 3150–AJ21

Addition of South Sudan to the Restricted Destinations List

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is amending its export and import regulations by adding South Sudan to the list of restricted destinations. This amendment is necessary to conform the NRC's regulations with U.S. Government foreign policy.

DATES: The final rule is effective February 6, 2013.

ADDRESSES: Please refer to Docket ID NRC–2012–0278 when contacting the NRC about the availability of information for this final rule. You can access information related to this rule, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC 2012–0278.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''ADAMS Public Documents'' and then select ''Begin Web-based ADAMS search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.
- *NRC's Public Document Room (PDR):* You may examine and purchase copies of public documents at the NRC's PDR, O1- F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

FOR FURTHER INFORMATION CONTACT: Brooke G. Smith, Senior International Policy Analyst, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2347; email: *brooke.smith@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background.
II. Voluntary Consensus Standards.
III. Environmental Impact: Categorical Exclusion.
IV. Paperwork Reduction Act Statement.
V. Regulatory Analysis.
VI. Regulatory Flexibility Certification.
VII. Backfit and Issue Finality.
VIII. Congressional Review Act.

I. Background

The purpose of this final rule is to revise the NRC's export and import regulations in Title 10 of the *Code of Federal Regulations* (10 CFR) part 110, ''Export and Import of Nuclear Equipment and Material,'' with regard to U.S. Government law and policy on South Sudan. South Sudan is an independent country, separate from Sudan. Following a referendum, South Sudan became an independent state on July 9, 2011, and the United States established diplomatic relations with South Sudan on the same day. Long-standing U.S. sanctions policy has been aimed at the current Sudan regime centered in Khartoum, Sudan, not South Sudan or its government, centered in Juba, South Sudan. The United States does not treat South Sudan as Sudan, and does not apply, for example, its Sudan Sanctions Regulations (31 CFR part 538) to South Sudan. Moreover, the Secretary of State's determination that Sudan provided repeated support for acts of international terrorism does not apply to South Sudan.

In light of the foregoing, the Executive Branch recommended that the NRC amend part 110 to add South Sudan to the restricted destinations list in § 110.29, while leaving Sudan on the embargoed destinations list in § 110.28. This means that exports of certain nuclear and byproduct materials to South Sudan may qualify for the NRC general license specified in §§ 110.21 through 110.24.

At present, South Sudan has no nuclear research or power program; however, South Sudan does have the need for radioactive sources for legitimate industrial, medical, and research purposes in support of important economic and commercial development projects. Exports of radioactive sources from the United States for such purposes would be facilitated by the recognition of South Sudan as an independent country, separate from Sudan (Khartoum), by adding it to the restricted destinations list, while leaving Sudan on the embargoed destinations list in part 110.

The NRC staff has determined that adding South Sudan to the restricted destinations list, while leaving Sudan on the embargoed destinations list, is consistent with current U.S. law and policy, and will pose no unreasonable risk to the public health and safety or to the common defense and security of the United States.

Because this rule involves a foreign affairs function of the United States, the notice and comment provisions of the Administrative Procedure Act do not apply (5 U.S.C. 553(a)(1)). This rule will become effective immediately upon publication.

II. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (Pub. L. 104–113) requires that Federal Agencies use technical standards that are developed or adopted by voluntary consensus standards bodies, unless using such a standard is inconsistent with applicable law or otherwise impractical. This final rule does not constitute the establishment of a standard for which the use of a voluntary consensus standard would be applicable.

III. Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for the rule.

IV. Paperwork Reduction Act Statement

This final rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq.). Existing requirements were approved by the Office of Management and Budget (OMB), Approval Number 3150–0036.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

V. Regulatory Analysis

Addition of South Sudan to the restricted destinations list in § 110.29 means that exports of certain radioactive materials to South Sudan may qualify for the NRC general license specified in §§ 110.21 through 110.24. There is no alternative to amending the regulations for the export and import of nuclear equipment and materials. This final rule is expected to have no changes in the information collection burden or cost to the public.

VI. Regulatory Flexibility Certification

As required by the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This rule affects only companies exporting nuclear equipment and materials to South Sudan which do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act (5 U.S.C. 601(3)), or the Size Standards established by the NRC (10 CFR 2.810).

VII. Backfit and Issue Finality

The NRC has determined that a backfit analysis is not required for this rule, because these amendments do not include any provisions that would impose backfits as defined in 10 CFR chapter I.

VIII. Congressional Review Act

Under the Congressional Review Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

List of Subjects in 10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalties, Export, Import, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR part 110.

PART 110—EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

■ 1. The authority citation for part 110 continues to read as follows:

Authority: Atomic Energy Act secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 223, 234 (42 U.S.C. 2071, 2073, 2074, 2077, 2092–2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154–2158, 2201, 2231–2233, 2237, 2239, 2273, 2282); Energy Reorganization Act sec. 201 (42 U.S.C. 5841); Solar, Wind, Waste, and Geothermal Power Act of 1990 sec. 5 (42 U.S.C. 2243); Government Paperwork Elimination Act sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, 119 Stat. 594.

Sections 110.1(b)(2) and 110.1(b)(3) also issued under 22 U.S.C. 2403. Section 110.11 also issued under Atomic Energy Act secs. 54(c), 57(d), 122 (42 U.S.C. 2074, 2152). Section 110.50(b)(3) also issued under Atomic Energy Act sec. 123 (42 U.S.C. 2153). Section 110.51 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 110.52 also issued under Atomic Energy Act sec. 186, (42 U.S.C. 2236). Sections 110.80–110.113 also issued under 5 U.S.C. 552, 554. Sections 110.130–110.135 also issued under 5 U.S.C. 553. Sections 110.2 and 110.42(a)(9) also issued under Intelligence Authorization Act sec. 903 (42 U.S.C. 2151 *et seq.*).

§ 110.29 [Amended]

■ 2. Section 110.29 is amended by adding ''South Sudan'' to the list of restricted destinations.

Dated at Rockville, Maryland, this 19th day of December, 2012.

For the Nuclear Regulatory Commission.

R.W. Borchardt,

Executive Director for Operations.

[FR Doc. 2013–02620 Filed 2–5–13; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 117, 119, and 121

[Docket No. FAA–2009–1093; Amdt. Nos. 117–1, 119–16, 121–357]

RIN 2120–AJ58

Flightcrew Member Duty and Rest Requirements; Technical Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; technical correction.

SUMMARY: The FAA is correcting the final flightcrew member duty and rest rule published on January 4, 2012. In that rule, the FAA amended its existing flight, duty and rest regulations applicable to certificate holders and their flightcrew members operating certain domestic, flag, and supplemental operations. This document corrects several issues requiring a technical correction in the codified text of the final flightcrew member duty and rest rule.

DATES: Effective January 14, 2014.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Dale E. Roberts, AFS–200, Flight Standards Service, Air Transportation Division Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–5749; email: *dale.e.roberts@faa.gov.*

For legal questions concerning this action, contact Alex Zektser, AGC–220, Office of Chief Counsel, Regulations Division, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267–3073; email: *alex.zektser@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

On January 4, 2012, the FAA published a final rule entitled ''Flightcrew Member Duty and Rest Requirements'' (77 FR 330). In that rule, the FAA created a new part, part 117, which replaced the then-existing flight, duty, and rest regulations for part 121 passenger operations. As part of this rulemaking, the FAA also applied the new part 117 to certain part 91 operations, and it permitted all-cargo operations operating under part 121 to voluntarily opt into the part 117 flight, duty, and rest regulations.

After the final rule was published, the FAA discovered several issues requiring a technical correction in the regulatory

text of the rule. These issues, and the corresponding technical corrections, are as follows.

Technical Corrections

1. Reporting a Flight Time Extension

Subsections 117.11(c)(2) and (d) contain requirements that are triggered if the certificate holder uses a flight-time extension for circumstances that are within the certificate holder's control. However, pursuant to § 117.11(b), a flight-time extension can only be taken for unforeseen operational circumstances that are ''beyond the certificate holder's control.'' Because a flight time extension cannot be taken for circumstances that are within the control of the certificate holder, the provisions of § 117.11(c)(2) and (d) are unnecessary and have been removed.

2. Applying § 117.19 Extensions to Short-Call Reserve Limits

The regulatory text of § 117.19 in the final rule permits extensions to flight duty periods but does not permit extensions to the short-call reserve limits specified in § 117.21(c)(3) and (4). Because these short-call-reserve limits were not intended to be more stringent than flight-duty-period limits, § 117.19 has been corrected to provide an extension for the short-call-reserve limits specified in § 117.21(c)(3) and (4).

3. Requirements for the 56-Hour Rest Period

The regulatory text of § 117.25(d) has been corrected to clarify that the rest requirements of that subsection are triggered if a flightcrew member: (1) Travels more than 60 degrees longitude during a flight duty period or series of flight duty periods; and (2) is away from home base for over 168 consecutive hours during this travel.

4. Applying § 117.29 Extensions to Short-Call Reserve Limits

Similar to the § 117.19 discussion above, § 117.29(b) also allows for an extension of flight-duty-period limits but does not allow for an extension of short-call-reserve limits. As such, § 117.29(b) has been corrected to allow short-call reserve to have the same extension as a flight duty period.

Accordingly, in the final rule, FR Doc. 2011–33078, published on January 4, 2012 (77 FR 330), make the following corrections:

§ 117.11 [Corrected]

■ 1. On pages 399 and 400, in the third column on page 399 and the first column of page 400, in § 117.11, revise paragraph (c) and remove paragraph (d).

The revision reads as follows:

''(c) Each certificate holder must report to the Administrator within 10 days any flight time that exceeded the maximum flight time limits permitted by this section. The report must contain a description of the extended flight time limitation and the circumstances surrounding the need for the extension.

§ 117.19 [Corrected]

■ 2. On page 400, in the second column, in § 117.19, paragraph (a)(1) is revised to read as follows:

''(1) The pilot in command and the certificate holder may extend the maximum flight duty period permitted in Tables B or C of this part up to 2 hours. The pilot in command and the certificate holder may also extend the maximum combined flight duty period and reserve availability period limits specified in § 117.21(c)(3) and (4) of this part up to 2 hours.''

§ 117.25 [Corrected]

■ 3. On page 401, in the second column, in § 117.25, paragraph (d) is revised to read as follows:

''(d) A flightcrew member must be given a minimum of 56 consecutive hours rest upon return to home base if the flightcrew member: (1) Travels more than 60° longitude during a flight duty period or a series of flight duty period, and (2) is away from home base for more than 168 consecutive hours during this travel. The 56 hours of rest specified in this section must encompass three physiological nights' rest based on local time.''

§ 117.29 [Corrected]

■ 4. On page 401, in the third column, in § 117.29, paragraph (b) is revised to read as follows:

''(b) The pilot-in-command may determine that the maximum applicable flight duty period, flight time, and/or combined flight duty period and reserve availability period limits must be exceeded to the extent necessary to allow the flightcrew to fly to the closest destination where they can safely be relieved from duty by another flightcrew or can receive the requisite amount of rest prior to commencing their next flight duty period.''

Issued in Washington, DC on January 31, 2013.

Mark W. Bury,

Acting Assistant Chief Counsel for International Law, Legislation, and Regulations Division, AGC–200.

[FR Doc. 2013–02504 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 305

RIN 3084–AB15]

Energy Labeling Rule

AGENCY: Federal Trade Commission (FTC or Commission).

ACTION: Final rule.

SUMMARY: The Commission issues final amendments for disclosures to help consumers, distributors, contractors, and installers easily determine whether a specific furnace or central air conditioner meets applicable Department of Energy regional efficiency standards.

DATES: The amendments published in this document are effective on March 15, 2013.

ADDRESSES: Requests for copies of this document should be sent to: Public Reference Branch, Room 130, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580. The complete record of this proceeding is also available at that address. Relevant portions of the proceeding, including this document, are available at *http://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Hampton Newsome, (202) 326–2889, Bureau of Consumer Protection, Federal Trade Commission, Room M–8102B, 600 Pennsylvania Avenue NW., Washington, DC, 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission's Energy Labeling Rule (''Rule'') (16 CFR Part 305), issued pursuant to the Energy Policy and Conservation Act (EPCA),[1] requires energy labeling for major household appliances and other consumer products to help consumers compare competing models.[2] When first published in 1979,[3] the Rule applied to eight product categories: refrigerators, refrigerator-freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners, and furnaces. The Commission has since expanded the Rule's coverage to include central air conditioners, heat pumps, plumbing products, lighting products,

[1] 42 U.S.C. 6291 *et seq.*

[2] More information about the Rule can be found at: *http://www.ftc.gov/energy.*

[3] 44 FR 66466 (Nov. 19, 1979). The Commission currently has two open proceedings related to other proposed amendments of the Rule in addition to the present one. *See* 77 FR 15298 (Mar. 15, 2012) (regulatory review of the Rule); 76 FR 45715 (Aug. 1, 2011) (proposed expanded light bulb coverage).

ceiling fans, certain types of water heaters, and televisions.[4]

The Rule requires manufacturers to attach yellow EnergyGuide labels to all covered appliances and televisions, as well as furnaces, central air conditioners, and heat pumps.[5] It also prohibits retailers from removing these labels or rendering them illegible.[6] In addition, retailers must post label information on Web sites and in paper catalogs from which consumers can order these products.[7]

Manufacturers must provide retailers, including distributors, contractors, and installers, with energy information concerning furnaces, central air conditioners, and heat pumps in paper or electronic form (including internet-based access). In turn, retailers, including installers, must show this information to their customers and let them read the information before purchase.[8]

The EnergyGuide labels for heating and cooling equipment contain two key disclosures: (1) The product's efficiency rating derived from Department of Energy (DOE) test procedures, and (2) a comparability range showing the highest and lowest ratings for all similar models.[9] The Rule also specifies the label's format. For example, the label must be yellow and feature the EnergyGuide headline in a specific format and type. Additionally, manufacturers cannot place any information on the label other than that specifically allowed by the Rule.

II. DOE Regional Standards for Heating and Cooling Equipment

In 2011, DOE established new efficiency standards for residential furnaces, central air conditioners, and heat pumps [10] as directed by the Energy Independence and Security Act of 2007 (EISA).[11] Unlike existing DOE standards, which impose uniform, national efficiency levels, the new standards vary by region for certain products.[12] As detailed in Tables 1 and 2 of this Notice, new DOE requirements impose regional efficiency standards for four product categories: split-system air conditioners, single-package air conditioners, non-weatherized gas furnaces, and mobile home gas furnaces. For all other covered heating and cooling equipment, the new standards are nationally uniform. In addition, DOE has not changed existing standards for boilers and electric furnaces. DOE has scheduled two compliance dates for the new standards: May 1, 2013, for non-weatherized gas furnaces, mobile home gas furnaces, and non-weatherized oil furnaces; and January 1, 2015, for weatherized gas furnaces and all central air conditioners and heat pumps. To promote compliance with these new standards, EISA directs DOE to develop an enforcement plan to specify the responsibilities of installers, distributors, and manufacturers in meeting the new standards and making required disclosures.[13]

III. EISA's Mandate for New FTC Disclosures Related to Regional Standards

In addition to requiring DOE to develop new efficiency standards, EISA directs the FTC to develop new disclosures for heating and cooling equipment. Specifically, the law requires the Commission to ''determine the appropriate 1 or more methods for disclosing information so that consumers, distributors, contractors, and installers can easily determine whether a specific piece of equipment that is installed in a specific building is in conformance with the regional standard that applies to the building.'' [14] The statute authorizes the Commission to modify the EnergyGuide label or develop other disclosure ''methods that make it easy for consumers and installers to use and understand at the point of installation.'' [15] Consistent with the timing for DOE's enforcement plan, EISA directs the Commission to complete this effort within 15 months after DOE establishes the regional standards.

IV. Advance Notice of Proposed Rulemaking

In response to EISA's mandate, the Commission published an Advance Notice of Proposed Rulemaking (ANPR) on November 28, 2011, seeking comments on the development of new disclosures related to the regional standards.[16] Specifically, the ANPR solicited suggestions for disclosures to help consumers, distributors, contractors, and installers easily determine whether a specific furnace, central air conditioner, or heat pump meets the applicable standard for their region. The Notice also sought input on the content, location, and format of such disclosures. To facilitate this process, FTC and DOE staff held a joint public meeting on December 16, 2011.[17]

V. Notice of Proposed Rulemaking

The Commission followed the ANPR with a Notice of Proposed Rulemaking (NPRM) on June 6, 2012, requesting comments on proposed, new EnergyGuide label content for heating and cooling equipment.[18] For products subject to regional standards, the proposed label contained two parts: an upper portion to educate consumers about the product's efficiency rating and a lower portion to help industry members comply with the new DOE standards. The proposal also expanded the label's availability by requiring it on manufacturer Web sites, on product packaging, and at the point-of-sale. In addition, the Commission proposed to direct contractors to make the labels available to consumers prior to purchase. The NPRM also sought comments on a change to the oil furnace labels to disclose efficiency ratings at multiple input capacities. Finally, the Commission stated that the compliance dates for the new labels would coincide with the DOE compliance dates for the various product categories.

The Commission received 11 written comments in response, each of which generally supported the proposed

[4] *See* 52 FR 46888 (Dec. 10, 1987) (central air conditioners and heat pumps); 54 FR 28031 (July 5, 1989) (fluorescent lamp ballasts); 58 FR 54955 (Oct. 25, 1993) (certain plumbing products); 59 FR 25176 (May 13, 1994) (lighting products); 59 FR 49556 (Sep. 28, 1994) (pool heaters); 71 FR 78057 (Dec. 26, 2006) (ceiling fans); 76 FR 1038 (Jan. 6, 2011) (televisions).

[5] *See* 42 U.S.C. 6302(a)(1), 16 CFR 305.4(a)(1).

[6] *See* 42 U.S.C. 6302(a)(2), 16 CFR 305.4(a)(2).

[7] *See* 42 U.S.C. 6296(a), 16 CFR 305.20.

[8] 16 CFR 305.14.

[9] 16 CFR 305.12.

[10] 76 FR 67037 (Oct. 31, 2011). DOE set October 25, 2012 as the effective date for the establishment of the regional standards regulations. *See also,* 76 FR 37408 (June 27, 2011) (DOE's initial publication of regional standards).

[11] Public Law 110–140; 42 U.S.C. 6295(o)(6). EISA amended EPCA to authorize separate regional standards for these products.

[12] 42 U.S.C. 6295(o)(6)(B). The DOE standards apply to three regions: the North, Southeast, and Southwest. For furnaces, the standards are the same for the Southeastern and Southwestern regions. The Northern region encompasses Alaska, Colorado, Connecticut, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. The Southeastern region encompasses Alabama, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, the District of Columbia, and U.S. territories. The Southwest includes Arizona, California, New Mexico, and Nevada. 76 FR 37422.

[13] 10 CFR 430.32 (DOE standards). EISA requires DOE to complete this plan within 15 months after issuance of the final efficiency standards. To augment DOE's enforcement efforts, EISA gives states authority to enforce the regional standards in Federal court. 42 U.S.C. 6295(o)(6)(G).

[14] 42 U.S.C. 6295(o)(6)(H).

[15] *Id.*

[16] 76 FR 72872 (Nov. 28, 2011).

[17] Transcript available at *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncacregstnd_enforceramework_pmtranscript.pdf.*

[18] 77 FR 33337 (June 6, 2012).

changes to the EnergyGuide label.[19] For example, ACCA stated that the new labels will facilitate compliance with the DOE standards and prevent unscrupulous contractors from undercutting competitors by selling cheaper, non-compliant products.[20] In addition, NRDC stated that the proposed label ''is logical and will be informative'' to consumers, installers, distributors, and other stakeholders. However, as discussed below, commenters raised concerns with some specifics of the proposal and suggested changes.

VI. Final Rule

After considering the comments, the Commission adopts the proposed amendments, with only minor revisions. The new label content discloses efficiency ratings in a simple format and provides regional information to help installers comply with the law.[21] The final provisions also expand the label's availability by requiring it on product packaging (§ 305.12(e)(2)), at the point of sale (§ 305.14) and, as already required by the Rule, on Web sites and the products themselves (§§ 305.20 and 305.12). These new requirements should help industry members comply with the regional standards and aid consumers in their purchasing decisions. As discussed below, the Commission made several changes to the proposed label's content, location, and timing in response to comments. Finally, the rule does not require implementation of the new disclosures until the final compliance dates for the DOE regional standards. Thus, if the DOE standards are postponed or vacated for any reason, the applicable labeling rules will not apply until DOE reissues a final compliance date.

A. Label Content

To inform industry members and consumers about regional standards, the Commission proposed a label with two sections. The upper portion, which resembles the current EnergyGuide, provides consumers with valuable energy efficiency information on labels for all heating and cooling products, whether or not they are subject to different regional standards. The lower portion contains maps, tables, and other information to help installers comply with regional standards and is required only on products subject to those standards (*i.e.,* split-system air conditioners, single-package air conditioners, and non-weatherized and mobile home gas furnaces). As detailed below, the final rule follows this two-section format (see Samples in Appendix L), which was proposed in the NPRM.

1. Upper Portion Content

Background: The proposed upper label portion in the NPRM contained three primary disclosures. First, it included the simple title, ''Efficiency Rating,'' with the technical term for the product's efficiency rating elsewhere in a smaller font (*e.g.,* ''Seasonal Energy Efficiency Ratio (SEER)''). Second, the proposed upper portion displayed a range of ratings for similar models to help consumers compare competing products.[22] This range information also contained ratings for the various condenser-coil combinations of split-system air conditioners and heat pumps. Finally, the proposed upper label portion included a prominent link to a DOE online energy cost calculator, as well as the product's capacity and model number.

Comments on Upper Portion Content: In response to the proposed rule, commenters raised concerns about the proposed wording for efficiency rating terms, the label's comparability range bar design, and the label's inclusion of capacity and model numbers.

First, some commenters objected to the Commission's proposal to prominently display the term ''Efficiency Rating,'' and relegate technical terms such as, ''SEER,'' ''Energy Efficiency Ratio (EER),'' ''Heating Seasonal Performance Factor (HSPF),'' and ''Annual Fuel Utilization Efficiency (AFUE),'' to a less noticeable portion of the label. The comments argued that this approach could incorrectly suggest to some consumers that all product types use the same rating system.[23] To address this concern, the commenters recommended that the label clearly display the applicable efficiency rating (*e.g.,* HSPF or SEER) to prevent consumers from making incorrect comparisons.[24]

Second, commenters raised concerns about the proposed comparability range design. In the NPRM, the Commission proposed to replace the line graph on the current label with a horizontal thermometer-style scale found on the new, smaller television EnergyGuide label. For split-system models (*i.e.,* models with a condenser and coil), the proposed label also included a secondary range, comprised of a line graph marked with downward arrows, depicting the high and low efficiency ratings associated with the system's different possible condenser-coil combinations. Both ACCA and NRDC commented that the proposed range design was unnecessarily complicated and potentially confusing to consumers, in part due to overlapping information on the range. These commenters recommended that the FTC return to the current range design, consistent with a draft label AHRI recommended earlier in this proceeding.[25]

Finally, one manufacturer, Goodman, opposed the proposal to require the basic model number and the model's capacity on the EnergyGuide label. Under current requirements, which do not mandate model number and capacity, Goodman uses a single label for multiple models that have the same energy efficiency rating, but different capacities. Accordingly, it argues the proposed capacity and model number disclosures would require the creation of many new labels. Goodman also questioned the benefit of including

[19] *See* Air Conditioning Contractors of America (ACCA) (# 560904–00011); Air-Conditioning, Heating, and Refrigeration Institute (AHRI) (# 560904–00008); American Gas Association (AGA) (# 560904–00005); American Public Gas Association (APGA) (# 560904–00004); Earthjustice (# 560904–00009); Goodman Manufacturing (# 560904–00010); Heating, Air-Conditioning and Refrigeration Distributors International (HARDI) (# 560904–00012); Ingersoll Rand Residential Solutions (# 560904–00007); Natural Resources Defense Council (NRDC) (including Alliance to Save Energy, American Council for an Energy-Efficient Economy, Appliance Standards Awareness Project, Consumer Federation of America, National Consumer Law Center, Natural Resources Defense Council, Northeast Energy Efficiency Partnerships, and Northwest Energy Efficiency Alliance) (# 560904–00003); Rae, Audra (# 560904–00002); Rheem Manufacturing Company (# 560904–00006). The comments are available at *http://www.ftc.gov/os/comments/regionaldisclosurenprm/index.shtm.*

[20] ACCA also supported the proposed split label format. *See also* HARDI comments.

[21] Tables 1 and 2 summarize the content of the final labels by product category. Consistent with current practice, the FTC staff will create new label templates for each heating and cooling product that manufacturers may download from *www.ftc.gov/energy.*

[22] In the NPRM, the Commission also proposed to update existing comparability ranges for all heating and cooling equipment. The Commission proposed to require new ranges beginning May 1, 2013, to coincide with the new efficiency standards applicable to most products. However, for products subject to standards effective on January 1, 2015 (*i.e.,* central air conditioners, heat pumps, and weatherized furnaces), the Commission proposed to wait to apply ranges until that date.

[23] *See* ACCA and NRDC comments. For example, NRDC explained that a consumer comparing a heat pump and a furnace might assume both products use the same rating system even though different rating systems apply (HSPF for the heat pump and SEER for the furnace).

[24] To reduce potential confusion, Goodman recommended changing the term ''condensing unit'' in the Rule to ''outdoor section'' and the term ''coil'' to ''indoor product.'' The Commission does not plan to change the current terms because they are consistent with the terms used in DOE regulations (10 CFR Part 430) and have appeared in FTC rules for decades with no apparent confusion.

[25] *See* AHRI Comments on ANPR (Feb. 3, 2012) *http://www.ftc.gov/os/comments/regionaldisclosuresanpr/00003.html.*

capacity on the label, especially for split systems, because a system's capacity will vary depending on the condenser-coil combination. It also noted that the AHRI Web site and manufacturer literature already provides a product's actual rated capacities.[26]

Response to Comments on Upper Portion Content: In response to these comments, the Commission has increased the prominence of the efficiency rating terms and changed the graphical presentation of the label's comparability range. However, consistent with the NPRM, the final rule requires capacity and model numbers on the labels.

The Commission agrees with commenters that the label's technical efficiency rating terms (*e.g.,* SEER) should appear in a more prominent fashion. In some situations, consumers may compare heating and cooling products that fall into different categories (*e.g.,* heat pumps and furnaces). Without clear information identifying various efficiency ratings across labels (*e.g.,* HSPF and AFUE), consumers may incorrectly compare different rating systems. Accordingly, the final rule requires the acronym for the model's rating type immediately adjacent to the term ''Efficiency Rating'' (*e.g.,* ''Efficiency Rating (SEER*)''). The full term for the applicable efficiency rating (*e.g.,* ''*Seasonal Energy Efficiency Rating'') will appear beneath the range information. *See, e.g.,* Sample Label 7A, below.

The Commission also agrees with commenters that the use of the horizontal thermometer scale may cause confusion. In particular, as noted by commenters, the high and low efficiency numbers associated with split systems complicate the disclosure and may make the thermometer-style range appear cluttered. Accordingly, the final rule retains the simpler design from the current label and augments it with the high and low ratings for split systems, similar to that suggested by AHRI in its earlier comments. *See, e.g.,* Sample Label 7A, below.

Finally, consistent with the proposal, the amendments require model number and capacity disclosures on the label. Without this information, consumers cannot use the DOE-generated cost calculator referenced on the label. In addition, for split systems, the model number and capacity allows consumers to obtain efficiency rating and energy cost information of various condenser-coil combinations. Although some manufacturers may have to change their labeling practices, the benefits of the energy cost estimates for consumers outweigh this incremental cost increase.[27]

Summary of Final Upper Portion Content: The final rule for the label's upper portion requires disclosure of the product's efficiency rating, a range of efficiency ratings for similar products, and a link to an online energy cost calculator. The new, updated upper portion design applies to all heating and cooling equipment, even product types not subject to the new regional standards such as electric furnaces, boilers, and weatherized furnaces. The new label bears the simple title ''Efficiency Rating,'' followed by a technical acronym for the rating applicable to that product (*e.g.,* SEER or AFUE). It also includes the term ''efficiency rating'' because most consumers will not recognize the technical terms alone (*e.g.,* SEER). However, the full name of the efficiency rating (*e.g.,* ''Seasonal Energy Efficiency Rating'') also appears on the label's upper portion.

In addition to the model's efficiency rating, the upper portion continues to display a range of ratings for similar models to help consumers compare competing products. The final rule updates the existing comparability ranges for most heating and cooling equipment.[28] Specifically, it updates ranges for non-weatherized, mobile home, and electric furnaces and boilers based on recent data and the DOE efficiency standards currently scheduled to become effective on May 1, 2013.[29] The Commission will issue new ranges for products subject to new standards currently scheduled to become effective on January 1, 2015 (*i.e.,* central air conditioners, heat pumps, and weatherized furnaces) in 2014.[30] The final rule also specifies separate ranges for each system type, including weatherized and non-weatherized furnaces, split-system air conditioner systems, small duct, high-velocity systems, and space-constrained air conditioners. The final label contains a prominent link to an online energy cost calculator provided by a DOE Web site (*productinfo.energy.gov*). This calculator will provide a clear, understandable tool to compare energy performance. To allow consumers to use the calculator, the labels must display the model's capacity in addition to its efficiency rating.[31]

Finally, consistent with the proposed label, the final label's upper portion contains specific information for split-system air conditioners and heat pumps. These systems consist of two separate pieces of equipment: an outdoor condenser and an indoor coil. During the installation process, installers match a condenser with a coil to form the entire air conditioning system. The final efficiency rating for these systems varies depending on the installed condenser-coil combination. Under the current Rule, EnergyGuide labels appear on the condenser unit and disclose the efficiency rating of that unit when matched with a typical coil (*i.e.,* the condenser-coil combination with the highest sales volume). The final label changes this approach by disclosing the lowest and highest SEER (and HSPF for some models) ratings for all the condenser's certified coil combinations to ensure the consumer and installers understand that the final rating of their system will depend on the coil installed with the condenser.[32] This disclosure provides the minimum and maximum efficiency yielded by a particular split-system. The upper label portion also states that an installed system's efficiency will vary depending on the coil matched with the condenser.

[26] In the NPRM, the Commission also sought comment on the incorporation of a QR (''Quick Response'') code on the label. Industry comments (*e.g.,* AHRI and Goodman) opposed the idea arguing that such a code would take up too much space on the label, confuse consumers, and provide only marginal benefit. In its separate regulatory review of the Rule, the Commission also sought comments on the use of a QR code. The Commission will consider the comments received in that proceeding before considering whether to propose any specific requirements related to QR codes.

[27] Because the FTC staff has assumed that manufacturers create a single label for each basic model, this change does not alter the Commission's Paperwork Reduction Act burden estimates for the Rule. *See* section VIII of this Notice.

[28] See Appendices G1–G6.

[29] The new ranges currently scheduled to become effective on May 1, 2013 apply to some equipment that is not subject to any change in the standards (*e.g.,* electric furnaces and boilers). The new ranges will ensure the labels provide consumers the most recent model data. The final rule adjusts the lower end of the boiler ranges to reflect new DOE efficiency standards that became effective Sept. 1, 2012. 73 FR 43611 (July 28, 2008).

[30] The Commission will publish new ranges for central air conditioners, heat pumps, and weatherized furnaces before the January 1, 2015 date. Under the current Rule, the Commission amends range information for labels on a five-year schedule. The ranges on the new sample heat pump and air conditioner labels in this Notice stem from current industry data and have been included only for illustrative purposes.

[31] Energy cost information already appears on EnergyGuide labels for other covered products, including dishwashers and televisions. Unlike those products, however, heating and cooling costs can vary significantly depending on whether the consumer lives in a hot or cold climate. For example, the annual operating cost of a furnace is likely to be much higher in Minnesota than Florida. Therefore, national average cost information on the label may not be helpful to many consumers. The online cost calculator will give consumers better information based on their location.

[32] *See, e.g.,* Sample 7A, Appendix L.

2. Lower Portion Content

Background: In the NPRM, the lower portion of the proposed label contained regional standards information, where applicable, to help installers and consumers understand those requirements. The proposed lower portion communicated this information through text, a map, and a Web site link. The text included general information for installers about regional efficiency standards, including a list of applicable states. In addition, a color U.S. map illustrating regional standards information appeared on the label for products that do not meet standards in one or more regions (*i.e.,* certain split air conditioner systems, single-package air conditioners lower than 11.0 EER, and non-weatherized and mobile gas furnaces lower than 90 AFUE). The Commission also designed the proposed labels to ensure that the FTC EnergyGuide map would not appear on any labels displaying the Energy Star logo, which also contains a map, to eliminate any confusion from the appearance of two different maps on the same label.

For central air-conditioner models that do not meet the regional standards in one or more regions, the proposed label displayed a generic map and a table illustrating the three regions covered by the new DOE standards. It also contained EER ratings (including high and low ratings for split-system combinations) to help installers determine regional standards compliance.[33] For split systems, the proposed label also contained a link to a DOE Web site listing various condenser-coil combinations. Finally, the proposed label for single-package air conditioners (*i.e.,* units with consolidated components) rated below 11.0 EER displayed a product-specific map, instead of the generic map on split-system labels, to illustrate that such models can only be installed in the northern and southeastern regions. On furnace labels, the Commission also proposed specific regional information. For non-weatherized gas and mobile home gas furnaces rated below 90 AFUE, the draft label contained a map and a list identifying those states where the product may be installed. For non-weatherized gas furnaces, mobile home furnaces, and air conditioners that meet standards in all regions, the proposed label contained the statement: ''Federal law allows this unit to be installed in all U.S. states and territories.''

Comments on Lower Portion Content: Commenters generally supported the content of the proposed lower label. However, several raised specific concerns about the proposed map's colors, the presentation of the ENERGY STAR logo, the prominence of EER disclosures, and the potential inclusion of a link to the AHRI directory.

First, three industry members urged the Commission to require a black and yellow label, instead of the proposed color map.[34] AHRI, which recommended a color map in earlier comments,[35] changed its recommendation, stating that multi-color labels would impose a substantial burden. Two other commenters argued that a color map would force some manufacturers to purchase new printers.[36] These comments urged the FTC to abandon the proposed color label and return to the yellow and black format. In doing so, they suggested single-color display patterns, such as solid and cross-hatch fills, to depict multiple map regions. However, one commenter, ACCA, opposed this change, arguing that the color label is critical to enable distributors, contractors, and consumers to determine whether equipment can be legally installed.

Second, commenters raised concerns about the content and placement of the ENERGY STAR logo, which includes a U.S. map identifying the states where the product qualifies for the ENERGY STAR program. ACCA noted that the proposed rule contained an older version of the ENERGY STAR logo, which did not identify Kentucky as part of the southern region. In addition, two comments raised concerns about the interaction of the ENERGY STAR logo with other label information. ACCA and NRDC argued that some labels may confuse consumers—specifically where the ENERGY STAR logo, which illustrates that some products only qualify for that program in certain states, appears with the statement ''Federal Law allows this unit to be installed in all U.S. States and territories.'' NRDC urged the Commission to avoid such problems by placing the ENERGY STAR logo in a separate section. Other commenters asked the Commission to clarify that the inclusion of the ENERGY STAR logo on the label is optional.[37]

Third, commenters recommended that the Commission increase the prominence of the label's EER information. ACCA and NRDC recommended that EER information appear side-by-side or close to the SEER ratings on the label's upper portion to provide informed consumers with this information and help educate others about different efficiency measures. One manufacturer recommended a larger font for the EER values on split and packaged central air conditioner labels.[38] In addition, NRDC encouraged the FTC to include a brief definition for both SEER and EER on the label as recommended in its comments on the ANPR.[39]

Finally, some industry members urged the Commission to allow manufacturers that participate in AHRI's certification programs to include a link to AHRI's Web site on the label. ACCA explained that contractors use this directory to determine the ratings of potential condenser-coil combinations and to print certificates for tax credit or utility incentive programs. AHRI argued that its directory is easier to use than the DOE Web site. AHRI also recommended that a database link appear on all EnergyGuide labels for all heating and cooling equipment, not just those for split-system central air conditioners.[40]

Response to Comments on Lower Portion Content: In response to comments, the Commission has changed the final label to yellow and black and updated the ENERGY STAR logo and changed its location. However, the Commission has not changed the location of the EER disclosures for split-system labels or included a link to the AHRI directory on the labels.

The Commission agrees with commenter concerns about the burden associated with multi-color labels. According to the comments, a multi-

[33] The applicable DOE standards for split-system air-conditioner products involve three different geographic regions and two different efficiency ratings (SEER and Energy Efficiency Ratio (EER)). As noted in the NPRM, EER is ''a measure of energy efficiency for central air conditioners at specific operating conditions,'' while SEER is ''a measure of energy efficiency for central air conditioners that estimates energy performance over a typical cooling season.'' 77 FR at 33339, n.19 (June 6, 2012).

[34] AHRI, Ingersoll Rand, and Rheem comments.

[35] AHRI comments (Feb. 3, 2012) available at *http://www.ftc.gov/os/comments/regionaldisclosuresanpr/00003-82667.pdf.*

[36] *See* Ingersoll Rand and Rheem comments.

[37] AHRI; and Ingersoll Rand comments. They explained that frequent changes to the ENERGY STAR program may make it difficult for manufacturers to update their labels to stay current with ENERGY STAR requirements.

[38] Ingersoll Rand comments.

[39] NRDC also suggested changing ''Notice'' to ''Notice of Minimum Regional Standards'' in the label's lower portion. It contended that this modification would provide clarity and further educate installers, distributors and other stakeholders who may be new to the idea of regional efficiency standards. The Commission has not included NRDC's suggested language because it would add additional text to an already crowded label. In addition, it is unclear whether the reference to ''regional standards'' in the heading will be helpful to the average consumer.

[40] Ingersoll Rand also urged the Commission to allow a link to the AHRI database on the label.

color label would require some manufacturers to purchase new printers and others to pay higher printing costs. The traditional yellow and black content can adequately communicate information to installers and consumers without the significant cost of multi-color printing. Accordingly, the final rule requires a yellow label with black text, consistent with the current one. The final label denotes different regions through gray-scale shading and conveys the same information provided by the proposed multi-color version.

The final rule also includes two changes related to the ENERGY STAR logo. To ensure the Rule includes the most current information, the final labels include an updated version of the ENERGY STAR logo. In addition, to minimize any confusion associated with the ENERGY STAR logo and the regional standards map, the final labels separate the ENERGY STAR logo from the regional standards information with a thick black line. Finally, the Commission notes that, under the Rule, the inclusion of the ENERGY STAR logo is optional.

The final rule continues to require EER ratings on the label for split and single-package air conditioners because such information is necessary to determine regional standards compliance for some products.[41] The Commission has increased the size of the EER disclosure. However, contrary to some comments, the ratings continue to appear on the lower portion of the labels. Because consumers are likely to be unfamiliar with EER ratings, their prominent inclusion on the label's upper portion could lead to confusion. Likewise, the Commission has not defined the complicated terms ''SEER'' and ''EER'' on the label because it is unclear whether their inclusion would significantly aid consumers. In addition, given the technical nature of the differences between EER and SEER, any explanation might create more confusion than clarity for consumers.

Contrary to some comments, the final label links consumers to the DOE Web site rather than AHRI's directory. DOE's Web site provides a U.S. government source of information from both AHRI and non-AHRI members. In addition, some manufacturers are not members of AHRI, and the link's inclusion on a government-mandated label is not appropriate. Finally, all the labels will have a link to DOE's certification database through the separate cost calculator link in the label's upper portion (*productinfo.energy.gov*).

Summary of Final Lower Portion Content: Consistent with the proposed rule, the final label's lower portion contains information to help installers and consumers ensure that installed equipment complies with DOE's regional standards. The label's text provides general information to installers about regional efficiency standards, including a list of states where the model may be legally installed.[42] A U.S. map illustrating regional standards information appears on labels for products that do not meet standards in one or more regions (*i.e.,* certain split air conditioner systems, single-package air conditioners rated at lower than 11.0 EER, and non-weatherized and mobile gas furnaces rated at lower than 90 AFUE). The map provides a simple, graphical means to inform distributors, contractors, and consumers about where installation of the particular equipment is prohibited. Finally, the label contains a link to DOE's database of certified equipment to allow installers and consumers to determine the ratings of specific condenser-coil combinations for split systems (*productinfo.energy.gov*).

As proposed in the NPRM, the final label's lower portion also contains specific content for central air conditioners and furnaces subject to regional standards. In particular, for models not meeting the standards in at least one region, the label displays a U.S. map and a table displaying information about the three regions covered by the new DOE standards. The labels for split-system and single-package air conditioners also contain EER ratings, which are necessary to help installers determine regional standards compliance (see Tables 1 and 2). For split systems, the EER information includes the high and low certified ratings. Consistent with DOE's standards, the label for single-package air conditioners rated below 11.0 EER displays a product-specific map to illustrate that such models can only be installed in the northern and southeastern regions. For non-weatherized and mobile gas furnaces rated below 90 AFUE, the label contains a map and a list identifying those states where the product may be installed. Conversely, for non-weatherized furnaces, mobile home furnaces, and central air conditioners that meet standards in all regions, the proposed label contains the statement: ''Federal law allows this unit to be installed in all U.S. states and territories.''

B. Location and Format of Label

Background: In the NPRM, the Commission explained that the label would serve as the primary tool for communicating efficiency and standards information. Under the proposed rule, the label would appear on packaging (for product categories subject to regional standards) and manufacturer Web sites, as well as on the product itself and retailer Web sites as already mandated. The proposal also required retail Web sites selling any product subject to regional standards to display the statement ''Federal law prohibits the installation of some [central air conditioners or furnaces] in certain states. Look to the EnergyGuide label to determine whether this product can be legally installed in your location.'' Finally, the proposed rule required certain retail sellers (*e.g.,* contractors, installers, and assemblers) to make the EnergyGuide label available to consumers before purchase and specifically directed contractors to give consumers the opportunity to review the EnergyGuide label prior to purchase as currently required.

Comments on Label Location and Format: Commenters generally supported the proposed label placement requirements. For example, ACCA asserted that the label's appearance on packaging will help prevent improper installations and its presence on manufacturer Web sites will aid contractors in providing the labels to consumers. Earthjustice predicted that the requirements will help ensure all consumers receive energy information about these products.

However, some commenters raised concerns about three specific aspects of the proposal. First, Earthjustice argued that the Rule should require all retailers, not just contractors, to ensure consumers have label information early in the sales process. Specifically, it urged the Commission to direct brick-and-mortar retailers to ''affirmatively provide consumers with a copy of the label or directions for viewing the label online prior to the sale of the product.'' It also argued that, at the very least, the Commission should clarify how retail sellers who negotiate or make sales over the telephone or online (*e.g.,* via email

[41] The Commission has corrected the text of the final amendments to clarify that the EER information must appear on all split-system and single-package model labels, not just those that do not meet the regional standards.

[42] In addition to the comments outlined above, ACCA recommended that the state names on the label appear in full and not as postal abbreviations. ACCA noted that the use of postal abbreviations changes the order the states appear in some cases. In the Commission's view, it is unlikely that these subtle changes will lead to serious confusion. Even in the few instances where the order of the abbreviations may differ from those of the full name, the abbreviations are in close enough proximity that the reader is not likely to miss them. In addition, the full spelling of states would consume significant space on the label.

or web forms) should make the required disclosure. Finally, Earthjustice recommended that the Rule require retail sellers to have customers confirm in writing that they have read and understood the label and that they are aware of any regional standards applicable to the product.

Second, NRDC and Earthjustice urged the Commission to ensure that labels remain attached for the product's lifetime to help homeowners with replacement purchases and prospective homebuyers who examine installed equipment. In particular, NRDC urged the Commission to eliminate language requiring adhesive labels that can be easily removed ''without the use of tools or liquids, other than water.'' NRDC noted that, because heating and cooling products are usually installed in out-of-the-way locations (*i.e.,* in utility closets, basements, rooftops, or outdoors), a more durable label is unlikely to create aesthetic concerns. In contrast, Goodman argued that the label may not be legible on units stored outdoors for months or years. It recommended specific adhesive specifications, to replace the current requirements which simply call for sufficient strength to prevent dislodgment during normal handling.[43]

Finally, several manufacturers objected to the proposal to require the label on product packaging. AHRI argued that this requirement is unnecessary because current label requirements adequately communicate product information to installers and consumers. Some commenters also argued that current labeling practices already allow installers to view the label before opening packages. For example, some manufacturers use transparent shrink-wrap as packaging, making the EnergyGuide label clearly visible to anyone examining the packaging. Other manufacturers create open pockets on their product packaging to ensure the label can be seen.[44] Given these examples, AHRI argued that the proposed mandatory package labels will increase costs without adding value to the disclosure process. Other commenters recommended that the Commission allow manufacturers to comply with the package label requirement by ensuring that the label affixed to the product is visible.[45] Furthermore, Goodman explained that mandatory package labels may not be feasible because many manufacturers ship their single package HVAC products in corrugated, wax-coated boxes, which do not hold adhesive labels well.

Response to Comments: Consistent with the NPRM, the final rule requires labels on products, packages, and Web sites to ensure the availability of regional standards information for consumers and installers. Additionally, the Commission, in response to commenters, has modified its proposal by updating the disclosure rules applicable to retailers, slightly changing the label's adhesive requirements, and clarifying that manufacturers need not affix a label to packaging if the label is legible through the packaging.

By focusing on the EnergyGuide labels as the primary vehicle for conveying energy efficiency, the final requirements provide a single, familiar tool for communicating efficiency and standards information. The Rule also avoids multiple formats that could cause confusion and increase compliance burdens. For distributors, installers, and other retailers, the comprehensive label eliminates the need to create their own disclosures. In addition, by requiring the label on products and packaging, the final rule should help consumers and installers with their purchasing and installation decisions, regardless of where those decisions occur. The label's continued presence on products provides consumers with efficiency information for their purchases. It will also help provide installers with regional standards information to ensure they install the correct equipment under the law.[46] For products subject to the regional standards, labels on packages will aid distributors and installers to determine whether a model meets applicable standards before they ship or open boxes, avoiding costly mistakes.

After considering the comments, the Commission has modified some requirements for point of purchase disclosures and package labeling as follows. First, in response to Earthjustice's concerns, the final rule (§ 305.14(b)(2)) states that brick-and-mortar retailers must show the label to their customers before they agree to purchase the product to ensure customers will have access to the labels for the products they are considering even if they do not specifically request to see them. Though it is unclear whether many consumers purchase heating and cooling equipment in brick-and-mortar stores, the revision will ensure that such consumers have the same label access as those purchasing equipment in their homes. Retailers may comply with the Rule by informing consumers of the labels and providing a way for them to access the information electronically. They may also display the labels on the products themselves (if the products are clearly visible to shoppers) or display them elsewhere in full view of the consumers. In addition, the final rule (§ 305.14(b)(3)) clarifies that retailer sellers who conduct their transactions solely over the telephone or internet (*e.g.,* email or web forms) must tell consumers where they can view the labels online and give them an opportunity to review labels before purchase. This will ensure that consumers have an opportunity to review the labels regardless of which purchase method they use. The final rule does not require contractors and other sellers to obtain a signed acknowledgment confirming that they have provided label information to consumers because it is unclear whether the benefits of such a requirement outweigh its substantial costs to small businesses.

The final rule eliminates the specific adhesive provisions requiring manufacturers to use labels that easily can be removed with water. As NRDC notes, labels on installed equipment can benefit consumers by helping homeowners in their future purchasing decisions or by informing homebuyers about the efficiency ratings of installed units. To encourage more durable labels, the final rule allows manufacturers to use stronger adhesives. At the same time, the Rule does not mandate a permanent label given uncertainties about the cost and feasibility of such a requirement. In the label's absence, the unit's model number will provide the information necessary to determine compliance, particularly with the availability of online databases from DOE and AHRI. The final rule does not impose a prescriptive adhesive requirement because there is no evidence that the current performance-based requirements, which have been in place for decades, do not work.

[43] Specifically, Goodman questioned the requirement that labels have ''an adhesion capacity sufficient to prevent their dislodgment during normal handling throughout the chain of distribution to the retailer or consumer,'' arguing that manufacturers cannot control how products are handled once they leave their control. Thus, Goodman recommended that the Rule simply require a peel-adhesion (as noted in the last sentence of the same paragraph), but with a reference to an appropriate industry standard test method for peel-adhesion developed by ASTM International.

[44] Rheem also argued that the label on the packaging would provide little value because consumers rarely see the packaging.

[45] Ingersoll Rand and Goodman comments.

[46] The proposed rule does not require a permanent EnergyGuide label on these products as suggested by comments, since the unit's model number provides the information necessary to determine compliance, particularly given the availability of online databases from DOE and AHRI.

Finally, in response to industry concerns, the final rule does not require a separate label on the packaging of products subject to regional standards if the label affixed to the product is visible from the package's exterior. There is no reason to require the manufacturer to place another label on the product packaging if the product label is clearly visible to someone examining the package. In addition, to ensure the label remains affixed to different packaging (*e.g.,* wax-coated boxes), manufacturers may affix the labels through means other than adhesives (*e.g.,* staples, tape, etc.) as long as the method prevents the label's dislodgment during normal handling throughout the distribution chain to the retailer or consumer and ensures the label is clearly visible.

Summary of Final Label Location and Format: The final rule requires that the label be visible on packaging for product categories subject to regional standards (§ 305.12) as well as on retailer and manufacturer Web sites (§§ 305.20 and 305.14).[47] For online disclosures, the final rule (§ 305.20) also directs retail Web sites selling any product subject to regional standards to display the statement, ''Federal law prohibits the installation of some [central air conditioners or furnaces] in certain states. Look to the EnergyGuide label to determine whether this product can be legally installed in your location.'' As discussed above, the final requirements (§ 305.14) direct retail sellers (*e.g.,* contractors, installers, assemblers, and retail stores) to make the EnergyGuide label available to consumers and provide them the opportunity to review the EnergyGuide label prior to purchase. Contractors can comply with this requirement by, for example, showing the labels to consumers or providing them instructions to view the labels online.[48]

C. Additional Labeling Requirements for Oil Furnaces

Background: In the NPRM, the Commission proposed to amend the oil furnace label to give manufacturers the option of including the efficiency ratings associated with different input rates, which allow different levels of fuel usage. The proposed label contained a chart displaying four efficiency ratings associated with four different input rates. Under the proposal, installers who use an input rate different from the manufacturer's default would mark the chart on the EnergyGuide label.

Comments: The commenters offered mixed views on this proposal. AHRI, which originally proposed the label modification, supported the proposal. However, it urged the Commission to change the term ''input rate'' to ''input capacity,'' consistent with the terminology used in DOE's regulations. It also noted that the proposed input capacities in the NPRM (*i.e.,* 84,000, 105,000, 119,000 and 140,000 Btu/h) do not represent an exhaustive list of capacities for typical models. Accordingly, AHRI urged the Commission to allow manufacturers to include up to four capacities of their own choosing. AHRI also urged the Commission to clarify the requirements for ENERGY STAR logo placement, noting that some oil furnace models may meet ENERGY STAR criteria at one input capacity, but not at another.

In contrast, Goodman opposed the proposed oil furnace label, raising concerns that the label would not be durable and, any requirement to make it so would be overly burdensome. Goodman also argued that a specific input capacity rating is not necessary because the labels adequately disclose relative performance from one product to the next.

Final Rule and Response to Comments: Consistent with the NPRM, the final rule (305.12(h)(15)) allows, but does not require, manufacturers to include multiple input capacities on their EnergyGuide labels for oil furnaces. However, the final rule contains several changes and clarifications in response to the comments. First, the Rule does not dictate which input capacities must appear on the label because, as noted by the comments, manufacturers do not offer a uniform set of input capacities. Instead, the final rule allows manufacturers to include up to four input capacities compatible with their model. Second, the label uses the term ''input capacity'' instead of ''input rate'' in response to commenter suggestions. Finally, the final rule only allows the ENERGY STAR logo on models certified by that program at all input capacities listed on the label. To avoid consumer confusion, the Rule does not allow the logo on models qualifying for ENERGY STAR at some capacities and not others.[49]

D. Compliance Date for New Labels

Background: In the NPRM, the Commission proposed to roll out the proposed label in two phases coinciding with the compliance dates of DOE's regional standards. Under the first phase, manufacturers would begin using the new label no later than May 1, 2013 for equipment subject to new standards effective on that date (*i.e.,* non-weatherized and mobile home furnaces) as well as equipment not subject to any change in the regional standards (*e.g.,* boilers, oil-fired and electric furnaces). Under the second phase, manufacturers would begin using the new labels no later than January 1, 2015 for any heating and cooling equipment subject to new standards effective on that date (*i.e.,* weatherized furnaces and central air conditioners and heat pumps).

Comments: Commenters raised several concerns with the proposed compliance dates, warning that three factors could delay implementation of the DOE rules and impact the labels' timing.[50] First, APGA has challenged DOE's new regional standards for furnaces in the U.S. Court of Appeals for the D.C. Circuit.[51] Second, AHRI has petitioned DOE to grant an 18-month extension for regional furnace efficiency standards from the current compliance date of May 1, 2013, to give manufacturers more time to comply with the standards and labels. Finally, AGA noted that DOE has not completed its rulemaking to develop a statutorily-required enforcement plan for regional standards. In the commenters' views, these three considerations cast doubt on the new labels' timing. AGA explained that resolution of these matters could render the Commission's final label requirements inaccurate or misleading and called on the Commission to wait and coordinate with DOE to ensure consistency between the final labels and DOE's standards and enforcement requirements. Earthjustice disagreed, arguing that the FTC cannot ignore its duty to meet the statutory deadline for labeling rules merely because of the ongoing litigation. To address these various uncertainties, Ingersoll Rand suggested the Commission tie the Rule's

[47] The Commission recently issued amendments to the Rule requiring manufacturer Web sites to provide consumers, distributors, and installers access to their product labels online for all products bearing an EnergyGuide label by July 15, 2013. The amendments also require all online retailers to include the EnergyGuide label for the products they sell by January 15, 2014. 78 FR 2200 (Jan. 10, 2013). These requirements are consistent with those issued by the Commission for television labels in 2011. *See* 76 FR 1038 (Jan. 11, 2011) (television requirements).

[48] The Rule already contains similar disclosure requirements. 16 CFR 305.14.

[49] In response to Goodman's comment, the Commission notes that the label, which is not designed to be permanent, will inform consumers after purchase of their system's efficiency as installed at a specific input capacity. Among other things, this information may be important for tax credits or utility rebates.

[50] APGA, AGA, Goodman, and AHRI comments.

[51] *American Public Gas Association* v. *U.S. Department of Energy,* No. 11–1485 (D.C. Cir. 2012).

compliance date to the DOE standard compliance date generally, without specifying a date.

In addition to concerns with these ongoing developments, some commenters expressed reservations about the timing of the labeling requirements. AHRI urged the Commission to recognize that some models bearing the old label may remain in the distribution chain after the Rule's compliance date. HARDI echoed these concerns, noting that some inventory may continue to appear on the market after the compliance date of the new standards. To reduce confusion associated with this transition, Goodman recommended that the label itself display DOE's compliance date. In addition, AHRI asked the Commission to clarify whether manufacturers could begin affixing the label to products before the compliance dates to ensure a reasonable transition period, and, presumably, avoid requiring all label changes on a single day.[52] Finally, NRDC recommended that the Commission require the label on products manufactured before the compliance date to begin educating installers early and to ensure that products in circulation have the new label when the standards go into effect. However, NRDC noted that, to avoid confusion, the label would have to explain that the regional standards do not apply until the compliance date.

Final Rule and Response to Comments: After considering the comments, the Commission has modified the Rule's language to account for possible changes in the DOE compliance dates. As a result, the final rule does not require that the labels themselves contain a particular mandatory compliance date. Instead, it ties the labeling requirements to DOE's compliance dates, whatever they may be. Accordingly, if the DOE standards are postponed or vacated, the new labeling rules will not apply until a new DOE compliance date is set. Nevertheless, the Commission has not delayed publication of the final labeling rules because EPCA imposes a clear completion deadline and, at this time, DOE has not changed its compliance dates.[53]

Recognizing that the DOE compliance dates for the standards could shift, the Commission has modified the final rule to remove specific compliance dates (*e.g.,* May 1, 2013), instead tying new label compliance to the compliance date for DOE's regional standards. This change eliminates the need to amend the labeling Rule should a delay occur in the implementation of DOE's requirements. Thus, consistent with the proposal, the final rule requires compliance with the new label content (305.12) in two phases.[54] Under the first phase, manufacturers must begin using the new label for weatherized gas and mobile home gas furnaces on the compliance date set by DOE for the standards applicable to those products (currently scheduled for May 1, 2013). That date also applies to revised labels for equipment not subject to the regional standards (*e.g.,* boilers, non-weatherized oil-fired furnaces, and electric furnaces). Likewise, under the second phase, manufacturers must begin using the new label for weatherized furnaces, central air conditioners, and heat pumps on the compliance date set by DOE for those products (currently January 1, 2015).[55]

On January 11, 2013, DOE and APGA filed a settlement agreement with the Court of Appeals for the D.C. Circuit to vacate the regional standards for non-weatherized gas and mobile home gas furnaces.[56] A final decision from the court on the settlement is still pending. If a final decision vacates the standards for those products, the Commission's labeling rules for products tied to that compliance date will not become effective because, as discussed above, the rule language ties the label requirements to the DOE compliance date. In short, without a DOE compliance date or DOE standards for that matter, the Commission will not require the new labeling provisions. When DOE revisits the standards, the Commission will amend the labeling rules if necessary to conform to the new requirements. The proposed settlement does not address the DOE regional standards scheduled for January 1, 2015 applicable to central air conditioners. Thus, absent further developments, the Commission does not plan to alter the final labeling requirements for those products or for weatherized furnaces.

In addition, the final label does not include a compliance date disclosure, as suggested by some comments. Given the uncertainties associated with the ongoing litigation and the extension request before DOE, the Commission is reluctant to place a specific date on the label that may become obsolete and cause consumer confusion.[57]

In response to AHRI's concerns, the Commission clarifies that manufacturers may begin implementing the new label format prior to the DOE compliance date to facilitate a reasonable transition to the new labels. The Commission has followed the same approach for similar changes in the past.[58] Early labeling will also increase the number of units displaying the new label format on the compliance date of the DOE standards. However, in weighing whether to begin labeling early, manufacturers should consider the status of the ongoing issues related to the timing of DOE's standards discussed above.

E. Possible DOE Waiver for Furnaces

Background and Comments: Commenters also urged the Commission to require information on the label alerting installers and consumers to a potential DOE waiver for furnace installations.[59] On February 6, 2012, several organizations petitioned DOE to waive the new regional standards where a higher-efficiency furnace installation would be infeasible or prohibitively expensive (*e.g.,* in some narrow row houses). Anticipating such waivers, the commenters urged the Commission to include special language on the label. For example, AGA recommended that the label's lower portion include a notice that reads, ''Federal law allows this unit to be installed in: [listed

[52] *See also* Goodman comments.

[53] 42 U.S.C. 6295(o)(6)(H). In addition, the Commission has not delayed the labeling rules pending completion of the DOE enforcement plan. Given the possibility that the DOE standards will become applicable before the issuance of that plan, the final labeling rule ensures the new disclosures will be available, as Congress intended, to inform industry members about the standards, regardless of the plan's status. However, if any conflicts should arise between DOE's final enforcement plan and the labels, the Commission will provide guidance to industry members and amend the labeling rules as necessary.

[54] Similarly, the final rule ties the new disclosure provisions in section 305.14 (*i.e.,* manufacturers' duty to post labels online and contractors' duty to make the labels available to consumers) to the DOE compliance date. Unlike the two-stage approach for label content in 305.12, the section 305.14 changes will take effect at a single time (*i.e.,* on the compliance date for regional standards applicable to non-weatherized furnaces) to minimize confusion and ensure uniformity in the contractor disclosures to consumers. Finally, as discussed earlier, recent amendments already require all manufacturers to post EnergyGuide labels online beginning July 15, 2013, whether or not a delay occurs for the DOE regional standards. 78 FR 2200.

[55] The Commission will update ranges for weatherized furnaces and central air conditioners and heat pumps before the January 1, 2015 transition to the new labels. DOE has clarified that the compliance date for the regional standards applies to the installation of products on or after that date. *See* Department of Energy, ''Regional Standards Enforcement Framework Document,'' *http://www1.eere.energy.gov/buildings/appliance_standards/pdfs/furncac_regstnd_enforceframework.pdf.*

[56] Joint Motion of Petitioner and Respondent to Vacate in Part and Remand for Further Rulemaking (Jan. 11, 2013), *American Public Gas Ass'n* v. *DOE,* No. 11–1485 (D.C. Cir. filed Dec. 23, 2011).

[57] Similarly, the final rule does not require such labels on products earlier than DOE's compliance dates given the uncertainty associated with the implementation of DOE's standards.

[58] *See, e.g.,* 75 FR 41710, 41696 (July 19, 2010) (light bulb labels).

[59] See NRDC, AGA, and ACCA comments.

states]'' and further provides that ''Federal law prohibits installation of this unit in other states, except in the case of an eligible waiver. See [DOE Web site] for information on eligibility requirements for a waiver.'' [60] HARDI, which expressed concerns with such a DOE waiver, cautioned that it is unclear whether DOE has the legal authority to issue such waivers.[61]

Final Rule and Response to Comments: Consistent with the comments, the final rule includes label waiver language that manufacturers must use if DOE issues waivers for furnace installations (§ 305.12(h)). Specifically, the required language states, ''Federal law prohibits installation of this unit in other states, unless a waiver from the Department of Energy allows such installation.'' This disclosure will alert installers and consumers to the existence of waivers should DOE issue such measures. The disclosure's absence could lead to significant confusion and disruption in the sale and installation of these models. As stated in the final rule, this language will only appear on the labels if DOE issues the requested waivers. If DOE does not issue such waivers, manufacturers cannot include it.

F. Full Fuel Cycle Disclosures

Both the AGA and APGA urged the Commission to work with DOE to develop consumer information about the full-fuel cycle energy consumption and greenhouse gas emissions associated with consumer products. In a 2011 policy statement issued in response to recommendations from the National Academy of Sciences (NAS), DOE announced plans to use full-fuel cycle measures of energy use and emissions in estimating the likely impacts of energy conservation standards.[62] DOE also committed to working with the Commission to generate information to help consumers make cross-class comparisons of the energy use and emissions of appliances. In their comments, AGA and APGA explained that both DOE and the Commission must begin to take the steps necessary to resolve such issues and provide consumers with better information about the energy use and environmental impacts of their appliance choices. AGA recommended that the Commission consider obtaining energy use and emissions information on a regional basis, to correspond with the regional standards. It also recommended that the Commission consider providing this type of information for both individual products as well as the range of competing products. Additionally, AGA noted that NAS identified the EnergyGuide label information as the most effective means to convey the environmental impact of energy consumption to the public. However, AGA acknowledged that unresolved issues remain before such information will be meaningful and accurate.

The Commission will continue to work with DOE to consider NAS's recommendations. As part of the Commission's ongoing review of the Rule, it sought comments on this issue.[63] The Commission will continue to consider this issue as part of the regulatory review.

TABLE 1—FURNACES

System type	Regional standards information on final label	Date for label change *	Efficiency standard-north	Efficiency standard-southeast	Efficiency standard-southwest
Non-weatherized gas	Models below 90 AFUE: U.S. map and explanatory text indicating product can only be installed in southeast/southwest (see Sample Label 9). All other models: a statement that unit can be installed in any state (see Sample Label 9A).	May 1, 2013	90% AFUE [64]	80% AFUE	80% AFUE
Mobile home gas	Models below 90 AFUE: U.S. map and explanatory text indicating product can only be installed in southeast/southwest. All other models: a statement that unit can be installed in any state.	May 1, 2013	90% AFUE	80% AFUE	80% AFUE
Non-weatherized oil-fired	No regional standards information (see Sample Label 9B).	May 1, 2013	83% AFUE	83% AFUE	83% AFUE
Weatherized gas	No regional standards information	Jan. 1, 2015	81% AFUE	81% AFUE	81% AFUE
Mobile home oil-fired	No regional standards information	May 1, 2013	75% AFUE	75% AFUE	75% AFUE
Weatherized oil-fired	No regional standards information	Jan. 1, 2015	78% AFUE	78% AFUE	78% AFUE
Electric	No regional standards information	May 1, 2013	78% AFUE	78% AFUE	78% AFUE

* The Rule indicates that the label must be changed on or before the compliance date of the DOE efficiency standards. The dates on this table reflect the dates currently scheduled by DOE.

[60] Similarly, NRDC recommended label text stating, ''Federal law prohibits installation of this unit in other states, except in the case of an eligible waiver.''

[61] AHRI noted that DOE has granted a waiver for small-duct, high velocity air conditioner systems and urged the FTC to develop an EnergyGuide label for products that have efficiencies outside the ranges in the proposed EnergyGuide labels and are sold based on waivers granted by DOE. The Commission does not plan to alter current requirements because the Rule already has a procedure that manufacturers can follow when their ratings fall outside of existing ranges. *See* 16 CFR 305.10(b).

[62] 76 FR 51281 (Aug. 18, 2011) (''Statement of Policy for Adopting Full-Fuel-Cycle Analyses Into Energy Conservation Standards Program'').

[63] 77 FR 15298 (Mar. 15, 2012) (NPRM).

[64] Annual Fuel Utilization Efficiency.

TABLE 2—CENTRAL AIR CONDITIONERS AND HEAT PUMPS

System type	Regional standards information on proposed label	Date for label change *	Efficiency standard-north	Efficiency standard-southeast	Efficiency standard-southwest
Split-system air conditioners	All models regardless of efficiency rating: low and high SEER and EER for certified compressor-coil combinations.	Jan. 1, 2015 ..	13 SEER [65]	14 SEER	14 SEER/12.2 EER [66] if model <45,000 Btu/h.
	Models below 14 SEER (any size model), below 12.2 EER (for models smaller than 45,000 Btu/h), or below 11.7 EER (for models larger than 45,000 Btu/h): General U.S. map & standards chart (see Sample Label 7A).	.....	.....	.....	14 SEER/11.7 EER if model >45,000 Btu/h.
	All other models: a statement that unit can be installed in any state.				
Split-system heat pumps	No regional standards information (see Sample Label 8A).	Jan. 1, 2015 ..	14 SEER/8.2 HSPF [67].	14 SEER/8.2 HSPF.	14 SEER/8.2 HSPF.
	All Models: low and high SEER and HSPF for certified compressor-coil combinations.				
Single-package air conditioners.	Models below 11 EER: U.S. Map and explanatory text indicating product can only be installed in northern and southeastern states (not southwestern) (see Sample Label 7B) & EER rating.	Jan. 1, 2015 ..	14 SEER	14 SEER	14 SEER/11.0 EER.
	All other models: a statement that unit can be installed in any state & EER rating.				
Single-Package Heat Pumps	No regional standards information	Jan. 1, 2015 ..	14 SEER/8.0 HSPF.	14 SEER/8.0 HSPF.	14 SEER/8.0 HSPF.
Small-duct, high-velocity systems.	No regional standards information	Jan. 1, 2015 ..	13 SEER/7.7 HSPF.	13 SEER/7.7 HSPF.	13 SEER/7.7 HSPF.
	All split-system models: low and high SEER and HSPF for certified compressor-coil combinations.				
Space-constrained products—air conditioners.	No regional standards information	Jan. 1, 2015 ..	12 SEER	12 SEER	12 SEER.
	All split-systems models: low and high SEER and HSPF for certified compressor-coil combinations.				
Space-constrained products—heat pumps.	No regional standards information	Jan. 1, 2015 ..	12 SEER/7.4 HSPF.	12 SEER/7.4 HSPF.	12 SEER/7.4 HSPF.
	All split-system models: low and high SEER and HSPF for certified compressor-coil combinations.				

* The Rule language states that the label must be changed on or before the compliance date of the DOE efficiency standards. The dates on this table reflect those currently scheduled by DOE.

VIII. Paperwork Reduction Act

The current Rule contains recordkeeping, disclosure, testing, and reporting requirements that constitute information collection requirements as defined by 5 CFR 1320.3(c), the definitional provision within the Office of Management and Budget (OMB) regulations that implement the Paperwork Reduction Act. OMB has approved the Rule's existing information collection requirements through Jan. 31, 2014 (OMB Control No. 3084 0069). As described below, the final amendments modify existing EnergyGuide label design and require its presence on packaging for some products. Accordingly, the Commission is submitting these amendments to OMB for review.

Manufacturer EnergyGuide Images Online: The final amendments require manufacturers to post images of their EnergyGuide labels on their Web sites. Given approximately 6,000 total models[68] at an estimated five minutes per model,[69] this requirement will entail a burden of 500 hours.[70] Assuming that the additional disclosure requirement will be implemented by graphic designers at a mean hourly wage of $23.41 per hour,[71] the associated labor cost would approximate $11,705 per year (500 hours x $23.41).

Updating EnergyGuide Labels: The amendments also require heating and cooling equipment manufacturers to change the EnergyGuide labels to the new design. These changes constitute more than routine, minor conforming changes such as those required to update existing labels. The Commission estimates that new label design will require a one-time drafting change for the manufacturers. Consistent with similar label changes in the past, the Commission estimates that this one-time change will take 40 hours per manufacturer.[72] As with other recent

[65] Seasonal Energy Efficiency Rating.

[66] Energy Efficiency Rating.

[67] Heating Seasonal Performance Factor.

[68] This estimate is based on information from industry sources (*e.g., www.ahrinet.org*).

[69] In comments, Goodman argued that the five-minute estimate did not account for time spent by designers and engineers creating the label. However, this particular estimate simply reflects the time spent by Web site personnel loading the image onto the manufacturer's Web site.

[70] Unlike retail Web sites that already have established Web pages for the products they offer, some manufacturers may have to create new Web pages for posting these required labels. Accordingly, the burden estimate for manufacturers is higher (five minutes per model) than that for catalog sellers (one minute per model).

[71] *See* U.S. Department of Labor, Occupational Employment and Wages—May 2011, Table 1, released March 27, 2012, available at *http://www.bls.gov/news.release/archives/ocwage_03272012.pdf.*

[72] 72 FR 49948, 49964 (Aug. 27, 2007) (general amendments to the EnergyGuide label design).

labeling changes, the FTC staff plans to provide template labels on the Commission's Web site to minimize the burden associated with such labels changes. The Commission estimates that there are approximately 100 manufacturers of affected covered products. Therefore, the label design change will result in a one-time burden of 4,000 hours (100 manufacturers x 40 hours). In calculating the associated labor cost estimate, the Commission assumes that the label design change will be implemented by engineers at an hourly wage rate of $44.36 per hour based on Bureau of Labor Statistics information.[73] Thus, the Commission estimates that the new label design change will result in a one-time labor cost of approximately $177,440 (4,000 hours x $44.36 per hour).

EnergyGuide Labels on Packaging: The amendments require manufacturers to affix a copy of the EnergyGuide on packaging for split-system and single-package air conditioners, and non-weatherized and mobile home gas furnaces. DOE has estimated past annual shipments of these units at about 5,500,000.[74] The Commission estimates the burden for package labeling at 12,222 hours [8 seconds × 5,500,000 units].[75] In calculating the associated labor cost estimate, the Commission assumes that the label design change will be implemented by packaging and filling machine operators at an hourly wage rate of $13.44 per hour based on Bureau of Labor Statistics information. Thus, the Commission estimates that label placement on packaging will result in an annual labor cost of approximately $164,264 (12,222 hours x $13.44 per hour).

Catalog and Installer Disclosures: The Rule already requires retailers to post energy information in catalogs (including Web sites) and installers and other retailers, including brick-and-mortar stores, to make information available to consumers at the point of sale. Therefore, the new requirements should not significantly alter the current burden estimate.

Estimated Annual Non-Labor Cost Burden: The Commission expects the amendments will impose additional labeling cost of $385,000, based on a conservative estimate of 5,500,000 units shipped, at an average cost of seven cents for each label.[76]

IX. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires that the Commission provide an Initial Regulatory Flexibility Analysis (IRFA) with a Proposed Rule, and a Final Regulatory Flexibility Analysis (FRFA) with the final Rule, unless the Commission certifies that the Rule will not have a significant economic impact on a substantial number of small entities.

The Commission does not anticipate that the Rule will have a significant economic impact on a substantial number of small entities. The Commission recognizes that some of the affected manufacturers may qualify as small businesses under the relevant thresholds. However, the Commission does not expect that the requirements specified in the final rule will have a significant impact on these entities because, as discussed in the previous section, the amendments involve formatting changes to labels, additional labels on some packaging, and Web site changes.

Although the Commission certified under the RFA that the amendments would not, if promulgated, have a significant impact on a substantial number of small entities, the Commission has determined, nonetheless, that it is appropriate to publish an FRFA in order to explain the impact of the amendments on small entities as follows:

A. Statement of the Need for, and Objectives of, the Amendments

As directed by Congress, the Commission is issuing new disclosures to help consumers and industry members understand new DOE regional efficiency standards for heating and cooling equipment. The objective of the final rule is to develop new labels to help communicate regional standards requirements for heating and cooling equipment. The legal basis for this Rule is the EPCA (42 U.S.C. 6291 *et seq.*).

B. Issues Raised by Comments in Response to the IRFA

The Commission did not receive any comments specifically related to the impact of the final amendments on small businesses. The Commission received comments on the burdens associated with the amendments, which are addressed in the Paperwork Reduction Act section of this notice.

C. Estimate of Number of Small Entities to Which the Amendments Will Apply

Under the Small Business Size Standards issued by the Small Business Administration, the standards for equipment manufacturers is 750 employees.[77] The Commission estimates that fewer than 50 such entities subject to the proposed Rule's requirements qualify as small businesses.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The Commission recognizes that the proposed labeling changes will involve some burdens on affected entities. However, the amendments should not have a significant impact on small entities. The amendments would increase existing burdens by requiring manufacturers to change their EnergyGuide labels for products and place labels on packages for certain furnaces and central air conditioners. Graphic designers and packaging operators will implement the new requirements. There should be no capital costs associated with the amendments.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission has not identified any other federal statutes, rules, or policies that would duplicate, overlap, or conflict with the Rule. While the labels are related to DOE efficiency standards, the proposed requirements do not overlap with DOE rules.

F. Alternatives

The Commission has considered alternatives to the proposed rule and changed the final rule to reduce regulatory burden. As discussed in this Notice, the Commission has eliminated the proposed multi-color label and, instead, required a black and yellow label to reduce costs associated with full-color printing. In addition, the

Comments from Goodman argued that the estimate should reflect time spent creating work requests, making the drawings, drawing review process, quality checks, and other activities.

[73] Goodman also indicated that engineers are generally involved in these activities, working at hourly rates higher than that of graphic designers. In response, the Commission has changed the estimate to assume all work is conducted by engineers. However, the Commission has not changed the time estimate because the FTC staff, consistent with current practice, plans to provide files containing label templates, largely eliminating the need for manufacturers to design the labels themselves.

[74] *See http://www1.eere.energy.gov/buildings/appliance_standards/residential/pdfs/hvac_ch_09_shipments_2011–04–25.pdf.*

[75] The Commission has increased this estimate from 6 to 8 seconds based on comments from Goodman explaining that the proposed time did not take into consideration restocking labels and ''potential decrease in line rates due to quantity of work at a given work station.''

[76] The Commission has added this estimate in response to Goodman's comments. The units shipped for this revised calculation excludes products that will not require a label on packaging (*e.g.,* products not subject to regional standards such as heat pumps).

[77] *See* Table of Small Business Size Standards, U. S. Small Business Administration (October 24, 2012) available at *http://www.sba.gov/content/table-small-business-size-standards.*

Commission has clarified that manufacturers do not have to include a separate label on packaging, if the label affixed to the product is visible to someone examining the package.

XII. Final Rule Language

List of Subjects in 16 CFR Part 305

Advertising, Energy conservation, Household appliances, Labeling, Reporting and recordkeeping requirements.

For the reasons set out above, the Commission issues the following amendments to 16 CFR part 305:

PART 305—ENERGY AND WATER USE LABELING FOR CONSUMER PRODUCTS UNDER THE ENERGY POLICY AND CONSERVATION ACT (ENERGY LABELING RULE)

■ 1. The authority citation for part 305 continues to read as follows:

Authority: 42 U.S.C. 6294.

■ 2. Amend § 305.12, by revising paragraphs (d), (e), (f) introductory text, and (g) introductory text, and adding paragraphs (h) and (i) to read as follows:

§ 305.12 Labeling for central air conditioners, heat pumps, and furnaces.

* * * * *

(d) *Label type.* The labels must be affixed in the form of an adhesive label, unless otherwise indicated by this section. All adhesive labels should be applied with an adhesive with an adhesion capacity sufficient to prevent their dislodgment during normal handling throughout the chain of distribution to the retailer or consumer. The paper stock for pressure-sensitive or other adhesive labels shall have a basic weight of not less than 58 pounds per 500 sheets (25''x38'') or equivalent, exclusive of the release liner and adhesive. A minimum peel adhesion capacity for the adhesive of 12 ounces per square inch is suggested, but not required if the adhesive can otherwise meet the above standard.

(e) *Placement.* (1) Manufacturers shall affix adhesive labels to the covered products in such a position that they are easily read by persons examining the products. The labels should be generally located on the upper-right-front corner of each product's front exterior. However, other prominent locations may be used as long as labels will not become dislodged during normal handling throughout the chain of distribution to retailers or consumers. Tops of the labels should not exceed 74 inches from the base of taller products. Labels can be displayed in the form of a flap tag adhered to the top of the appliance and bent (folded at 90°) to hang over the front, as long as this can be done with assurance that it will be readily visible. Labels for split-system central air conditioners should be affixed to the condensing unit.

(2) In addition to the requirements of paragraph (e)(1), for split-system and single-package central air conditioners, and all non-weatherized and mobile home furnaces manufactured on or after the compliance date of regional efficiency standards issued by the Department of Energy for those products in 10 CFR part 430, manufacturers shall affix labels to covered product packages or the products themselves in positions that allow persons examining the packaged products to read the labels easily. Labels on packaging must be affixed via adhesive or another means sufficient to prevent their dislodgment during normal handling throughout the chain of distribution to the retailer or consumer. Labels for split-system central air conditioners should be affixed to condensing units' packages or condensing units consistent with this paragraph.

(f) *Content of labels for furnaces.* Content of labels for non-weatherized furnaces, mobile home furnaces, electric furnaces, and boilers manufactured before the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for non-weatherized, and mobile home furnaces and content of labels for weatherized furnaces manufactured before the compliance date of regional efficiency standards for split-system air conditioners issued by the Department of Energy in 10 CFR part 430.

* * * * *

(g) *Content of labels for air conditioners and heat pumps.* Content of labels for central air conditioners and heat pumps manufactured before the compliance date of regional efficiency standards issued by the Department of Energy for central air conditioners in 10 CFR part 430.

* * * * *

(h) *Subject heading.* Content of labels for non-weatherized furnaces, mobile home furnaces, and electric furnaces, and boilers manufactured on or after the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for non-weatherized, and mobile home furnaces and content of labels for weatherized gas and oil-fired furnaces manufactured on or after the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for split-system air conditioners.

(1) Headlines and texts, as illustrated in the prototype and sample labels in appendix L to this part.

(2) Name of manufacturer or private labeler shall, in the case of a corporation, be deemed to be satisfied only by the actual corporate name, which may be preceded or followed by the name of the particular division of the corporation. In the case of an individual, partnership, or association, the name under which the business is conducted shall be used.

(3) The model's basic model number.

(4) The model's capacity as illustrated in the prototype and sample labels in appendix L to this part.

(5) The annual fuel utilization efficiency (AFUE) for furnace models as determined in accordance with § 305.5.

(6) Ranges of comparability consisting of the lowest and highest annual fuel utilization efficiency (AFUE) ratings for all furnaces of the model's type consistent with sample label 9A in appendix L.

(7) Placement of the labeled product on the scale shall be proportionate to the lowest and highest annual fuel utilization efficiency ratings forming the scale.

(8) The following statement shall appear in bold print on furnace labels adjacent to the range(s) as illustrated in the sample labels in appendix L:

For energy cost info, visit productinfo.energy.gov.

(9) For non-weatherized gas furnaces and mobile home gas furnaces with an AFUE of 90 or greater, the label must contain the following regional standards information consistent with sample label 9A in appendix L to this part:

Notice Federal law allows this unit to be installed in all U.S. states and territories.

(10) For non-weatherized gas furnaces and mobile home gas furnaces with an AFUE lower than 90, the label shall contain the following regional standards information consistent with sample label 9 in appendix L to this part:

(i) A statement that reads either:

(A) ''Notice Federal law allows this unit to be installed only in: AL, AZ, AR, CA, DC, DE, FL, GA, HI, KY, LA, MD, MS, NC, NM, NV, OK, SC, TN, TX, VA, and U.S. territories. Federal law prohibits installation of this unit in other states,'' if the Department of Energy has not issued waivers applicable to these products, or

(B) ''Notice Federal law allows this unit to be installed only in: AL, AZ, AR, CA, DC, DE, FL, GA, HI, KY, LA, MD, MS, NC, NM, NV, OK, SC, TN, TX, VA, and U.S. territories. Federal law prohibits installation of this unit in other states, unless a waiver from the

Department of Energy allows such installation,'' if the Department of Energy has issued waivers applicable to these products.

(ii) A map and accompanying text as illustrated in sample label 9 in appendix L.

(11) The following statement shall appear at the top of the label as illustrated in the sample labels in appendix L:

Federal law prohibits removal of this label before consumer purchase.

(12) No marks or information other than that specified in this part shall appear on or directly adjoining this label except that:

(i) A part or publication number identification may be included on this label, as desired by the manufacturer. If a manufacturer elects to use a part or publication number, it must appear in the lower right-hand corner of the label and be set in 6-point type or smaller.

(ii) The energy use disclosure labels required by the governments of Canada or Mexico may appear directly adjoining this label, as desired by the manufacturer.

(iii) The manufacturer may include the ENERGY STAR logo on the label for certified products in a location consistent with the sample labels in appendix L. The logo must be no larger than 1 inch by 3 inches in size. Only manufacturers that have signed a Memorandum of Understanding with the Department of Energy or the Environmental Protection Agency may add the ENERGY STAR logo to labels on qualifying covered products; such manufacturers may add the ENERGY STAR logo to labels only on those covered products that are contemplated by the Memorandum of Understanding.

(13) Manufacturers of boilers shipped with more than one input nozzle to be installed in the field must label such boilers with the AFUE of the system when it is set up with the nozzle that results in the lowest AFUE rating.

(14) Manufacturers that ship out boilers that may be set up as either steam or hot water units must label the boilers with the AFUE rating derived by conducting the required test on the boiler as a hot water unit.

(15) Manufacturers of oil furnaces must label their products with the AFUE rating associated with the furnace's input capacity set by the manufacturer at shipment. The oil furnace label may also contain a chart, as illustrated in sample label 9B in appendix L, indicating the efficiency rating at up to three additional input capacities offered by the manufacturer. Consistent with paragraph (f)(12)(iii) of this section, labels for oil furnaces may include the ENERGY STAR logo only if the model qualifies for that program on all input capacities displayed on the label.

(i) *Subject heading.* Content of labels for central air conditioners and heat pumps manufactured on or after the compliance date of regional efficiency standards issued by the Department of Energy for central air conditioners in 10 CFR part 430.

(1) Headlines and texts, as illustrated in the prototype and sample labels in appendix L to this part.

(2) Name of manufacturer or private labeler shall, in the case of a corporation, be deemed to be satisfied only by the actual corporate name, which may be preceded or followed by the name of the particular division of the corporation. In the case of an individual, partnership, or association, the name under which the business is conducted shall be used.

(3) The model's basic model number.

(4) The model's capacity as illustrated in the prototype and sample labels in appendix L to this part.

(5) The seasonal energy efficiency ratio (SEER) for the cooling function of central air conditioners as determined in accordance with § 305.5. For the heating function, the heating seasonal performance factor (HSPF) shall be calculated for heating Region IV for the standardized design heating requirement nearest the capacity measured in the High Temperature Test in accordance with § 305.5. In addition, as illustrated in the sample labels 7A and 8A in appendix L, the ratings for any split-system condenser-evaporator coil combinations shall include the low and high ratings of all condenser-evaporator coil combinations certified to the Department of Energy pursuant to 10 CFR Part 430.

(6)(i) Each cooling-only central air conditioner label shall contain a range of comparability consisting of the lowest and highest SEER for all cooling only central air conditioners consistent with sample label 7B in appendix L to this part.

(ii) Each heat pump label, except as noted in paragraph (g)(6)(iii) of this section, shall contain two ranges of comparability. The first range shall consist of the lowest and highest seasonal energy efficiency ratios for the cooling side of all heat pumps consistent with sample label 8A in appendix L to this part. The second range shall consist of the lowest and highest heating seasonal performance factors for the heating side of all heat pumps consistent with sample label 8A in appendix L to this part.

(iii) Each heating-only heat pump label shall contain a range of comparability consisting of the lowest and highest heating seasonal performance factors for all heating-only heat pumps following the format of sample label 8A in appendix L to this part.

(7) Placement of the labeled product on the scale shall be proportionate to the lowest and highest efficiency ratings forming the scale.

(8) The following statement shall appear on the label in bold print as indicated in the sample labels in appendix L to this part.

For energy cost info, visit *productinfo.energy.gov.*

(9) All labels on split-system condenser units must contain one of the following three statements:

(i) For labels disclosing only the seasonal energy efficiency ratio for cooling, the statement should read:

This system's efficiency rating depends on the coil your contractor installs with this unit. Ask for details.

(ii) For labels disclosing both the seasonal energy efficiency ratio for cooling and the heating seasonal performance factor for heating, the statement should read:

This system's efficiency ratings depend on the coil your contractor installs with this unit. The heating efficiency rating will vary slightly in different geographic regions. Ask your contractor for details.

(iii) For labels disclosing only the heating seasonal performance factor for heating, the statement should read:

This system's efficiency rating depends on the coil your contractor installs with this unit. The efficiency rating will vary slightly in different geographic regions. Ask your contractor for details.

(10) The following statement shall appear at the top of the label as illustrated in the sample labels in appendix L of this part:

Federal law prohibits removal of this label before consumer purchase.

(11) For any single-package air conditioner with a Energy Efficiency Ratio (EER) of at least 11.0, any split-system central air conditioner with a rated cooling capacity of at least 45,000 Btu/h and efficiency ratings of at least 14 SEER and 11.7 EER, and any split-system central air conditioners with a rated cooling capacity less than 45,000 Btu/h and efficiency ratings of at least 14 SEER and 12.2 EER, the label must contain the following regional standards information:

(i) A statement that reads: Notice Federal law allows this unit to be

installed in all U.S. states and territories.

(ii) For split systems, a statement that reads:

Energy Efficiency Ratio (EER): The installed system's EER could range from [__] to [__], depending on the coil installed with this unit.

(iii) A statement that reads:

Energy Efficiency Ratio (EER): This model's EER is [____].

(12) For any split-system central air conditioners with a rated cooling capacity of at least 45,000 Btu/h and minimum efficiency ratings below 14 SEER or 11.7 EER, and any split-system central air conditioner with a rated cooling capacity less than 45,000 Btu/h and a minimum efficiency rating below 14 SEER or 12.2 EER, the label must contain the following regional standards information consistent with sample label 7A in appendix L to this part:

(i) A statement that reads:

The installed system must meet the minimum Federal regional efficiency standards.

See productinfo.energy.gov for certified combinations.

(ii) A map and accompanying text as illustrated in the sample label 7A in appendix L.

(iii) For single-package air conditioner systems, a statement that reads:

Energy Efficiency Ratio (EER): could range from ____ to ____, depending on the coil installed with this unit.

(13) For any single-package air conditioner with an EER below 11.0, the label must contain the following regional standards information consistent with sample label 7B in appendix L to this part:

(i) A statement that reads:

Notice Federal law allows this unit to be installed only in: AK, AL, AR, CO, CT, DC, DE, FL, GA, HI, ID, IL, IA, IN, KS, KY, LA, ME, MD, MI, MN, MO, MS, MT, NC, ND, NE., NH, NJ, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VA, VT, WA, WV, WI, WY and U.S. territories.

Federal law prohibits installation of this unit in other states.

(ii) A map and accompanying text as illustrated in the sample label in appendix L.

(i) A statement that reads:

Energy Efficiency Ratio (EER): This model's EER is [____].

(14) No marks or information other than that specified in this part shall appear on or directly adjoining this label except that:

(i) A part or publication number identification may be included on this label, as desired by the manufacturer. If a manufacturer elects to use a part or publication number, it must appear in the lower right-hand corner of the label and be set in 6-point type or smaller.

(ii) The energy use disclosure labels required by the governments of Canada or Mexico may appear directly adjoining this label, as desired by the manufacturer.

(iii) The manufacturer may include the ENERGY STAR logo on the label for certified products in a location consistent with the sample labels in appendix L to this part. The logo must be no larger than 1 inch by 3 inches in size. Only manufacturers that have signed a Memorandum of Understanding with the Department of Energy or the Environmental Protection Agency may add the ENERGY STAR logo to labels on qualifying covered products; such manufacturers may add the ENERGY STAR logo to labels only on those covered products that are contemplated by the Memorandum of Understanding.

■ 3. Revise § 305.14 to read as follows:

§ 305.14 Energy information disclosures for heating and cooling equipment.

(a) The following provisions apply to any covered central air conditioner, heat pump, or furnaces distributed in commerce before the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for non-weatherized, and mobile home furnaces.

(1) *Required information.* Manufacturers and private labelers of central air conditioners, heat pumps, and furnaces (including boilers) must provide energy information about the equipment they sell to distributors and retailers, including contractors. This information can be provided through means such as fact sheets, product brochures, and directories. All required information must be disclosed clearly and conspicuously. The information must include:

(i) Name of manufacturer or private labeler which, in the case of a corporation, shall be deemed to be satisfied only by the actual corporate name, which may be preceded or followed by the name of the particular division of the corporation. In the case of an individual, partnership, or association, the name under which the business is conducted shall be used;

(ii) Trade name (if different from manufacturer);

(iii) Model number(s) given by the manufacturer or private labeler;

(iv) Capacity or size as determined in accordance with § 305.7;

(v) Energy efficiency rating as determined in accordance with § 305.5. The energy efficiency rating(s) for split-system condenser-evaporator coil combinations shall be either:

(A) The energy efficiency rating of the actual condenser-evaporator coil combination comprising the listed split system; or

(B) The energy efficiency rating of the condenser-evaporator coil combination that is the particular manufacturer's most commonly sold combination for that condenser model.

(vi) Ranges of comparability and of energy efficiency ratings found in the appropriate appendices accompanying this part.

(vii) A statement that the energy efficiency ratings are based on U.S. Government standard tests.

(viii) If the ''most common'' condenser-evaporator coil combinations are given for central air conditioners and heat pump efficiency ratings pursuant to § 305.14(a)(1)(v)(B), the statement required by § 305.14(a)(1)(vii) as follows:

(A) For information disclosing the seasonal energy efficiency ratio for cooling, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating may vary slightly with different coils.

(B) For information disclosing both the seasonal energy efficiency ratio for cooling and the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

(C) For information disclosing the heating seasonal performance factor for heating, the statement should read:

This energy rating is based on U.S. Government standard tests of this condenser model combined with the most common coil. The rating will vary slightly with different coils and in different geographic regions.

(ix) For central air conditioners disclosing the efficiency ratings for specific condenser/coil combinations pursuant to § 305.14(a)(1)(v)(B), a general disclosure that the efficiency ratings are based on U.S. Government tests.

(2) *Distribution.* (i) Manufacturers and private labelers must give distributors and retailers, including assemblers, the information specified under § 305.14(a)(1) for the central air conditioners, heat pumps, and furnaces (including boilers) they sell to them. This information may be provided in paper or electronic form (including

Internet-based access). Distributors must give this information to retailers, including assemblers, they supply.

(ii) Retailers, including assemblers, who sell central air conditioners, heat pumps, and furnaces (including boilers) to consumers must make the information specified under § 305.14(a)(1) available to customers in any manner, as long as customers are likely to notice it. For example, it may be available in a display, where customers can take copies of them. It may be kept in a binder or made available electronically at a counter or service desk, with a sign telling customers where the required information is.

(iii) Retailers, including assemblers, who negotiate or make sales at a place other than their regular places of business must show the required information to their customers and let them read the information before they agree to purchase the product. If the information is Internet-based, retailers, including assemblers, who negotiate or make sales at a place other than their regular places of business, may choose to provide customers with instructions to access such information in lieu of showing them a paper version of the information. Retailers who choose to use the Internet for the required information, must let customers read such information before the customers agree to purchase the product.

(b) The following provisions apply to any covered central air conditioner, heat pump, or furnaces distributed in commerce on or after the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for non-weatherized and mobile home furnaces.

(1) *Manufacturer duty to provide labels.* For any covered central air conditioner, heat pump, or furnace model that a manufacturer distributes in commerce, the manufacturer must make a copy of the EnergyGuide label available on a publicly accessible Web site in a manner that allows catalog sellers and consumers to hyperlink to the label or download it for their use. The labels must remain on the Web site for six months after the manufacturer ceases the model's production.

(2) *Distribution.* (i) Manufacturers and private labelers must provide to distributors and retailers, including assemblers, EnergyGuide labels for covered central air conditioners, heat pumps, and furnaces (including boilers) they sell to them. The label may be provided in paper or electronic form (including Internet-based access). Distributors must give this information to retailers, including assemblers, they supply.

(ii) Retailers, including assemblers, who sell covered central air conditioners, heat pumps, and furnaces (including boilers) to consumers must show the labels for the products they offer to customers and let them read the labels before the customers agree to purchase the product. For example, the retailer may display labeled units in their store or direct consumers to the labels in a binder or computer at a counter or service desk.

(iii) Retailers, including installers and assemblers, who negotiate or make sales at a place other than their regular places of business, including sales over the telephone or through electronic communications, must show the labels for the products they offer to customers and let them read the labels before the customers agree to purchase the product. If the labels are on a Web site, retailers, including assemblers, who negotiate or make sales at a place other than their regular places of business, may choose to provide customers with instructions to access such labels in lieu of showing them a paper version of the information. Retailers who choose to use the Internet for the required label disclosures must provide customers the opportunity to read such information prior to sale of the product.

(3) *Oil furnace labels.* If an installer installs an oil furnace with an input capacity different from that set by the manufacturer and the manufacturer identifies alternative capacities on the label, the installer must permanently mark the appropriate box on the EnergyGuide label displaying the installed input capacity and the associated AFUE as illustrated in Sample Label 9B.

■ 4. Amend § 305.20, by adding paragraphs (a)(5) and (i) to read as follows:

§ 305.20 Paper catalogs and Web sites.

(a) * * *

(5) For Furnaces, central air conditioners, and heat pumps offered for sale on or after the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 for non-weatherized furnaces: The model's efficiency rating or ratings as disclosed on the label and a disclosure stating ''For more information, visit *www.ftc.gov/energy.*'' For split-system units, a disclosure stating ''This system's efficiency rating depends on the coil installed with this unit.'' For central air conditioners manufactured on or after the compliance date of regional efficiency standards issued by the Department of Energy for those products in 10 CFR part 430 and subject to such regional standards, the catalog must provide, in at least one location, the disclosures and graphics required by § 305.12(i)(11) and (12). For non-weatherized gas and mobile home gas furnaces manufactured after the compliance date of regional efficiency standards issued by the Department of Energy for those products in 10 CFR part 430, and all furnaces manufactured after the compliance date of regional efficiency standards issued by the Department of Energy in 10 CFR part 430 and subject to such standards, the catalog must disclose, in a clear and conspicuous fashion, the states in which specific models may be installed as indicated on the product's label prepared by the manufacturer pursuant to § 305.12.

* * * * *

(i) For split-system and single-package central air conditioners and non-weatherized or mobile home furnaces offered for sale on or after the compliance date of regional efficiency standards issued by the Department of Energy for those products in 10 CFR part 430, the catalog (Web site or paper catalog) must contain the following statement conspicuously placed on the product page in close proximity to the link to the product's EnergyGuide label:

Federal law prohibits the installation of some [central air conditioners or furnaces] in certain states. Look to the EnergyGuide label to determine whether this product can be installed in your location.

■ 5. Revise Appendices G1, G2, G3, G4, G5, G6, G7, and G8 to read as follows:

Appendix G1 to Part 305—Furnaces—Gas

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Gas Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	78.0	96.6

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Gas Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	80.0	98.5
Weatherized Gas Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	.....	.....

Appendix G2 to Part 305—Furnaces—Electric

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Furnaces—All Capacities	100.0	100.0

Appendix G3 to Part 305—Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Oil Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	78.0	86.1
Non-Weatherized Oil Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	83.0	95.4
Weatherized Oil Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	.....	.....

Appendix G4 to Part 305—Mobile Home Furnaces—Gas

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Gas Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	75.0	92.1
Mobile Home Gas Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	80.0	96.5

Appendix G5 to Part 305—Mobile Home Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Oil Furnaces Manufactured Before the Compliance Date of DOE Regional Standards—All Capacities	75.0	92.1
Mobile Home Oil Furnaces Manufactured After the Compliance Date of DOE Regional Standards—All Capacities	75.0	86.6

Appendix G6 to Part 305—Boilers (Gas)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Gas (Except Steam) Boilers Manufactured Before the Compliance Date of DOE Regional Standards for Non-Weatherized Furnaces *—All Capacities	80.0	95.5
Gas (Steam) Boilers Manufactured Before the Compliance Date of DOE Regional Standards for Non-Weatherized Furnaces *—All Capacities	75.8	84.0
All Gas Boilers Manufactured After the Compliance Date of DOE Regional Standards *—All Capacities	80.0	98.0

* Timing for boiler range revisions is tied to the compliance date for non-weatherized furnace regional standards.

Appendix G7 to Part 305—Boilers (Oil)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Oil Boilers Manufactured Before the Compliance Date of DOE Regional Standards for Non-Weatherized Furnaces *—All Capacities	80.0	92.0
Oil Boilers Manufactured After the Compliance Date of DOE Regional Standards *—All Capacities	82.0	96.0

Appendix G8 to Part 305—Boilers (Electric)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Boilers	100	100

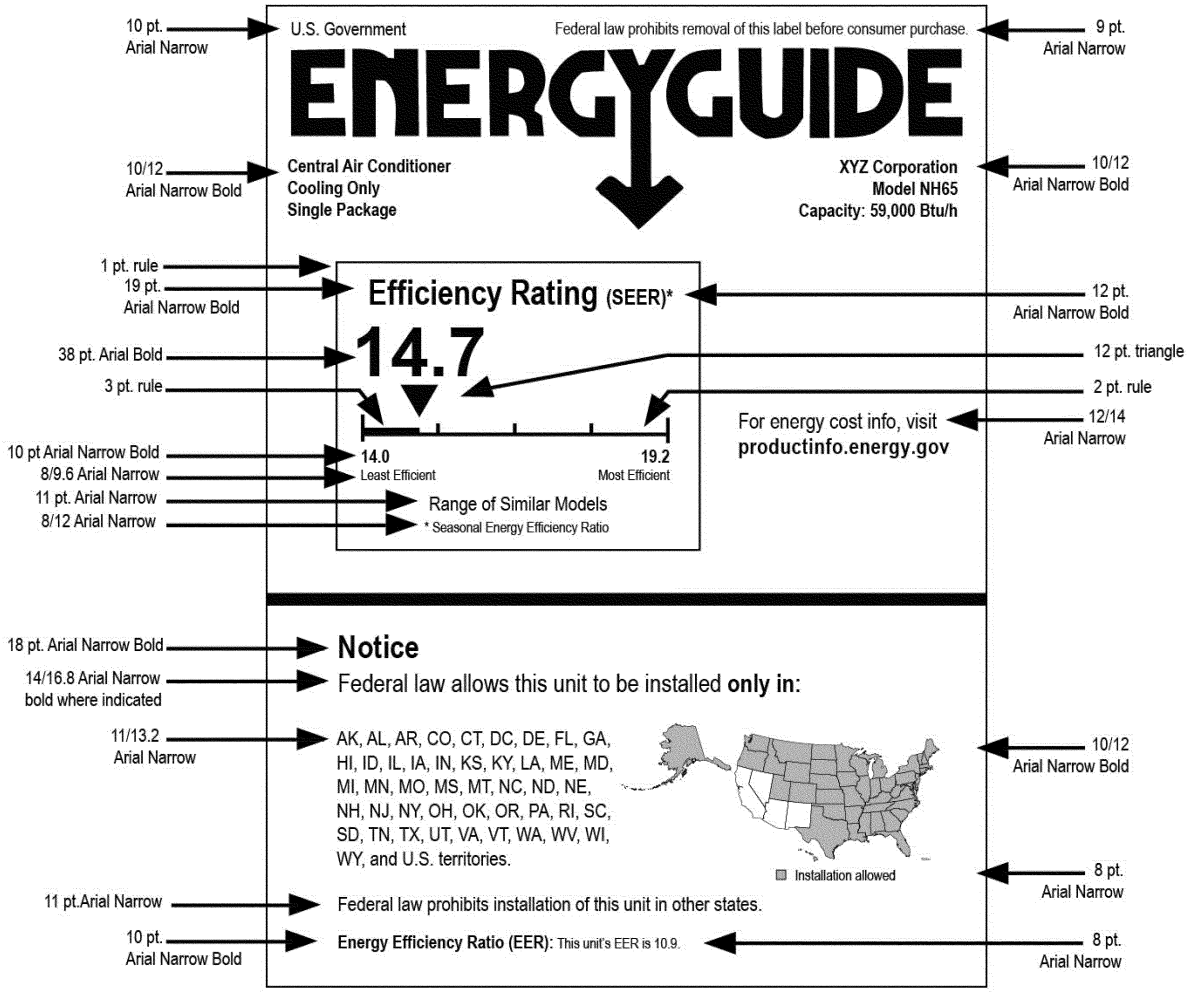
■ 6. In Appendix L, Prototype Labels 3 and 4 are revised, Sample Label 7 is revised, Sample Labels 7A and 7B are added, Sample Label 8 is revised, Sample Label 8A is added, Sample Label 9 is revised, and Sample Labels 9A and 9B are added to read as follows:

Appendix L to Part 305—Sample Labels

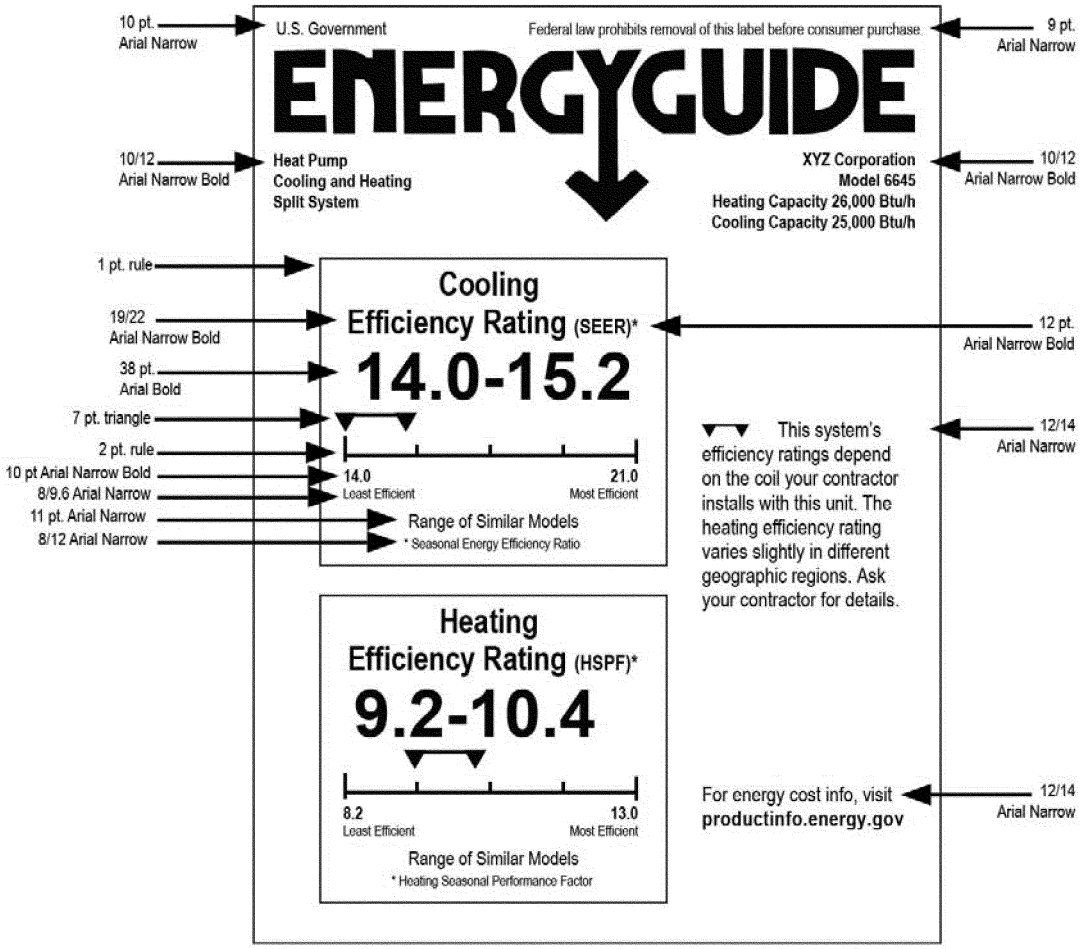
* * * * *

BILLING CODE 6750–01–P

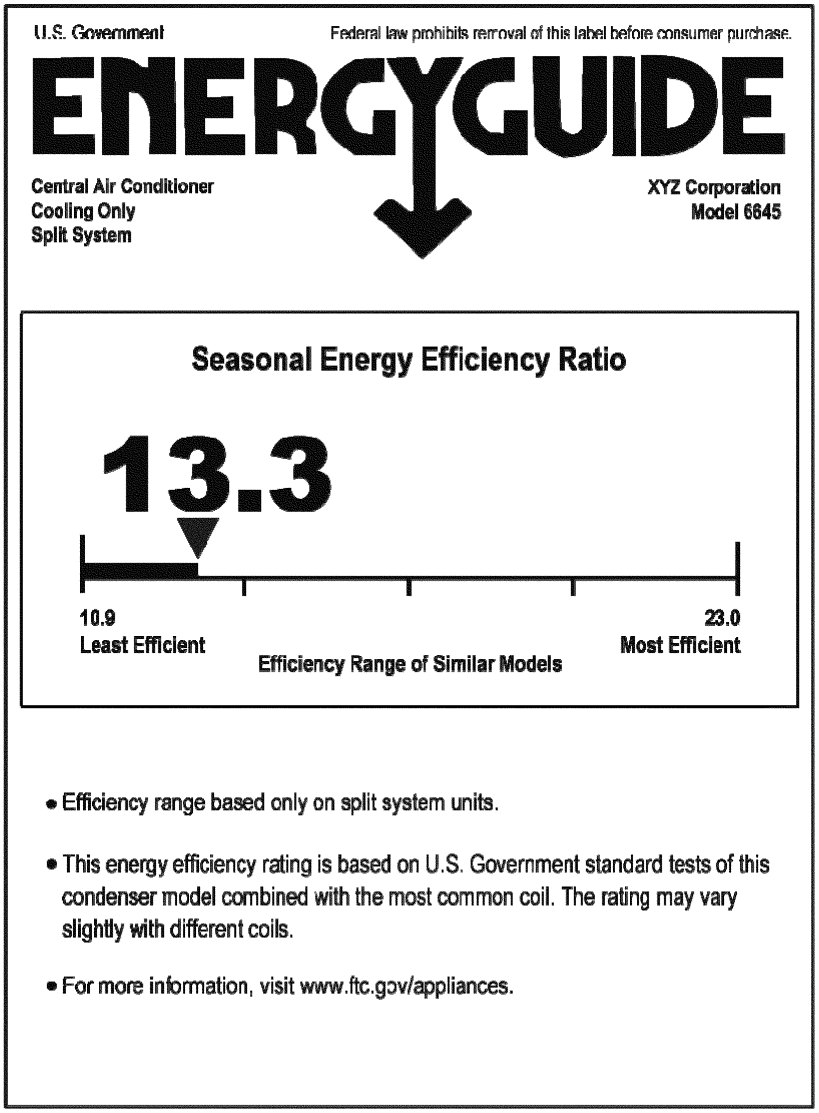
* Timing of boiler range revisions is tied to the compliance date for non-weatherized furnace regional standards.



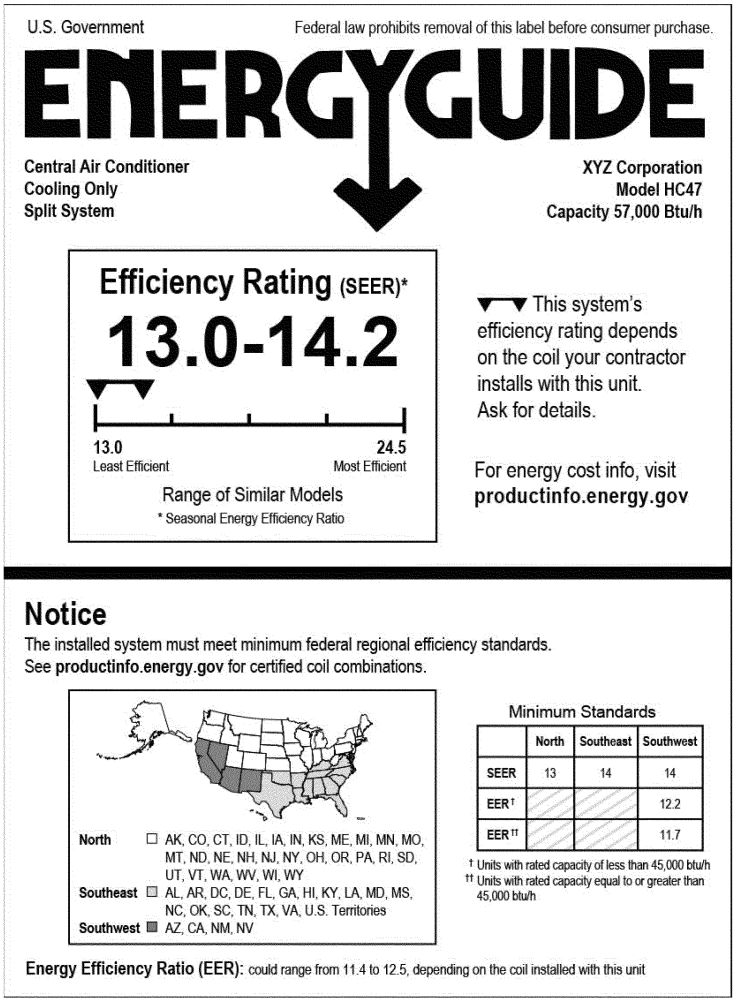
Prototype Label 3 - Single-Package Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



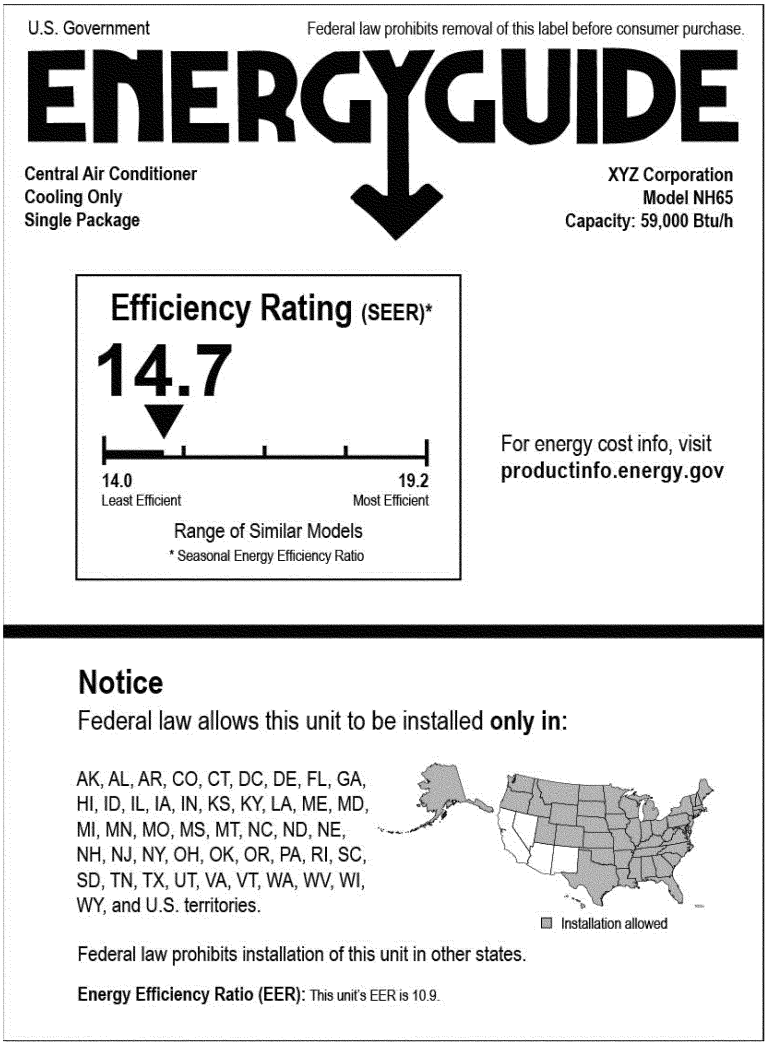
Prototype Label 4 - Split-system Heat Pump (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



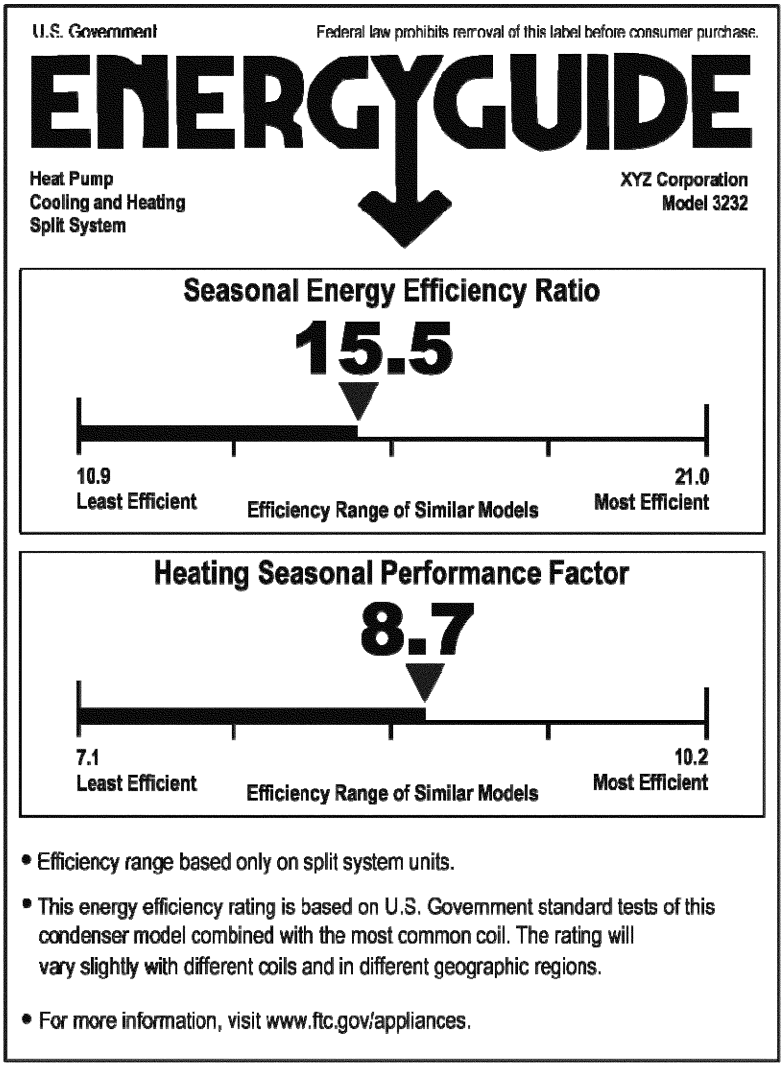
Sample Label 7 – Split-system Central Air Conditioner (models manufactured before the compliance date of DOE regional efficiency standards in 10 CFR part 430)



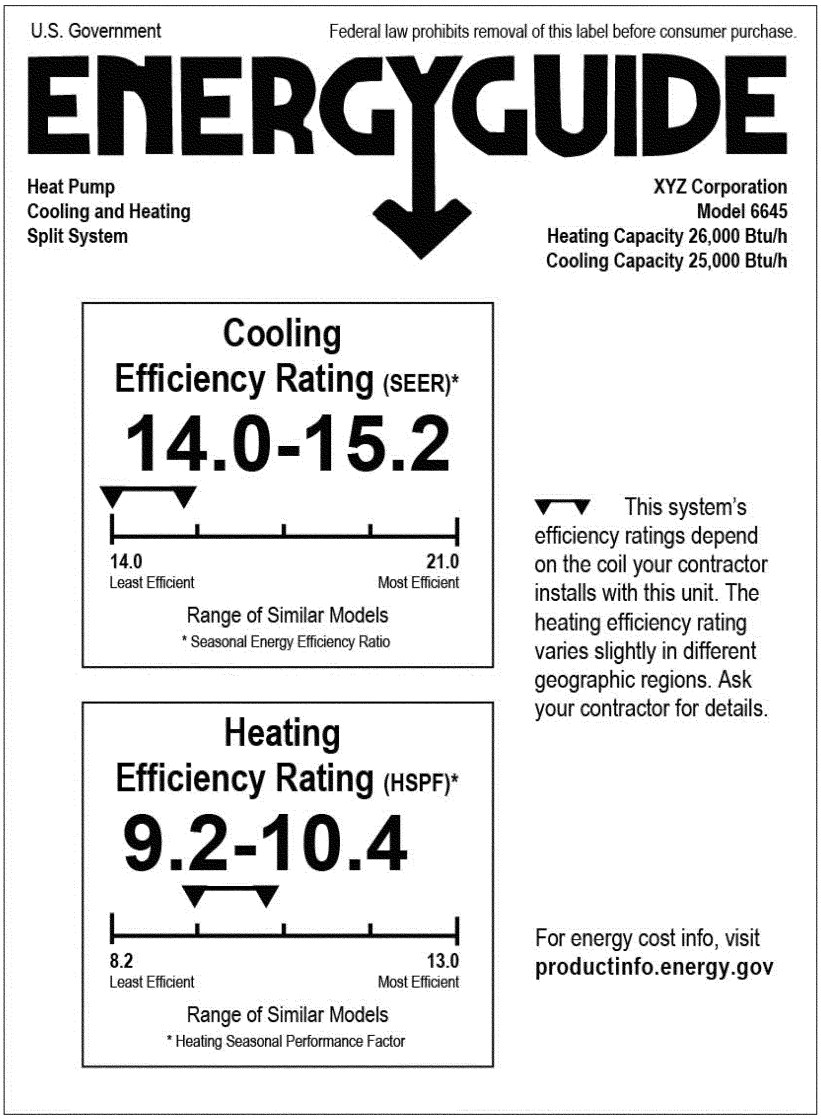
Sample Label 7A Split-system Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



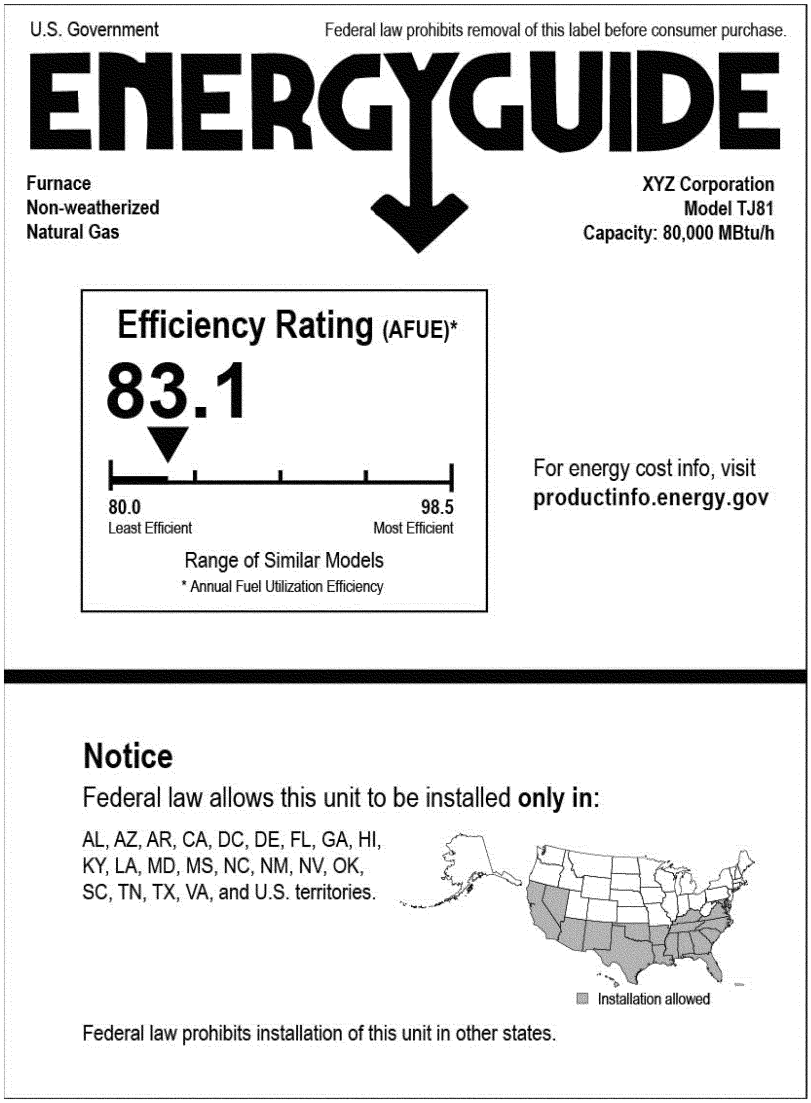
Sample Label 7B Single-Package Central Air Conditioner (models manufactured after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



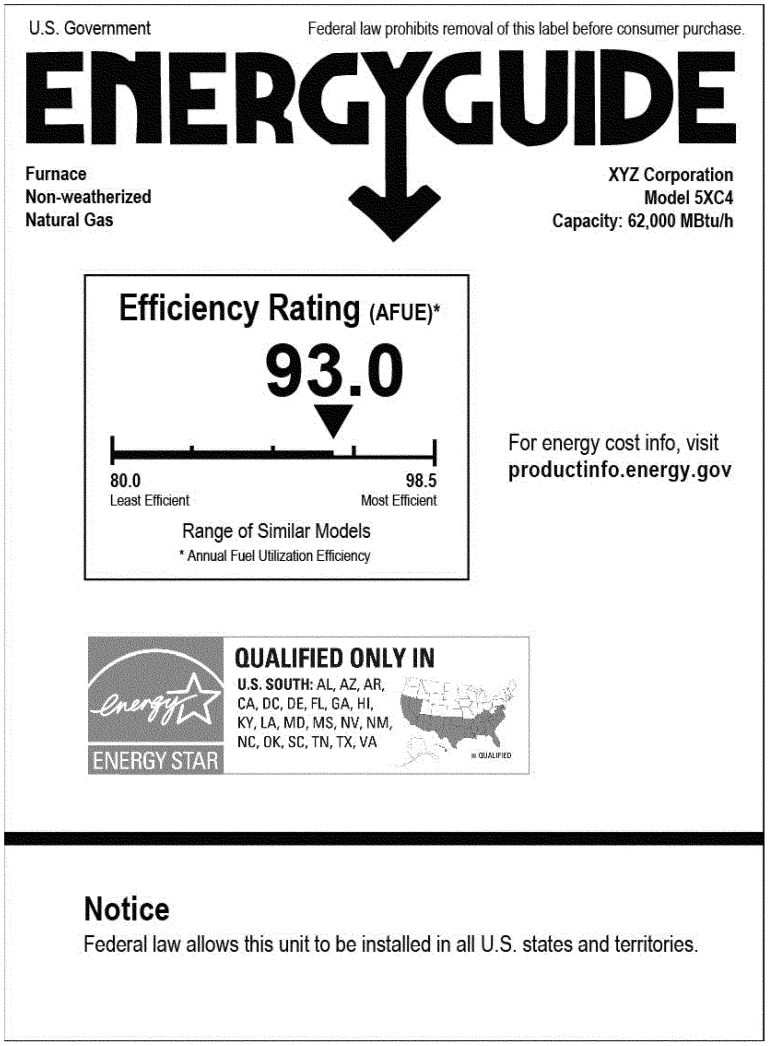
Sample Label 8 – Split-system Heat Pump (only for units manufactured before the compliance date of DOE regional efficiency standards in 10 CFR part 430)



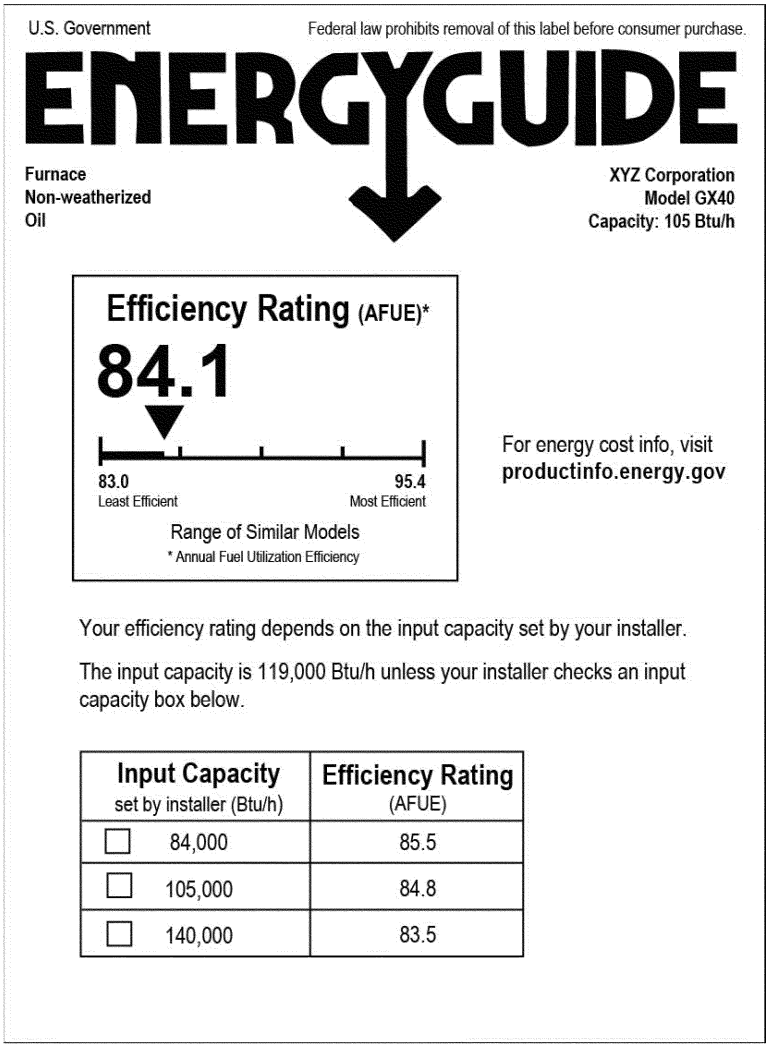
Sample Label 8A – Split-system Heat Pump (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Sample Label 9 – Non-weatherized Gas Furnace (below 90 AFUE) (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Sample Label 9A – Non-weatherized Gas Furnace (ENERGY STAR) (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)



Sample Label 9B – Non-weatherized Oil Furnaces (only for units manufactured on or after the compliance date of DOE regional efficiency standards in 10 CFR part 430)

* * * * *

* * * * *

By direction of the Commission, Commissioner Wright not participating.

Donald S. Clark

Secretary.

[FR Doc. 2013–02225 Filed 2–5–13; 8:45 am]

BILLING CODE 6750–01–C

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 157

[Docket No. RM81–19–000]

Natural Gas Pipelines; Project Cost and Annual Limits

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: Pursuant to the authority delegated by 18 CFR 375.308(x)(1), the Director of the Office of Energy Projects (OEP) computes and publishes the project cost and annual limits for natural gas pipelines blanket construction certificates for each calendar year.

DATES: This final rule is effective February 6, 2013 and establishes cost limits applicable from January 1, 2013 through December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Richard Foley, Chief, Certificates Branch 1, Division of Pipeline Certificates, (202) 502–8955.

SUPPLEMENTARY INFORMATION:

Publication of Project Cost Limits Under Blanket Certificates

Order of the Director, OEP

(February 1, 2013)

Section 157.208(d) of the Commission's Regulations provides for project cost limits applicable to construction, acquisition, operation and miscellaneous rearrangement of facilities (Table I) authorized under the blanket certificate procedure (Order No. 234, 19 FERC ¶ 61,216). Section 157.215(a) specifies the calendar year dollar limit which may be expended on underground storage testing and development (Table II) authorized under the blanket certificate. Section 157.208(d) requires that the ''limits specified in Tables I and II shall be adjusted each calendar year to reflect the 'GDP implicit price deflator' published by the Department of Commerce for the previous calendar year.''

Pursuant to § 375.308(x)(1) of the Commission's Regulations, the authority for the publication of such cost limits, as adjusted for inflation, is delegated to the Director of the Office of Energy Projects. The cost limits for calendar year 2013, as published in Table I of § 157.208(d) and Table II of § 157.215(a), are hereby issued.

Effective Date

This final rule is effective February 6, 2013. The provisions of 5 U.S.C. 804 regarding Congressional review of Final Rules does not apply to the Final Rule because the rule concerns agency procedure and practice and will not substantially affect the rights or obligations of non-agency parties. The Final Rule merely updates amounts published in the Code of Federal Regulations to reflect the Department of Commerce's latest annual determination of the Gross Domestic Product (GDP) implicit price deflator, a mathematical updating required by the Commission's existing regulations.

List of Subjects in 18 CFR Part 157

Administrative practice and procedure, Natural Gas, Reporting and recordkeeping requirements.

Jeff C. Wright,

Director, Office of Energy Projects.

Accordingly, 18 CFR part 157 is amended as follows:

PART 157—[AMENDED]

■ 1. The authority citation for Part 157 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 2. Table I in § 157.208(d) is revised to read as follows:

§ 157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.

* * * * *

(d) * * *

TABLE I

Year	Limit	
	Auto. proj. cost limit (Col.1)	Prior notice proj. cost limit (Col.2)
1982	$4,200,000	$12,000,000
1983	4,500,000	12,800,000
1984	4,700,000	13,300,000
1985	4,900,000	13,800,000
1986	5,100,000	14,300,000
1987	5,200,000	14,700,000
1988	5,400,000	15,100,000
1989	5,600,000	15,600,000
1990	5,800,000	16,000,000
1991	6,000,000	16,700,000
1992	6,200,000	17,300,000
1993	6,400,000	17,700,000
1994	6,600,000	18,100,000
1995	6,700,000	18,400,000
1996	6,900,000	18,800,000
1997	7,000,000	19,200,000
1998	7,100,000	19,600,000
1999	7,200,000	19,800,000
2000	7,300,000	20,200,000
2001	7,400,000	20,600,000
2002	7,500,000	21,000,000
2003	7,600,000	21,200,000
2004	7,800,000	21,600,000
2005	8,000,000	22,000,000
2006	9,600,000	27,400,000
2007	9,900,000	28,200,000
2008	10,200,000	29,000,000
2009	10,400,000	29,600,000
2010	10,500,000	29,900,000
2011	10,600,000	30,200,000
2012	10,800,000	30,800,000
2013	11,000,000	31,400,000

* * * * *

■ 3. Table II in § 157.215(a)(5) is revised to read as follows:

§ 157.215 Underground storage testing and development.

(a) * * *

(5) * * *

TABLE II

Year	Limit
1982	$2,700,000
1983	2,900,000
1984	3,000,000
1985	3,100,000
1986	3,200,000
1987	3,300,000
1988	3,400,000
1989	3,500,000
1990	3,600,000
1991	3,800,000
1992	3,900,000
1993	4,000,000

TABLE II—Continued

Year	Limit
1994	4,100,000
1995	4,200,000
1996	4,300,000
1997	4,400,000
1998	4,500,000
1999	4,550,000
2000	4,650,000
2001	4,750,000
2002	4,850,000
2003	4,900,000
2004	5,000,000
2005	5,100,000
2006	5,250,000
2007	5,400,000
2008	5,550,000
2009	5,600,000
2010	5,700,000
2011	5,750,000
2012	5,850,000
2013	6,000,000

* * * * *

[FR Doc. 2013–02612 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1986

[Docket Number: OSHA–2011–0841]

RIN 1218–AC58

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provision of the Seaman's Protection Act (SPA), as Amended

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides the interim final text of regulations governing the employee protection (whistleblower) provisions of the Seaman's Protection Act (''SPA'' or ''the Act''), as amended by Section 611 of the Coast Guard Authorization Act of 2010. Section 611 transfers to the Occupational Safety and Health Administration (''OSHA'' or ''the Agency'') the administration of the whistleblower protections previously enforced solely via a private right of action. This interim rule establishes procedures and time frames for the handling of retaliation complaints under SPA, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an

administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) on behalf of the Secretary of Labor (Secretary), and judicial review of the Secretary's final decision. In addition, this interim rule provides the Secretary's interpretation of the term ''seaman'' and addresses other interpretive issues raised by SPA.

DATES: This interim final rule is effective on February 6, 2013. Comments on the interim final rule must be submitted (postmarked, sent or received) on or before April 8, 2013.

ADDRESSES: You may submit comments and additional materials by any of the following methods:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal e-Rulemaking Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2011–0841, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., EST.

Instructions: All submissions must include the agency name and the OSHA docket number for this rulemaking (Docket No. OSHA–2011–0841). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates.

Docket: To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index, however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT: Beth S. Slavet, Director, Directorate of Whistleblower Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–4624, 200 Constitution Avenue NW., Washington, DC 20210; telephone (202) 693–2199. This is not a toll-free number. This **Federal Register** publication is available in alternative formats: large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted SPA as Section 13 of the Coast Guard Authorization Act of 1984, Public Law 98–557, 98 Stat. 2860 (1984). SPA protected seamen from retaliation for reporting a violation of Subtitle II of Title 46 of the U.S. Code, which governs vessels and seamen, or a regulation promulgated under that Subtitle. S. Rep. No. 98–454, at 11 (1984). Congress passed SPA in response to *Donovan* v. *Texaco,* 720 F.2d 825 (5th Cir. 1983), in which the Fifth Circuit held that the whistleblower provision of the Occupational Safety and Health Act (OSH Act) did not cover a seaman who had been demoted and discharged from his position because he reported a possible safety violation to the U.S. Coast Guard. S. Rep. No. 98–454, at 12 (1984). This original version of SPA prohibited ''[a]n owner, charterer, managing operator, agent, master, or individual in charge of a vessel'' from retaliating against a seaman ''because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that'' a violation of Subtitle II had occurred. Public Law 98–557 § 13(a), 98 Stat. at 2863. It permitted seamen to bring actions in U.S. district courts seeking relief for alleged retaliation in violation of the Act. *Id.* § 13(a), 98 Stat. at 2863–64.

In 2002, Congress amended SPA. Section 428 of the Maritime Transportation Security Act of 2002, Public Law 107–295, 116 Stat. at 2064 (2002), altered both the protections afforded and remedies permitted by the Act. First, Congress removed the specific list of actors who were prohibited from retaliating against seamen and replaced that text with ''[a] person.'' Public Law 107–295 § 428(a), 116 Stat. at 2127. Second, Congress expanded the existing description of protected activity to include reports to ''the Coast Guard or other appropriate Federal agency or department,'' rather than only to the Coast Guard, and violations ''of a maritime safety law or regulation prescribed under that law or regulation,'' rather than only of Subtitle II and its accompanying regulations. *Id.* Third, Congress added a second type of protected activity; a seaman who ''refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public'' was granted protection from retaliation. *Id.* The new text clarified that, ''[t]o qualify for protection against the seaman's employer under paragraph (1)(B), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.'' *Id.* The amended statute further explained that ''The circumstances causing a seaman's apprehension of serious injury under paragraph (1)(B) must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman's employer.'' Public Law 107–295 § 428, 116 Stat. at 2127.

Congress made additional changes to the Act, including those that led OSHA to initiate this rulemaking, on October 15, 2010. Section 611 of the Coast Guard Authorization Act of 2010, Public Law 111–281, 124 Stat. at 2905 (2010), made further additions to the list of protected activities under SPA and fundamentally changed the remedies section of the Act. Regarding protected activities, Section 611 added to subsection (a):

(C) the seaman testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(D) the seaman notified, or attempted to notify, the vessel owner or the Secretary [of the department in which the Coast Guard is operating [1]] of a work-related personal injury or work-related illness of a seaman;

(E) the seaman cooperated with a safety investigation by the Secretary [of the department in which the Coast Guard is operating] or the National Transportation Safety Board;

(F) the seaman furnished information to the Secretary [of the department in which the Coast Guard is operating], the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting

[1] The text of 46 U.S.C. 2114 refers to ''the Secretary,'' defined for purposes of Part A of Subtitle II as ''the Secretary of the department in which the Coast Guard is operating.'' 46 U.S.C. 2101(34). The Coast Guard is currently part of the Department of Homeland Security.

in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(G) the seaman accurately reported hours of duty under this part.

Id. § 611(a), 124 Stat. at 2969.

Congress replaced section (b) of SPA, which had provided a private right of action to seamen and described relief a court could award, in its entirety. The new text provides:

(b) A seaman alleging discharge or discrimination in violation of subsection (a) of this section, or another person at the seaman's request, may file a complaint with respect to such allegation in the same manner as a complaint may be filed under subsection (b) of section 31105 of title 49. Such complaint shall be subject to the procedures, requirements, and rights described in that section, including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of that section, and the requirement to bring a civil action under subsection (d) of that section.

Id. Section 31105 of title 49 is the ''Employee protections'' provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105. STAA provides that initial complaints regarding retaliation under that statute are to be filed with and handled by the Secretary of Labor (Secretary), *see id.* § 31105(b)–(e), and the Secretary has delegated her authority in this regard to OSHA. *See* Secretary's Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012). The Secretary has also delegated to OSHA her authority under SPA. *Id.* at 3913. Hearings on determinations by the Assistant Secretary for OSHA (Assistant Secretary) are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges (ALJs) are decided by the Department of Labor's Administrative Review Board (ARB). *See* Secretary's Order 1–2010, 75 FR 3924–01 (Jan. 25, 2010).

OSHA is promulgating this interim final rule to establish procedures for the handling of whistleblower complaints under SPA and address certain interpretative issues raised by the statute. To the extent possible within the bounds of applicable statutory language, these regulations are designed to be consistent with the procedures applied to claims under STAA, and the other whistleblower statutes administered by OSHA, including the Energy Reorganization Act (ERA), 42 U.S.C. 5851, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. 42121, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. 1514A, and the Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. 2087.

II. Summary of Statutory Procedures

As explained above, SPA adopts the process for filing a complaint established under subsection (b) of STAA. 46 U.S.C. 2114(b). It further incorporates the other ''procedures, requirements, and rights described in'' STAA, *id.,* described below. OSHA therefore understands SPA to incorporate STAA subsections (b) through (g). SPA's text could cause confusion regarding which sections of STAA it adopts by referring, in some cases incorrectly,[2] to certain sections while not mentioning others.[3] Those references follow the word ''including,'' however, with no suggestion that the subsequent list is meant to be exclusive, so OSHA will not treat it as such. OSHA does not read SPA as incorporating Sections (a), (h), (i), or (j) of STAA because those provisions are substantive and specific to STAA or agencies other than the Department of Labor rather than describing ''procedures, requirements, and rights.'' The statutory procedures applicable to SPA claims are summarized below.

Filing of SPA Complaints

A seaman, or another person at the seaman's request, alleging a violation of SPA, may file a complaint with the Secretary not later than 180 days after the alleged retaliation.

Legal Burdens of Proof for SPA Complaints

Section (b)(1) of STAA states that STAA whistleblower complaints will be governed by the legal burdens of proof set forth in AIR21, 49 U.S.C. 42121(b), which contains whistleblower protections for employees in the aviation industry. 49 U.S.C. 31105(b)(1). Accordingly, these burdens of proof also govern SPA whistleblower complaints.

Under AIR21, a violation may be found only if the complainant demonstrates that protected activity was a contributing factor in the adverse action described in the complaint. 49 U.S.C. 42121(b)(2)(B)(iii). Relief is unavailable if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. 49 U.S.C. 42121(b)(2)(B)(iv); *see Vieques Air Link, Inc.* v. *Dep't of Labor,* 437 F.3d 102, 108–09 (1st Cir. 2006) (per curiam) (burdens of proof under AIR21); *see also Formella* v. *U.S. Dep't of Labor,* 628 F.3d 381, 389 (7th Cir. 2010) (explaining that because it incorporates the burdens of proof set forth in AIR21, STAA requires only a showing that the protected activity was a contributing factor, not a but-for cause, of the adverse action.).

Written Notice of Complaint and Findings.

Under Section (b) of STAA, upon receipt of the complaint, the Secretary must provide written notice of the filing of the complaint to the person or persons alleged in the complaint to have violated the Act (''respondent''). 49 U.S.C. 31105(b).

Within 60 days of receipt of the complaint, the Secretary must conduct an investigation of the allegations, decide whether it is reasonable to believe the complaint has merit, and provide written notification to the complainant and the respondent of the investigative findings.

Remedies

If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the findings a preliminary order for the relief provided for under Section (b)(3) of STAA, 49 U.S.C. 31105(b)(3). This order shall require the respondent to take affirmative action to abate the violation; reinstate the complainant to the former position with the same pay and terms and privileges of employment; and pay compensatory damages, including back pay with interest and compensation for any

[2] Specifically, the Act's adoption of STAA's ''procedures, requirements, and rights'' is followed by the text ''including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of [STAA], and the requirement to bring a civil action under subsection (d) of that section.'' 46 U.S.C. 2114(b). But Section (c) addresses de novo review in the district court if the Secretary has not issued a final decision after 210 days; Section (d) addresses filing a petition for review after receiving an adverse order following a hearing; and Section (e) provides that ''[i]f a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.'' 49 U.S.C. 31105(c)–(e).

[3] Section (f) declares that STAA does not preempt any other federal or state law safeguarding against retaliation; Section (g) declares that STAA does not diminish any legal rights of any employee, nor may the rights of the Section be waived; Section (h) prohibits the disclosure by the Secretary of Transportation or the Secretary of Homeland Security of the identity of an employee who provides information about an alleged violation of the statute except, under certain circumstances, to the Attorney General; Section (i) creates a process for reporting security problems to the Department of Homeland Security; and Section (j) defines the term ''employee'' for purposes of STAA. 49 U.S.C. 31105(f)–(j).

special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. Additionally, if the Secretary issues a preliminary order and the complainant so requests, the Secretary may assess against the respondent the costs, including attorney fees, reasonably incurred by the complainant in bringing the complaint. Punitive damages of up to $250,000.00 are also available.

Hearings

Section (b) of STAA also provides for hearings. Specifically, the complainant and the respondent have 30 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within 30 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, it is to be conducted expeditiously. The Secretary shall issue a final order within 120 days after the conclusion of any hearing. The final order may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the respondent may enter into a settlement agreement that terminates the proceeding.

De Novo Review

Section (c) of STAA provides for de novo review of a whistleblower claim by a United States district court in the event that the Secretary has not issued a final decision within 210 days after the filing of a complaint and the delay is not due to the complainant's bad faith. 49 U.S.C. 31105(c). The provision provides that the court will have jurisdiction over the action without regard to the amount in controversy and that the case will be tried before a jury at the request of either party.

Judicial Review

Section (d) of STAA provides that within 60 days of the issuance of the Secretary's final order following a hearing, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. 49 U.S.C. 31105(d).

Civil Actions To Enforce

Section (e) of STAA provides that if a person fails to comply with an order issued by the Secretary under Section (b), the Secretary of Labor ''shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.'' 49 U.S.C. 31105(e).

Preemption

Section (f) of STAA clarifies that nothing in the statute preempts or diminishes any other safeguards against discrimination provided by Federal or State law. 49 U.S.C. 31105(f).

Employee Rights

Section (g) of STAA states that nothing in STAA shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. 49 U.S.C. 31105(g). It further states that rights and remedies under 49 U.S.C. 31105 ''may not be waived by any agreement, policy, form, or condition of employment.''

III. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been written and organized to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of SPA and of STAA.

Throughout the regulatory text, OSHA has used the term ''retaliate'' rather than ''discharge or in any manner discriminate,'' the phrase that appears in the text of SPA. The use of ''retaliate,'' which also appears in the regulations implementing STAA, the ERA, SOX, and CPSIA, is not intended to have a substantive effect. It simply reflects that claims brought under these whistleblower provisions, whether alleging discharge or some other form of discrimination, are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee's protected activity rather than as a result of an employee's characteristics (such as race, gender, or religion).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

Section 1986.100 Purpose and Scope

This section describes the purpose of the regulations implementing SPA's whistleblower provision and provides an overview of the procedures contained in the regulations.

Section 1986.101 Definitions

This section includes general definitions applicable to SPA's whistleblower provision. Most of the definitions are of terms common to whistleblower statutes and are defined here as they are elsewhere. Some terms call for additional explanation.

SPA prohibits retaliation by a ''person.'' Title 1 of the U.S. Code provides the definition of this term because there is no indication in the statute that any other meaning applies. Accordingly, ''person … include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'' 1 U.S.C. 1. This list, as indicated by the word ''include,'' is not exhaustive. *See Fed. Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95, 100 (1941) (''[T]he term 'including' is not one of all embracing definition, but connotes simply an illustrative application of the general principle.'' (citation omitted)). Paragraph (j) accordingly defines ''person'' as ''one or more individuals or other entities, including but not limited to corporations, companies, associations, firms, partnerships, societies, and joint stock companies.''

SPA protects seamen when they make certain reports and notifications. 46 U.S.C. 2114(a)(1)(A), (D), (G). Paragraphs (h) and (k) define ''report'' and ''notify'' both to include ''any oral or written communications of a violation.'' This interpretation of the statute is consistent with a plain reading of the statutory text and best fulfills the purposes of SPA. *See Gaffney* v. *Riverboat Servs. of Ind.,* 451 F.3d 424, 445–46 (7th Cir. 2006) (explaining that to interpret SPA's reference to a ''report'' as requiring a formal complaint ''would narrow the statute in a manner that Congress clearly avoided, and, in the process, would frustrate the clear purpose of the provision''). It is also consistent with the legislative history of the statute, which indicates that Congress meant SPA to respond to *Donovan* v. *Texaco,* 720 F.2d 825 (5th Cir. 1983), a case in which a seaman had told the Coast Guard about an unsafe condition by telephone. S. Rep. No. 98–454, at 11; *Donovan,* 720 F.2d at 825; *see also Gaffney,* 451 F.3d at 446 (reasoning that SPA's legislative history, ''coupled with Congress' decision not to define 'report' in the statute or in the course of discussing *Donovan* in the relevant legislative history,'' indicates that SPA ''does not require a formal complaint, or even a written statement, as a prerequisite to statutory whistleblower protection''); *cf. Kasten* v. *Saint-Gobain Performance Plastics Corp.,* 131 S. Ct. 1325 (2011) (holding that the provision of the Fair Labor Standards Act that prohibits employers

from retaliating against an employee because such employee has ''filed any complaint'' protects oral complaints).

In addition, SPA protects seaman complaints and testimony related to ''maritime safety law[s] or regulation[s].'' Paragraph (g) defines this term as including ''any statute or regulation regarding health or safety that applies to any person or equipment on a vessel.'' This definition clarifies the meaning of this term in two respects. First, though the statutory text refers to ''safety'' the Secretary finds that Congress did not intend to exclude regulations that address health hazards; rather, it is apparent that no such distinction was intended. *Compare* 46 U.S.C. 2114(a)(1)(B) (protecting seamen when they refuse to perform a duty that would result in a serious injury) *with id.* (a)(2) (clarifying that circumstances that would justify a refusal to work under (a)(1)(B) are those that present a ''real danger of injury or serious impairment of health''); *see also id.* (a)(1)(D) (protecting reports of injuries and illnesses). The definition makes clear that laws or regulations addressing either maritime safety or health are included.

Second, because working conditions on vessels can be subject to regulation from multiple jurisdictions, the Secretary interprets ''maritime safety law or regulation'' to include all regulations regarding health or safety that apply to any person or equipment on a vessel under the circumstances at issue. The statute or regulation need not exclusively or explicitly serve the purpose of protecting the safety of seamen, or promoting safety on vessels, to fall within the meaning of this provision of SPA.

Section 2214(a)(1)(D) of SPA protects a seaman's notification of the ''vessel owner'' of injuries and illnesses. This would include all notifications to agents of the owner, such as the vessel's master. *See* 2 Robert Force & Martin J. Norris, *The Law of Seamen* § 25–1 (5th ed. 2003). Other parties that may fall within the meaning of ''vessel owner'' include an owner pro hac vice, operator, or charter or bare boat charterer. *See* 33 U.S.C. 902(21) (defining, for purposes of the LHWCA, the entities liable for negligence of a vessel); *see also Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1041 (5th Cir. 1983) (referring to this list of entities as ''the broad definition of 'vessel owner' under 33 U.S.C. 902(21)''). Paragraph (q) defines ''vessel owner'' as including ''all of the agents of the owner, including the vessel's master.''

SPA protects ''a seaman'' from retaliation, but it does not include a definition of ''seaman.'' The Senate Report that accompanied the original, 1984 version of SPA indicates that SPA was originally intended to provide a remedy for workers whose whistleblower rights under 11(c) might be not be available in a jurisdiction that follows *Donovan* v. *Texaco,* 720 F.2d 825 (5th Cir. 1983).[4] *See* S. Rep. No. 98–454, at 11–12 (1984). The Senate Report also provides specific insight as to the definition of ''seaman,'' stating that ''the Committee intends the term 'seaman' to be interpreted broadly, to include any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States.'' *Id.* at 11.

OSHA considered three basic approaches for defining the term ''seaman'': (a) Mirroring the one established by the Jones Act, 46 U.S.C. 30104, which reflects general maritime law; (b) as a ''gap filler'' available only where workers arguably lack coverage because of 4(b)(1) preemption under *Texaco;* or (c) using the broader definition of ''seaman'' suggested by the legislative history of SPA discussed above.

First, OSHA rejected adopting a definition of ''seaman'' for SPA that mirrors the one established by case law under the Jones Act. The Jones Act provides that a ''seaman'' injured in the course of employment may bring a civil action against his or her employer, 46 U.S.C. 30104, but like SPA, the Jones Act does not define the term ''seaman.'' Looking to general maritime law, the Supreme Court has defined the term as including those who have an employment-related connection to a vessel in navigation that contributes to the function of the vessel or to the accomplishment of its mission, even if the employment does not aid in navigation or contribute to the transportation of the vessel, *McDermott International, Inc.* v. *Wilander,* 498 U.S. 337, 355 (1991). Importantly, the Supreme Court views the term seaman as excluding land-based workers; that is, a seaman ''must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and nature.'' *Chandris* v. *Latsis,* 515 U.S. 347, 368 (1995).

However, OSHA is concerned that the Jones Act definition of ''seaman'' is more restrictive than the definition as clarified in the legislative history of the SPA. As a result, certain workers who are employed on vessels in significant ways, but who are not Jones Act seaman, would not be protected under the Jones Act definition. For example, certain riverboat pilots spend substantial time aboard a vessel in furtherance of its purpose, but do not have a connection to a particular vessel or group of vessels, so they have been found not to be covered under the Jones Act. *See Bach* v. *Trident Steamship Co., Inc.,* 920 F.2d 322, *aff'd after remand,* 947 F.2d 1290 (5th Cir. 1991); *Blancq* v. *Hapag-Lloyd A.G.,* 986 F. Supp. 376, 379 (E.D. La. 1997). Moreover, there is at least a possibility that under the *Texaco* analysis, a court would find that such pilots also lack 11(c) rights when reporting safety violations aboard vessels on which they are working.

OSHA also notes that SPA and the Jones Act are fundamentally different types of statutes that need not be squarely consistent in their coverage. The Jones Act provides that particular workers, after being injured, are entitled to recover by civil action against their employers. SPA, on the other hand, is prophylactic and remedial in nature and intended to prevent injuries before they happen by protecting reports of safety violations, which suggests a broader definition is appropriate.

Second, OSHA rejected the approach of defining ''seaman'' as applying only to workers who arguably are not covered by 11(c). The legislative history shows that Congress originally passed the SPA in response to *Texaco:* ''This section responds to *Donavan* v. *Texaco,* (720 F.2d 825 (5th Cir. 1983)) in which a seaman was demoted and ultimately discharged from his job for reporting a possible safety violation to the Coast Guard * * * [This section] establishes a new legal remedy for seamen, to protect them against discriminatory action due to their reporting a violation of Subtitle II to the Coast Guard. The Amendment creates a private right of action similar but not identical to that in OSH Act Section 11(c).'' S. Rep. No. 98–454, at 11–12 (1984). But the legislative history in 2010 suggests a broader definition for ''seaman'' workers also who may be covered by 11(c). On a more practical level, OSHA could not fashion a clear definition of ''seaman'' that squarely fills the gap arguably left by *Texaco* without requiring agency investigators to conduct a complex case-by-case analysis of whether each SPA complainant is exempt from the OSH Act under the rationale of *Texaco,* a holding with which the Department does not agree.

Thus, the interim final rule adopts the third option—the broader definition of seaman as clarified in the legislative history of SPA. The first sentence of paragraph (m) incorporates the language

[4] Nothing in this preamble should be read to suggest that OSHA agrees with the holding or rationale of *Texaco.*

of the Senate report to define ''seaman.'' As indicated in the report, and consistent with the remedial purposes of whistleblower statutes like SPA, OSHA intends that the regulatory language be construed broadly. *See Whirlpool Corporation* v. *Marshall,* 445 U.S. 1, 13 (1980); *Bechtel Const. Co.* v. *Sec'y of Labor,* 50 F.3d 926, 932 (11th Cir. 1995). Workers who are seamen for purposes of the Jones Act or general maritime law, *see, e.g., Chandris, Inc.* v. *Latsis,* 515 U.S. 347, 355 (1995), are covered by the definition, as are land-based workers, if they are ''engaged or employed * * * on board a vessel'' for some part of their duties. *See* H. Rep. No. 111–303, pt. 1, at 119 (2009) (noting that SPA extends protections to ''maritime workers'').

Finally, paragraph (m) includes an additional sentence indicating that former seaman and applicants are included in the definition. Such language is included in the definition of ''employee'' in the regulations governing other OSHA-administered whistleblower protection laws, such as STAA (49 CFR 1978.101(h)), the National Transit Systems Security Act and the Federal Railroad Safety Act (29 CFR 1982.101(d)), SOX (29 CFR 1980.101(g)), and the OSH Act (29 CFR 1977.5(b)). This interpretation is consistent with the Supreme Court's reading of the term ''employee'' in 42 U.S.C. 2000e-3a, the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, to include former employees. *Robinson* v. *Shell Oil Co.,* 519 U.S. 337 (1997). Among the Court's reasons for this interpretation were the lack of temporal modifiers for the term ''employee''; the reinstatement remedy, which only applies to former employees; and the remedial purpose of preventing workers from being deterred from whistleblowing because of a fear of blacklisting. These reasons apply equally to SPA and the other whistleblower provisions enforced by OSHA.

OSHA encourages interested parties to submit comments on the issues discussed above in the definition of ''seaman,'' any potential alternative definitions they wish OSHA to consider in the final rule, and any information they have about the practical effects of using various alternative definitions. The definition of ''seaman'' adopted in these regulations is based on and limited to SPA. Nothing should be inferred from the above discussion or the regulatory text about the meaning of ''seaman'' under the OSH Act or any other statute administered by the Department of Labor.

''Citizen of the United States,'' a term used in the definition of ''seaman,'' is not defined in the 1984 Senate report. The definition of this term in paragraph (d) of the regulation is based on two sources: the definition applicable to individuals given in 46 U.S.C. 104 and the definition of ''entities deemed citizens of the United States'' in 46 U.S.C. 50501. These provisions are from the same title of the U.S. Code as SPA, and deal with similar subject matter. They are roughly similar to definitions of citizen of the United States used in other similar contexts. *See* 49 U.S.C. 42121(a)(2) (definition applicable to AIR21); 46 U.S.C. 12103(b) (ownership of vessels eligible to receive a certificate of documentation from the United States). Paragraph (d) of the regulation combines the text of 46 U.S.C. 104 and 50501, with two changes. First, the regulation adds the text ''or other entity'' to the list of business forms that can meet the definition. This change reflects the development of new business forms, such as limited liability companies, in recent years. Second, it deletes the language for section 50501 requiring that at least 75 percent of the interest in a corporation, partnership, or association be owned by citizens of the United States where the vessel is operating ''in the coastwise trade.'' 46 U.S.C. 50501(a); *see also* 46 U.S.C. 50501(d) (providing four criteria for determining whether 75 percent of the interest in a corporation is owned by citizens of the United States). There is no basis for distinguishing between vessels on this basis in implementing SPA; the purposes of this whistleblower statute are wholly unrelated to the locations between which the vessel travels. Accordingly, this language has been omitted.

Paragraph (p) defines ''vessel,'' a term used in the definition of seaman and that also arises in SPA itself. This definition is taken from Title 46 of the U.S. Code and ''includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.'' 46 U.S.C. 115; *see also* 1 U.S.C. 3; *Stewart* v. *Dutra Constr. Co.,* 543 U.S. 481, 496–97 (2005) (analyzing the meaning of the term ''vessel,'' as defined by 1 U.S.C. 3, and concluding that ''a 'vessel' is a watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment,'' and thus excludes ships ''taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport'').

Section 1986.102 Obligations and Prohibited Acts

This section describes the activities that are protected under SPA and the conduct that is prohibited in response to any protected activities. These protected activities are set out in the statute, as described above. Consistent with OSHA's interpretation of other anti-retaliation provisions, the prohibited conduct includes any form of retaliation, including, but not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman. Section 1986.102 tracks the language of the statute in defining the categories of protected activity.

As with other whistleblower statutes, SPA's provisions describing protected activity are to be read broadly. *See, e.g., Clean Harbors Envtl. Servs., Inc.* v. *Herman,* 146 F.3d 12, 20–21 (1st Cir. 1998) (expansively construing language in STAA to facilitate achieving the policy goals of encouraging corporate compliance with safety laws and employee reports of violations of those laws); *Bechtel Constr. Co.* v. *Sec'y of Labor,* 50 F.3d 926, 932–33 (11th Cir. 1995) (''[I]t is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in Federal labor laws.''); *Passaic Valley Sewerage Comm'rs* v. *U.S. Dep't of Labor,* 992 F.2d 474, 478 (3d Cir. 1993) (discussing the ''broad remedial purpose'' of the whistleblower provision in the Clean Water Act in expansively interpreting a term in that statute). Indeed, SPA's prohibition of discharging or ''in any manner'' discriminating against seamen indicates Congress's intent that the provision have broad application. *See NLRB* v. *Scrivener,* 405 U.S. 117, 122 (1972) (determining that language in the National Labor Relations Act should be read broadly because ''the presence of the preceding words 'to discharge or otherwise discriminate' reveals, we think, particularly by the word 'otherwise,' an intent on the part of Congress to afford broad rather than narrow protection to the employee''); *Phillips* v. *Interior Board of Mine Operations Appeals,* 500 F.2d 772, 782–83 (DC Cir. 1974) (relying on *Scrivener* in reasoning that the words ''in any other way discriminate'' in the Mine Safety Act support a broad reading of that Act's protections for miners). Likewise, the statement in the Senate Report regarding SPA that the term ''seaman'' is to be ''interpreted broadly'' further supports the premise that Congress did not intend that SPA be

construed narrowly. S. Rep. No. 98–454, at 11 (1984).

OSHA therefore will interpret each of the seven types of protected activity listed in the Act broadly. Moreover, while SPA, unlike other whistleblower statutes, does not contain a provision directly protecting all internal complaints by seamen to their superiors, many such complaints are covered under the seven specific categories listed in the Act. Protection of internal complaints is important because it ''leverage[es] the government's limited enforcement resources'' by encouraging employees to report substandard working conditions to their employers. *Clean Harbors,* 146 F.3d at 19–20. Such protections promote the resolution of violations without drawn-out litigation, and the ''failure to protect internal complaints may have the perverse result of encouraging employers to fire employees who believe they have been treated illegally before they file a formal complaint.'' *Minor* v. *Bostwick Laboratories, Inc.,* 669 F.3d 428, 437 (4th Cir. 2012). In addition, in the maritime context, a seaman on a vessel at sea may not be able to contact the authorities to correct a dangerous condition, and his or her only recourse will be to seek correction from the ship's officers. Because internal complaints are an important part of keeping a workplace safe, OSHA will give a broad construction to the Act's language to ensure that internal complaints are protected as fully as possible.

The statute first prohibits retaliation because ''the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.'' 46 U.S.C. 2114(a)(1)(A). One way an employer will know that a seaman ''is about to report'' the violation is when the seaman has made an internal complaint and there are circumstances from which a reasonable person would understand that the seaman will likely report the violation if the violation is not cured. These circumstances might arise from the internal report itself (e.g., ''I will contact the authorities if it is not fixed''), the seaman's history of reporting similar violations to authorities, or other similar considerations. Further, given that a seaman may be at sea for extended periods without access to ways of reporting a violation, a significant time may elapse between the time the employer learns of the seaman's intent to report and the time the report can actually be made. OSHA will read the phrase ''about to report'' broadly to protect the seaman in such a circumstance.

The Act also protects the seaman against discrimination when ''the seaman has refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public.'' 46 U.S.C. 2114(a)(1)(B). To qualify for this protection, the seaman ''must have sought from the employer, and been unable to obtain, correction of the unsafe condition.'' 46 U.S.C. 2114(a)(3). Although not stated explicitly, in the Secretary's view, the reasonable implication of the statutory language is that the seaman's preliminary act of seeking correction of the condition is itself protected activity. That is, a seaman who asks his or her employer to correct a condition he reasonably believes would result in serious injury and suffers retaliation because of that request before the occasion to refuse to perform the unsafe work arises is protected by the Act. Although the literal terms of the Act could be read to leave the request for correction required yet unprotected, courts reject ''absurd result[s].'' *Stone* v. *Instrumentation Laboratory Co.,* 591 F.3d 239, 243 (4th Cir. 2009) (''Courts will not * * * adopt a 'literal' construction of a statute if such interpretation would thwart the statute's obvious purpose or lead to an 'absurd result.' '' [quoting *Chesapeake Ranch Water Co.* v. *Board of Comm'rs of Calvert County,* 401 F.3d 274, 280 (4th Cir. 2005)]). The Agency's interpretation is embodied in the last sentence of section 1986.102(c): ''Any seaman who requests such a correction shall be protected against retaliation because of the request.''

SPA provides protection to certain other types of internal communications. It covers the situation where ''the seaman notified, or attempted to notify, the vessel owner or the Secretary [of the department in which in Coast Guard is operating] of a work-related personal injury or work-related illness of a seaman.'' 46 U.S.C. 2114(a)(1)(D). As noted above, this covers oral, written and electronic communications to any agent of the vessel's owner. SPA also disallows retaliation because ''the seaman accurately reported hours of duty under this part.'' 46 U.S.C. 2114(a)(1)(G). In keeping with the discussion above, this language too should be interpreted in favor of broad protection for seamen should a question of its meaning arise.

Finally, consistent with the broad interpretation of the statute as discussed above, OSHA believes that most reports required by the U.S. Coast Guard under 46 CFR 4.04 and 4.05 are protected by SPA.

Section 1986.103 Filing of Retaliation Complaints

This section describes the process for filing a complaint alleging retaliation in violation of SPA. The procedures described are consistent with those governing complaints under STAA as well as other whistleblower statutes OSHA administers.

Under paragraph (a), complaints may be filed by a seaman or, with the seaman's consent, by any person on the seaman's behalf. Paragraph (b) provides that complaints filed under SPA need not be in any particular form; they may be either oral or in writing. If the complainant is unable to file the complaint in English, OSHA will accept the complaint in any language. Paragraph (c) explains with whom in OSHA complaints may be filed.

Paragraph (d) addresses timeliness. To be timely, a complaint must be filed within 180 days of the occurrence of the alleged violation. Under Supreme Court precedent, a violation occurs when the retaliatory decision has been both ''made and communicated to'' the complainant. *Del. State College* v. *Ricks,* 449 U.S. 250, 258 (1980). In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *EEOC* v. *United Parcel Serv.,* 249 F.3d 557, 561–62 (6th Cir. 2001). However, the time for filing a complaint may be tolled for reasons warranted by applicable case law. A complaint will be considered filed on the date of postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office. The regulatory text indicates that filing deadlines may be tolled based on principles developed in applicable case law. *See, e.g., Donovan* v. *Hahner, Foreman & Harness, Inc.,* 736 F.2d 1421, 1423–29 (10th Cir. 1984).

Paragraph (e), which is consistent with provisions implementing other OSHA whistleblower programs, describes the relationship between section 11(c) complaints and SPA whistleblower complaints. Section 11(c) of the OSH Act, 29 U.S.C. 660(c), generally prohibits employers from retaliating against employees for filing safety or health complaints or otherwise initiating or participating in proceedings under the OSH Act. Some of the activity

protected by SPA, including maritime safety complaints and work refusals, may also be covered under section 11(c), though the geographic limits of section 4(a) of the OSH Act, 29 U.S.C. 653(a), which are applicable to section 11(c), do not apply to SPA.[5] Paragraph (e) states that SPA whistleblower complaints that also allege facts constituting an 11(c) violation will be deemed to have been filed under both statutes. Similarly, section 11(c) complaints that allege facts constituting a violation of SPA will also be deemed to have been filed under both laws. In these cases, normal procedures and timeliness requirements under the respective statutes and regulations will apply.

OSHA notes that a complaint of retaliation filed with OSHA under SPA is not a formal document and need not conform to the pleading standards for complaints filed in federal district court articulated in *Bell Atlantic Corp.* v. *Twombly,* 550 U.S. 544 (2007) and *Ashcroft* v. *Iqbal,* 556 U.S. 662 (2009). *See Sylvester* v. *Parexel Int'l, Inc.,* No. 07–123, 2011 WL 2165854, at *9–10 (ARB May 26, 2011) (holding whistleblower complaints filed with OSHA under analogous provisions in the Sarbanes-Oxley Act need not conform to federal court pleading standards). Rather, the complaint filed with OSHA under this section simply alerts the Agency to the existence of the alleged retaliation and the complainant's desire that the Agency investigate the complaint. Upon the filing of a complaint with OSHA, the Assistant Secretary is to determine whether ''the complaint, supplemented as appropriate by interviews of the complainant'' alleges ''the existence of facts and evidence to make a prima facie showing.'' 29 CFR 1986.104(e). As explained in section 1986.104(e), if the complaint, supplemented as appropriate, contains a prima facie allegation, and the respondent does not show clear and convincing evidence that it would have taken the same action in the absence of the alleged protected activity, OSHA conducts an investigation to determine whether there is reasonable cause to believe that retaliation has occurred. *See* 49 U.S.C. 42121(b)(2), 29 CFR 1986.104(e).

Section 1986.104 Investigation

This section describes the procedures that apply to the investigation of complaints under SPA. Paragraph (a) of this section outlines the procedures for notifying the parties and the U.S. Coast Guard of the complaint and notifying the respondent of its rights under these regulations. Paragraph (b) describes the procedures for the respondent to submit its response to the complaint. Paragraph (c) explains that the Agency will share respondent's submissions with the complainant, with redactions in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.,* and other applicable confidentiality laws as necessary, and will permit the complainant to respond to those submissions. The Agency expects that sharing information with complainants will assist OSHA in conducting full and fair investigations and the Assistant Secretary in thoroughly assessing defenses raised by respondents. Paragraph (d) of this section discusses confidentiality of information provided during investigations.

Paragraph (e) sets forth the applicable burdens of proof. As discussed above, SPA adopts the relevant provisions of STAA, which in turn adopts the burden of proof of AIR21. A complainant must make an initial prima facie showing that protected activity was ''a contributing factor'' in the adverse action alleged in the complaint, *i.e.,* that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. *See Ferguson* v. *New Prime, Inc.,* No. 10–75, 2011 WL 4343278, at *3 (ARB Aug. 31, 2011); *Clarke* v. *Navajo Express,* No. 09–114, 2011 WL 2614326, at *3 (ARB June 29, 2011). The complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing. The complainant's burden may be satisfied, for example, if he or she shows that the adverse action took place shortly after protected activity, giving rise to the inference that it was a contributing factor in the adverse action.

If the complainant does not make the required prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer* v. *U.S. Dep't of Labor,* 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the burden-shifting framework of the ERA, which is the same framework now found in STAA and therefore SPA, served a ''gatekeeping function'' that ''stemm[ed] frivolous complaints''). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, OSHA must dismiss a complaint under SPA and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that the protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity.

Paragraph (f) describes the procedures the Assistant Secretary will follow prior to the issuance of findings and a preliminary order when the Assistant Secretary has reasonable cause to believe that a violation has occurred. Its purpose is to ensure compliance with the Due Process Clause of the Fifth Amendment, as interpreted by the Supreme Court in *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252 (1987) (requiring OSHA to give a STAA respondent the opportunity to review the substance of the evidence and respond, prior to ordering preliminary reinstatement).

Section 1986.105 Issuance of Findings and Preliminary Orders

This section provides that, within 60 days of the filing of a complaint and on the basis of information obtained in the investigation, the Assistant Secretary will issue written findings regarding whether there is reasonable cause to believe that the complaint has merit. If the Assistant Secretary concludes that there is reasonable cause to believe that the complaint has merit, the Assistant Secretary will order appropriate relief, including: a requirement that the person take affirmative action to abate the violation; reinstatement to the seaman's former position; compensatory damages including back pay with interest and damages such as litigation costs; and, if the Assistant Secretary so chooses, punitive damages up to $250,000. Affirmative action to abate the violation includes a variety of measures, such as posting notices about SPA orders and rights, as well as expungement of adverse comments in a personnel record. *See Scott* v. *Roadway Express, Inc.,* No. 01–065, 2003 WL 21269144, at *1–2 (ARB May 29, 2003) (posting notices of STAA orders and rights); *Pollock* v. *Continental Express,* Nos. 07–073, 08–051, 2010 WL 1776974, at *9 (ARB Apr. 7, 2010) (expungement of adverse references).

The findings and, where appropriate, preliminary order, advise the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing. If no objections are filed within 30 days of receipt of the

[5] SPA contains no geographic limit; its scope is limited only by the definition of ''seaman.''

findings, the findings and any preliminary order of the Assistant Secretary become the final decision and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed.

In appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. *Smith* v. *Lake City Enterprises, Inc.,* Nos. 09–033, 08–091, 2010 WL 3910346, at *8 (ARB Sept. 24, 2010) (holding that an employer who violated STAA was to compensate the complainant with ''front pay'' when reinstatement was not possible). Such front pay or economic reinstatement is also employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). *See, e.g., Sec'y of Labor ex rel. York* v. *BR&D Enters., Inc.,* 23 FMSHRC 697, 2001 WL 1806020, at *1 (ALJ June 26, 2001). Front pay has been recognized as a possible remedy in cases under the whistleblower statutes enforced by OSHA in circumstances where reinstatement would not be appropriate. *See, e.g., Hagman* v. *Washington Mutual Bank,* ALJ No. 2005–SOX–73, 2006 WL 6105301, at *32 (Dec. 19, 2006) (noting that while reinstatement is the ''preferred and presumptive remedy'' under Sarbanes-Oxley, ''[f]ront pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) An employee's medical condition that is causally related to her employer's retaliatory action * * * (2) manifest hostility between the parties * * * (3) the fact that claimant's former position no longer exists * * * or (4) the fact that employer is no longer in business at the time of the decision''); *Hobby* v. *Georgia Power Co.,* ARB No. 98–166, ALJ No. 1990–ERA–30 (ARB Feb. 9, 2001) (noting circumstances in which front pay may be available in lieu of reinstatement but ordering reinstatement), *aff'd sub nom. Hobby* v. *USDOL,* No. 01–10916 (11th Cir. Sept. 30, 2002) (unpublished); *Brown* v. *Lockheed Martin Corp.,* ALJ No. 2008–SOX–49, 2010 WL 2054426, at *55–56 (Jan. 15, 2010) (same). Congress intended that seamen be preliminarily reinstated to their positions if OSHA finds reasonable cause to believe that they were discharged in violation of SPA. When OSHA finds a violation, the norm is for OSHA to order immediate preliminary reinstatement. Neither an employer nor an employee has a statutory right to choose economic reinstatement. Rather, economic reinstatement is designed to accommodate situations in which evidence establishes to OSHA's satisfaction that reinstatement is inadvisable for some reason, notwithstanding the employer's retaliatory discharge of the seaman. In such situations, actual reinstatement might be delayed until after the administrative adjudication is completed as long as the seaman continues to receive his or her pay and benefits and is not otherwise disadvantaged by a delay in reinstatement. There is no statutory basis for allowing the employer to recover the costs of economically reinstating a seaman should the employer ultimately prevail in the whistleblower adjudication.

In ordering interest on back pay, the Secretary has determined that, instead of computing the interest due by compounding quarterly the Internal Revenue Service interest rate for the underpayment of taxes, which under 26 U.S.C. 6621 is generally the Federal short-term rate plus three percentage points, interest will be compounded daily. The Secretary believes that daily compounding of interest better achieves the make-whole purpose of a back pay award. Daily compounding of interest has become the norm in private lending and recently was found to be the most appropriate method of calculating interest on back pay by the National Labor Relations Board. *See Jackson Hosp. Corp.* v. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union,* 356 NLRB No. 8, 2010 WL 4318371, at *3–4 (2010). Additionally, interest on tax underpayments under the Internal Revenue Code, 26 U.S.C. 6621, is compounded daily pursuant to 26 U.S.C. 6622(a).

Subpart B—Litigation

Section 1986.106 Objections to the Findings and the Preliminary Order and Request for a Hearing

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections also is considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections on the other parties of record and the OSHA official who issued the findings, the failure to serve copies of the objections on the other parties of record does not affect the ALJ's jurisdiction to hear and decide the merits of the case. *See Shirani* v. *Calvert Cliffs Nuclear Power Plant, Inc.,* No. 04–101, 2005 WL 2865915, at *7 (ARB Oct. 31, 2005).

A respondent may file a motion to stay OSHA's preliminary order of reinstatement with the Office of Administrative Law Judges. However, a stay will be granted only on the basis of exceptional circumstances. The Secretary believes that a stay of the Assistant Secretary's preliminary order of reinstatement would be appropriate only where the respondent can establish the necessary criteria for a stay, *i.e.,* the respondent would suffer irreparable injury; the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

Section 1986.107 Hearings

This section adopts the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR Part 18 subpart A. This section provides that the hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. If both the complainant and respondent object to the findings and/or order of the Assistant Secretary, an ALJ will conduct a single, consolidated hearing. This section states that ALJs have broad power to limit discovery in order to expedite the hearing. This furthers an important goal of SPA—to have unlawfully terminated seamen reinstated as quickly as possible.

This section explains that formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious. This is consistent with the Administrative Procedure Act, which provides at 5 U.S.C. 556(d): ''Any oral or documentary evidence may be received, but the Agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence * * *'' *See also Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 705–06 (1948) (administrative agencies not restricted

by rigid rules of evidence). Furthermore, it is inappropriate to apply the technical rules of evidence in Part 18 because the Secretary anticipates that complainants will often appear *pro se,* as is the case with other whistleblower statutes the Department of Labor administers. Also, hearsay evidence is often appropriate in whistleblower cases, as there often is no relevant evidence other than hearsay to prove discriminatory intent. ALJs have the responsibility to determine the appropriate weight to be given to such evidence. For these reasons the interests of determining all of the relevant facts are best served by not having strict evidentiary rules.

Section 1986.108 Role of Federal Agencies

Paragraph (a)(1) of this section explains that the Assistant Secretary, represented by an attorney from the appropriate Regional Solicitor's office, ordinarily will be the prosecuting party in cases in which the respondent objects to the findings or the preliminary reinstatement order. This has been the practice under STAA, from which the SPA's procedures are drawn, and the public interest generally requires the Assistant Secretary's participation in such matters. The case reports show that there has been relatively little litigation under SPA to date, and OSHA believes that relatively few private attorneys have developed adequate expertise in representing SPA whistleblower complainants.

Where the complainant, but not the respondent, objects to the findings or order, the regulations retain the Assistant Secretary's discretion to participate as a party or amicus curiae at any stage of the proceedings, including the right to petition for review of an ALJ decision.

Paragraph (a)(2) clarifies that if the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1), he or she may, upon written notice to the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ will issue appropriate orders to regulate the course of future proceedings.

Paragraph (a)(3) provides that copies of documents in all cases must be sent to all parties, or if represented by counsel, to them. If the Assistant Secretary is participating in the proceeding, copies of documents must be sent to the Regional Solicitor's office representing the Assistant Secretary.

Paragraph (b) states that the U.S. Coast Guard, if interested in a proceeding, also may participate as amicus curiae at any time in the proceeding. This paragraph also permits the U.S. Coast Guard to request copies of all documents, regardless of whether it is participating in the case.

Section 1986.109 Decisions and Orders of the Administrative Law Judge

This section sets forth, in paragraph (a), the requirements for the content of the decision and order of the ALJ. Paragraphs (a) and (b) state the standards for finding a violation under SPA and for precluding such a finding.

Specifically, the complainant must show that the protected activity was a ''contributing factor'' in the adverse action alleged in the complaint. A contributing factor is ''any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.'' *Clarke, supra,* at *3. The complainant (a term that, in this paragraph, refers to the Assistant Secretary if he or she is the prosecuting party) can succeed by providing either direct or indirect proof of contribution. Direct evidence is evidence that conclusively connects the protected activity and the adverse action and does not rely upon inference. If the complainant does not produce direct evidence, he or she must proceed indirectly, or inferentially, by proving by a preponderance of the evidence that a motive prohibited by SPA was the true reason for the adverse action. One type of indirect, also known as circumstantial, evidence is evidence that discredits the respondent's proffered reasons for the adverse action, demonstrating instead that they were pretext for retaliation. *Id.* Another type of circumstantial evidence is temporal proximity between the protected activity and the adverse action. *Ferguson, supra,* at *2. The respondent may avoid liability if it ''demonstrates by clear and convincing evidence'' that it would have taken the same adverse action in any event. Clear and convincing evidence is evidence indicating that the thing to be proved is highly probably or reasonably certain. *Clarke, supra,* at *3.

Paragraph (c) provides that the Assistant Secretary's determinations about when to proceed with an investigation and when to dismiss a complaint without an investigation or without a complete investigation are discretionary decisions not subject to review by the ALJ. The ALJ hears cases de novo and, therefore may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. If there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if warranted by the facts and circumstances.

Paragraph (d)(1) describes the remedies that the ALJ may order and provides that interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. (See the earlier discussion of 1986.105.) In addition, paragraph (d)(2) in this section requires the ALJ to issue an order denying the complaint if he or she determines that the respondent has not violated SPA.

Paragraph (e) requires that the ALJ's decision be served on all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Paragraph (e) also provides that any ALJ decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the ARB.

Section 1986.110 Decisions and Orders of the Administrative Review Board

Paragraph (a) sets forth rules regarding seeking review of an ALJ's decision with the ARB. Upon the issuance of the ALJ's decision, the parties have 14 days within which to petition the ARB for review of that decision. If no timely petition for review is filed with the ARB, the decision of the ALJ becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing of the petition; if the petition is filed in person, by hand delivery or other means, the petition is considered filed upon receipt. In addition to being sent to the ARB, the petition is to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and, in cases in which the Assistant Secretary is a party, the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

Consistent with the procedures for petitions for review under other OSHA-administered whistleblower laws, paragraph (b) of this section indicates that the ARB has discretion to accept or reject review in SPA whistleblower cases. Congress intended these

whistleblower cases to be expedited, as reflected by the provision in STAA, which applies to SPA, providing for a hearing de novo in district court if the Secretary has not issued a final decision within 210 days of the filing of the complaint. Making review of SPA whistleblower cases discretionary may assist in furthering that goal. As noted in paragraph (a) of this section, the parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary.

When the ARB accepts a petition for review, the ARB will review the ALJ's factual determinations under the substantial evidence standard. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that portion ordering reinstatement, is inoperative while the matter is pending before the ARB. In exceptional circumstances, however, the ARB may grant a motion to stay an ALJ's order of reinstatement. A stay of a preliminary order of reinstatement is appropriate only where the respondent can establish the necessary criteria for a stay, i.e., the respondent will suffer irreparable injury; the respondent is likely to succeed on the merits; a balancing of possible harms to the parties favors the respondent; and the public interest favors a stay.

Paragraph (c) incorporates the statutory requirement that the Secretary's final decision be issued within 120 days of the conclusion of the hearing. The hearing is deemed concluded 14 days after the date of the ALJ's decision unless a motion for reconsideration has been filed with the ALJ, in which case the hearing is concluded on the date the motion for reconsideration is ruled upon or 14 days after a new ALJ decision is issued. This paragraph further provides for the ARB's decision in all cases to be served on all parties, the Chief Administrative Law Judge, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

Paragraph (d) describes the remedies the ARB can award if it concludes that the respondent has violated SPA. (See the earlier discussion of remedies at 1986.105 and .109.) Under paragraph (e), if the ARB determines that the respondent has not violated the law, it will issue an order denying the complaint.

Subpart C—Miscellaneous Provisions

Section 1986.111 Withdrawal of SPA Complaints, Findings, Objections, and Petitions for Review; Settlement

This section provides procedures and time periods for the withdrawal of complaints, the withdrawal of findings and/or preliminary orders by the Assistant Secretary, and the withdrawal of objections to findings and/or orders. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

Paragraph (a) permits a complainant to withdraw, orally or in writing, his or her complaint to the Assistant Secretary, at any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order. The Assistant Secretary will confirm in writing the complainant's desire to withdraw and will determine whether to approve the withdrawal. If approved, the Assistant Secretary will notify all parties if the withdrawal is approved. Complaints that are withdrawn pursuant to settlement agreements prior to the filing of objections must be approved in accordance with the settlement approval procedures in paragraph (d). The complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

Under paragraph (b), the Assistant Secretary may withdraw his or her findings and/or preliminary order at any time before the expiration of the 30-day objection period described in section 1986.106, if no objection has yet been filed. The Assistant Secretary may substitute new findings and/or a preliminary order, and the date of receipt of the substituted findings and/or order will begin a new 30-day objection period.

Paragraph (c) addresses situations in which parties seek to withdraw either objections to the Assistant Secretary's findings and/or preliminary order or petitions for review of ALJ decisions. A party may withdraw its objections to the Assistant Secretary's findings and/or preliminary order at any time before the findings and/or preliminary order become final by filing a written withdrawal with the ALJ. Similarly, if a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, depending on where the case is pending, will determine whether to approve the withdrawal of the objections or the petition for review. Paragraph (c) clarifies that if the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or preliminary order, and there are no other pending objections, the Assistant Secretary's findings and/or preliminary order will become the final order of the Secretary. Likewise, if the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. Finally, paragraph (c) provides that if objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d).

Paragraph (d)(1) states that a case may be settled at the investigative stage if the Assistant Secretary, the complainant, and the respondent agree. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties. Paragraph (d)(2) permits a case to be settled, if the participating parties agree and the ALJ before whom the case is pending approves, at any time after the filing of objections to the Assistant Secretary's findings and/or preliminary order. Similarly, if the case is before the ARB, the ARB may approve a settlement between the participating parties.

Under paragraph (e), settlements approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to 49 U.S.C. 31105(e), as incorporated by 46 U.S.C. 2114(b).

Section 1986.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary. Paragraph (a) provides that within 60 days of the issuance of a final order under sections 1986.109 or 1986.110, a person adversely affected or aggrieved by such order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. Paragraph (b) states that a final order will not be subject to judicial review in any criminal or other civil proceeding. Paragraph (c) requires that, in cases where judicial review is sought, the ARB or ALJ, as the case may be, submit the record of proceedings to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

Section 1986.113 Judicial Enforcement

This section provides that the Secretary may obtain judicial enforcement of orders, including orders approving settlement agreements, by filing a civil action seeking such enforcement in the United States district court for the district in which the violation occurred.

Section 1986.114 District Court Jurisdiction of Retaliation Complaints Under SPA

This section allows a complainant to bring an action in district court for de novo review of the allegations contained in the complaint filed with OSHA if there has been no final decision of the Secretary and 210 days have passed since the filing of that complaint and the delay was not due to the complainant's bad faith. This section reflects the Secretary's position that it would not be reasonable to construe the statute to permit a complainant to initiate an action in federal court after the Secretary issues a final decision, even if the date of the final decision is more than 210 days after the filing of the administrative complaint. In the Secretary's view, the purpose of the ''kick out'' provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the court of appeals.

Paragraph (b) of this section requires complainants to provide file-stamped copies of their complaint within seven days after filing a complaint in district court to the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending. A copy of the complaint also must be provided to the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. This provision is necessary to notify the Agency that the complainant has opted to file a complaint in district court. This provision is not a substitute for the complainant's compliance with the requirements for service of process of the district court complaint contained in the Federal Rules of Civil Procedure and the local rules of the district court where the complaint is filed.

Section 1986.115 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and three days notice to the parties, waive any rule or issue such orders as justice or the administration of SPA's whistleblower provision requires.

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 1986.103) which was previously reviewed as a statutory requirement of the Seaman's Protection Act (46 U.S.C. 2114) and approved for use by the Office of Management and Budget (''OMB''), and was assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995). A non-material change has been submitted to OMB to include the regulatory citation.

V. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (APA) do not apply ''to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). This is a rule of agency procedure, practice, and interpretation within the meaning of that section, since it provides procedures for the handling of retaliation complaints. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments are not required for these regulations. Although this is a procedural rule not subject to the notice and comment procedures of the APA, the Agency is providing persons interested in this interim final rule 60 days to submit comments. A final rule will be published after the Agency receives and reviews the public's comments.

Furthermore, because this rule is procedural and interpretative rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this interim final rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Orders 12866 and 13563; Unfunded Mandates Reform Act of 1995; Executive Order 13132

The Department has concluded that this rule is not a ''significant regulatory action'' within the meaning of Section 3(f)(4) of Executive Order 12866, as reaffirmed by Executive Order 13563, because it is not likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

The rule is procedural and interpretative in nature, and it is expected to have a negligible economic impact. For this reason, and the fact that no notice of proposed rulemaking has been published, no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531 *et seq.* Finally, this rule does not have ''federalism implications.'' The rule does 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'' and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of SPA. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

List of Subjects in 29 CFR Part 1986

Administrative practice and procedure, Employment, Investigations, Marine safety, Reporting and recordkeeping requirements, Safety, Seamen, Transportation, Whistleblowing.

Authority and Signature

This document was prepared under the direction and control of David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health.

Signed at Washington, DC on January 31, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

■ Accordingly, for the reasons set out in the preamble, 29 CFR part 1986 is added to read as follows:

PART 1986—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISION OF THE SEAMAN'S PROTECTION ACT (SPA), AS AMENDED.

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

Sec.
1986.100 Purpose and scope.
1986.101 Definitions.
1986.102 Obligations and prohibited acts.
1986.103 Filing of retaliation complaints.
1986.104 Investigation.
1986.105 Issuance of findings and preliminary orders.

Subpart B—Litigation

1986.106 Objections to the findings and the preliminary order and request for a hearing.
1986.107 Hearings.
1986.108 Role of Federal agencies.
1986.109 Decisions and orders of the administrative law judge.
1986.110 Decisions and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.
1986.112 Judicial review.
1986.113 Judicial enforcement.
1986.114 District court jurisdiction of retaliation complaints under SPA.
1986.115 Special circumstances; waiver of rules.

Authority: 46 U.S.C. 2114; 49 U.S.C. 31105; Secretary's Order 1–2012 (Jan. 18, 2012), 77 FR 3912 (Jan. 25, 2012); Secretary's Order 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010).

Subpart A—Complaints, Investigations, Findings, and Preliminary Orders

§ 1986.100 Purpose and scope.

(a) This part sets forth the procedures for, and interpretations of, the Seaman's Protection Act (SPA), 46 U.S.C. 2114, as amended, which protects a seaman from retaliation because the seaman has engaged in protected activity pertaining to compliance with maritime safety laws and accompanying regulations. SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. 31105.

(b) This part establishes procedures pursuant to the statutory provisions set forth above for the expeditious handling of retaliation complaints filed by seamen or persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints, investigations, issuance of findings and preliminary orders, objections to findings, litigation before administrative law judges (ALJs), post-hearing administrative review, withdrawals and settlements, and judicial review and enforcement. In addition, these rules provide the Secretary's interpretations on certain statutory issues.

§ 1986.101 Definitions.

As used in this part:

(a) *Act* means the Seaman's Protection Act (SPA), 46 U.S.C. 2114, as amended.

(b) *Assistant Secretary* means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

(c) *Business days* means days other than Saturdays, Sundays, and Federal holidays.

(d) *Citizen of the United States* means:

(1) An individual who is a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22)) or a corporation, partnership, association, or other business entity if the controlling interest is owned by citizens of the United States. The controlling interest in a corporation is owned by citizens of the United States if:

(i) Title to the majority of the stock in the corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of a person not a citizen of the United States;

(ii) The majority of the voting power in the corporation is vested in citizens of the United States;

(iii) There is no contract or understanding by which the majority of the voting power in the corporation may be exercised, directly or indirectly, in behalf of a person not a citizen of the United States; and

(iv) There is no other means by which control of the corporation is given to or permitted to be exercised by a person not a citizen of the United States.

(2) Furthermore, a corporation is only a citizen of the United States if:

(i) It is incorporated under the laws of the United States or a State;

(ii) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and

(iii) No more of its directors are noncitizens than a minority of the number necessary to constitute a quorum.

(e) *Complainant* means the seaman who filed a SPA whistleblower complaint or on whose behalf a complaint was filed.

(f) *Cooperated* means any assistance or participation with an investigation, at any stage of the investigation, and regardless of the outcome of the investigation.

(g) *Maritime safety law or regulation* includes any statute or regulation regarding health or safety that applies to any person or equipment on a vessel.

(h) *Notify* or *notified* includes any oral or written communications.

(i) *OSHA* means the Occupational Safety and Health Administration of the United States Department of Labor.

(j) *Person* means one or more individuals or other entities, including but not limited to corporations, companies, associations, firms, partnerships, societies, and joint stock companies.

(k) *Report* or *reported* means any oral or written communications.

(l) *Respondent* means the person alleged to have violated 46 U.S.C. 2114.

(m) *Seaman* means any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States. The term includes an individual formerly performing the work described above or an applicant for such work.

(n) *Secretary* means the Secretary of Labor or persons to whom authority under the Act has been delegated.

(o) *State* means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Northern Mariana Islands.

(p) *Vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

(q) *Vessel owner* includes all of the agents of the owner, including the vessel's master.

(r) Any future amendments to SPA that affect the definition of a term or terms listed in this section will apply in lieu of the definition stated herein.

§ 1986.102 Obligations and prohibited acts.

(a) A person may not retaliate against any seaman because the seaman:

(1) In good faith reported or is about to report to the Coast Guard or other

appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred;

(2) Refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public;

(3) Testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;

(4) Notified, or attempted to notify, the vessel owner or the Secretary of the department in which the Coast Guard is operating of a work-related personal injury or work-related illness of a seaman;

(5) Cooperated with a safety investigation by the Secretary of the department in which the Coast Guard is operating or the National Transportation Safety Board;

(6) Furnished information to the Secretary of the department in which the Coast Guard is operating, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or

(7) Accurately reported hours of duty under part A of subtitle II of title 46 of the United States Code.

(b) Retaliation means any discrimination against a seaman including, but is not limited to, discharging, demoting, suspending, harassing, intimidating, threatening, restraining, coercing, blacklisting, or disciplining a seaman.

(c) For purposes of paragraph (a)(2) of this section, the circumstances causing a seaman's apprehension of serious injury must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman's employer. To qualify for protection based on activity described in paragraph (a)(2) of this section, the seaman must have sought from the employer, and been unable to obtain, correction of the unsafe condition. Any seaman who requests such a correction shall be protected against retaliation because of the request.

§ 1986.103 Filing of retaliation complaints.

(a) *Who may file.* A seaman who believes that he or she has been retaliated against by a person in violation of SPA may file, or have filed by any person on the seaman's behalf, a complaint alleging such retaliation.

(b) *Nature of filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a seaman is unable to file a complaint in English, OSHA will accept the complaint in any other language.

(c) *Place of filing.* The complaint should be filed with the OSHA office responsible for enforcement activities in the geographical area where the seaman resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: *http://www.osha.gov.*

(d) *Time for filing.* Not later than 180 days after an alleged violation occurs, a seaman who believes that he or she has been retaliated against in violation of SPA may file, or have filed by any person on his or her behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, electronic communication transmittal, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(e) *Relationship to section 11(c) complaints.* A complaint filed under SPA alleging facts that would also constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both SPA and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would also constitute a violation of SPA will be deemed to be a complaint filed under both SPA and section 11(c). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

§ 1986.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Assistant Secretary will also notify the respondent of the respondent's rights under paragraphs (b) and (f) of this section. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented by counsel) and to the U.S. Coast Guard.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the Agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the Agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The Agency will also provide the complainant with an opportunity to respond to such submissions.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title.

(e)(1) A complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The seaman engaged in a protected activity;

(ii) The respondent knew or suspected that the seaman engaged in the protected activity;

(iii) The seaman suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.,* to give rise to an inference that the respondent knew or suspected that the seaman engaged in protected activity and that

the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint will not be conducted or will be discontinued if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant's protected activity.

(5) If the respondent fails to make a timely response or fails to satisfy the burden set forth in the prior paragraph, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

(f) Prior to the issuance of findings and a preliminary order as provided for in § 1986.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the respondent has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the respondent (or the respondent's legal counsel, if respondent is represented by counsel) to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The complainant will also receive a copy of the materials that must be provided to the respondent under this paragraph. Before providing such materials to the complainant, the Agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. The respondent will be given the opportunity to submit a written response, to meet with the investigators, to present statements from witnesses in support of its position, and to present legal and factual arguments. The respondent must present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon thereafter as the Assistant Secretary and the respondent can agree, if the interests of justice so require.

§ 1986.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 60 days of the filing of the complaint, written findings as to whether there is reasonable cause to believe that the respondent retaliated against the complainant in violation of SPA.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Assistant Secretary will accompany the findings with a preliminary order providing relief. Such order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant has incurred). Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily. The preliminary order may also require the respondent to pay punitive damages of up to $250,000.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and, where appropriate, the preliminary order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and, where appropriate, the preliminary order will inform the parties of the right to object to the findings and/or the order and to request a hearing. The findings and, where appropriate, the preliminary order also will give the address of the Chief Administrative Law Judge, U.S. Department of Labor. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, a copy of the original complaint and a copy of the findings and/or order.

(c) The findings and the preliminary order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel), or on the compliance date set forth in the preliminary order, whichever is later, unless an objection and request for a hearing have been timely filed as provided at § 1986.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and the preliminary order, regardless of any objections to the findings and/or the order.

Subpart B—Litigation

§ 1986.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, must file any objections and a request for a hearing on the record within 30 days of receipt of the findings and preliminary order pursuant to § 1986.105(c). The objections and request for a hearing must be in writing and state whether the objections are to the findings and/or the preliminary order. The date of the postmark, facsimile transmittal, or electronic communication transmittal is considered the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, and copies of the objections must be mailed at the same time to the other parties of record, and the OSHA official who issued the findings.

(b) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which will not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the respondent's receipt of the findings and preliminary order, regardless of any objections to the order. The respondent may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order of reinstatement, which shall be granted only based on exceptional circumstances. If no timely objection is filed with respect to either the findings or the preliminary order, the findings and/or preliminary order will become the final decision of the Secretary, not subject to judicial review.

§ 1986.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A of part 18 of this title.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to an ALJ who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo on the record. ALJs have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated, and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1986.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. In any case in which the respondent objects to the findings or the preliminary order, the Assistant Secretary ordinarily will be the prosecuting party. In any other cases, at the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or participate as amicus curiae at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an ALJ, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) If the Assistant Secretary assumes the role of prosecuting party in accordance with paragraph (a)(1) of this section, he or she may, upon written notice to the ALJ or the Administrative Review Board, as the case may be, and the other parties, withdraw as the prosecuting party in the exercise of prosecutorial discretion. If the Assistant Secretary withdraws, the complainant will become the prosecuting party and the ALJ or the Administrative Review Board, as the case may be, will issue appropriate orders to regulate the course of future proceedings.

(3) Copies of documents in all cases shall be sent to all parties, or if they are represented by counsel, to the latter. In cases in which the Assistant Secretary is a party, copies of the documents shall be sent to the Regional Solicitor's Office representing the Assistant Secretary.

(b) The U.S. Coast Guard, if interested in a proceeding, may participate as amicus curiae at any time in the proceeding, at its discretion. At the request of the U.S. Coast Guard, copies of all documents in a case must be sent to that agency, whether or not that agency is participating in the proceeding.

§ 1986.109 Decisions and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (d) of this section, as appropriate. A determination that a violation has occurred may be made only if the complainant has demonstrated by a preponderance of the evidence that protected activity was a contributing factor in the adverse action alleged in the complaint.

(b) If the complainant or the Assistant Secretary has satisfied the burden set forth in the prior paragraph, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1986.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the ALJ will issue an order that will require, where appropriate: affirmative action to abate the violation, reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (back pay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees which the complainant may have incurred); and payment of punitive damages up to $250,000. Interest on back pay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(2) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor. Any ALJ's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the respondent. All other portions of the ALJ's order will be effective 14 days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board (ARB), U.S. Department of Labor. The ALJ decision will become the final order of the Secretary unless a petition for review is timely filed with the ARB and the ARB accepts the decision for review.

§ 1986.110 Decisions and orders of the Administrative Review Board.

(a) The Assistant Secretary or any other party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections may be deemed waived. A petition must be filed within 14 days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or electronic communication transmittal will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary and, in cases in which the Assistant Secretary is a party, on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the ALJ will

become the final order of the Secretary unless the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that any order of reinstatement will be effective while review is conducted by the ARB unless the ARB grants a motion by the respondent to stay that order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual determinations of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 120 days of the conclusion of the hearing, which will be deemed to be 14 days after the date of the decision of the ALJ, unless a motion for reconsideration has been filed with the ALJ in the interim. In such case, the conclusion of the hearing is the date the motion for reconsideration is ruled upon or 14 days after a new decision is issued. The ARB's final decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision also will be served on the Assistant Secretary and on the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the ARB will issue a final order providing relief to the complainant. The final order will require, where appropriate: affirmative action to abate the violation; reinstatement of the complainant to his or her former position, with the same compensation, terms, conditions, and privileges of the complainant's employment; payment of compensatory damages (backpay with interest and compensation for any special damages sustained as a result of the retaliation, including any litigation costs, expert witness fees, and reasonable attorney fees the complainant may have incurred); and payment of punitive damages up to $250,000. Interest on backpay will be calculated using the interest rate applicable to underpayment of taxes under 26 U.S.C. 6621 and will be compounded daily.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.

Subpart C—Miscellaneous Provisions

§ 1986.111 Withdrawal of SPA complaints, findings, objections, and petitions for review; settlement.

(a) At any time prior to the filing of objections to the Assistant Secretary's findings and/or preliminary order, a complainant may withdraw his or her complaint by notifying the Assistant Secretary, orally or in writing, of his or her withdrawal. The Assistant Secretary then will confirm in writing the complainant's desire to withdraw and determine whether to approve the withdrawal. The Assistant Secretary will notify the parties (and each party's legal counsel if the party is represented by counsel) of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section. A complainant may not withdraw his or her complaint after the filing of objections to the Assistant Secretary's findings and/or preliminary order.

(b) The Assistant Secretary may withdraw the findings and/or a preliminary order at any time before the expiration of the 30-day objection period described in § 1986.106, provided that no objection has been filed yet, and substitute new findings and/or a new preliminary order. The date of the receipt of the substituted findings or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings and/or preliminary order become final, a party may withdraw objections to the Assistant Secretary's findings and/or preliminary order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw a petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or order, and there are no other pending objections, the Assistant Secretary's findings and/or order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a SPA complaint and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant, and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates the Assistant Secretary's consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ or by the ARB, if the ARB has accepted the case for review. A copy of the settlement will be filed with the ALJ or the ARB as the case may be.

(e) Any settlement approved by the Assistant Secretary, the ALJ, or the ARB will constitute the final order of the Secretary and may be enforced in a United States district court pursuant to 49 U.S.C. 31105(e), as incorporated by 46 U.S.C. 2114(b).

§ 1986.112 Judicial review.

(a) Within 60 days after the issuance of a final order under §§ 1986.109 and 1986.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(b) A final order is not subject to judicial review in any criminal or other civil proceeding.

(c) If a timely petition for review is filed, the record of a case, including the record of proceedings before the ALJ, will be transmitted by the ARB, or the ALJ, as the case may be, to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court.

§ 1986.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order, including one approving a settlement agreement issued under SPA, the Secretary may file a civil action seeking enforcement of the order in the United States district

court for the district in which the violation was found to have occurred.

§ 1986.114 District court jurisdiction of retaliation complaints under SPA.

(a) If there is no final order of the Secretary, 210 days have passed since the filing of the complaint, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, which will have jurisdiction over such an action without regard to the amount in controversy. The action shall, at the request of either party to such action, be tried by the court with a jury.

(b) Within seven days after filing a complaint in federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending on where the proceeding is pending, a copy of the file-stamped complaint. A copy of the complaint also must be served on the OSHA official who issued the findings and/or preliminary order, the Assistant Secretary, and the Associate Solicitor, Division of Occupational Safety and Health, U.S. Department of Labor.

§ 1986.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue such orders as justice or the administration of SPA requires.

[FR Doc. 2013–02539 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–26–P

POSTAL SERVICE

39 CFR Part 501

Authorization To Manufacture and Distribute Postage Evidencing Systems; Discontinued Indicia

AGENCY: Postal Service™.

ACTION: Final rule.

SUMMARY: The Postal Service is amending the rules concerning the manufacture and distribution of postage evidencing systems to clarify that effective January 1, 2016, all postage evidencing systems (postage meters and PC Postage® products) will be required to produce Information-Based Indicia (IBI) or Intelligent Mail® Indicia (IMI) for evidence of pre-paid postage, and that indicia from noncompliant systems will not be recognized as valid postage.

DATES: *Effective date:* January 1, 2016.

FOR FURTHER INFORMATION CONTACT: Marlo Ivey, Business Programs Specialist, Payment Technology, U.S. Postal Service, (202) 268–7613.

SUPPLEMENTARY INFORMATION: In 1999, the Postal Service introduced the Information Based Indicia Program (IBIP). Under IBIP, postage evidencing systems submitted for Postal Service test and evaluation were required to produce IBI—digital indicia that use a two-dimensional (2–D) barcode. In 2012, the next generation of postage evidencing was introduced through the publication of the IMI performance criteria. Both IBI and IMI contain a 2–D barcode that includes revenue security-related data elements and product and service information.

On July 13, 2012, the Postal Service published a proposed rule (77 FR 41336) stating that after January 1, 2016, all postage evidencing systems (postage meters and PC Postage products) will be required to produce IBI or IMI for evidence of pre-paid postage. Indicia from postage evidencing systems that are not IBI-compliant or IMI-compliant will not be recognized as valid after December 31, 2015. The following amendment to 39 CFR part 501 is intended to clarify that noncompliant indicia will be decertified, and will not be recognized as valid after that date.

One comment was received. The vendor understands the need to implement such changes to maintain revenue protection and accountability. However, by discontinuing the non-IBI or non-IMI indicia over such a short period of time it would put them at risk in the market due to the amount of resources needed to complete upgrading their customers in just 3 years.

Our response noted that this proposed rule was expected over the past several years, since the Postal Service has discussed with the industry the need to discontinue these indicia. Since the introduction of the IBI, the Postal Service has made significant investment in infrastructure to enhance the revenue security and processing of the mail. Postage meter indicia that do not bear an IBI or IMI indicia are inconsistent with these enhanced systems and processes and pose a threat to their effectiveness. Also, they do not have the enhanced revenue security features required under today's performance criteria. Recent experiences have demonstrated that these meters pose revenue risks to the Postal Service.

In addition, metering systems producing non-IBI or IMI do not provide the Postal Service and its customers the product level and mail processing visibility needed to manage business in today's information rich environment.

Given these compelling reasons, the Postal Service does not intend to delay the discontinuance of non-IBI or IMI beyond December 31, 2015. We believe this date (about 3 years in the future) provides the best compromise for all parties impacted by this ruling.

List of Subjects in 39 CFR Part 501

Postal Service.

Accordingly, the Postal Service amends 39 CFR part 501 as follows:

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE EVIDENCING SYSTEMS

■ 1. The authority citation for 39 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 410, 2601, 2605, Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended); 5 U.S.C. App. 3.

■ 2. Add § 501.20 to read as follows:

§ 501.20 Discontinued Postage Evidencing Indicia.

(a) *Decertified indicia* (evidence of pre-paid postage) are indicia that have been withdrawn by the Postal Service as valid forms of postage evidence through publication by the Postal Service in the **Federal Register**, or by voluntary withdrawal undertaken by the provider.

(b) Effective January 1, 2016, all Postage Evidencing Systems (postage meters and PC Postage products) will be required to produce Information-Based Indicia (IBI) or Intelligent Mail Indicia (IMI) for evidence of pre-paid postage. Non-IBI and non-IMI indicia will be decertified effective January 1, 2016, and may not be used as a valid form of postage evidence. These decertified indicia will not be recognized as valid postage after December 31, 2015.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–02514 Filed 2–5–13; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0104; FRL–9363–1]

40 CFR Part 180

Endosulfan; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Order reestablishing tolerance.

SUMMARY: EPA has granted an objection to the timing of the revocation of the tolerance for endosulfan on tea. The objection was filed by the Chamber of

Commerce of Zhejiang International Tea Industry. With this document, EPA is amending the tolerances for endosulfan to reestablish a time-limited tolerance for residues on tea.

DATES: This document is effective February 6, 2013.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0104, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Andrea Mojica, Pesticide Reevaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–0122; fax number: (703) 308–8005; email address: *mojica.andrea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

In this document EPA grants an objection by the Chamber of Commerce of Zhejiang International Tea Industry to the timing of a revocation action concerning the endosulfan tolerance on tea. This action may also be of interest to agricultural producers, food manufacturers, or pesticide manufacturers. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop Production (NAICS code 111).
- Animal Production (NAICS code 112).
- Food Manufacturing (NAICS code 311).
- Pesticide Manufacturing (NAICS code 32532).

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0104, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.* The electronic version of EPA's tolerance regulations in 40 CFR part 180 are available through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

II. Response to Objection

A. What action is the Agency taking?

In this order, EPA grants the objection of the Chamber of Commerce of Zhejiang International Tea Industry (''Zhejiang Chamber of Commerce'') to the immediate revocation of the tolerance. On May 4, 2011, EPA proposed to revoke all tolerances for endosulfan (76 FR 25281) (FRL–8870–4). Many of the tolerances were not proposed to be revoked immediately but had proposed revocation dates from 1 to 5 years in the future to allow phase-out of endosulfan. However, as to the tea tolerance, EPA proposed immediate revocation based upon the fact that ''[t]here are no active registrations for use of endosulfan in the United States for growing tea and there may never have been one.'' EPA concluded that ''these tolerances are no longer needed and should be revoked.'' EPA received no comments on proposed revocation of the tea tolerance and accordingly, the tolerance was revoked on September 14, 2011 (76 FR 56648) (FRL–8883–9).

The Zhejiang Chamber of Commerce filed a timely objection to EPA's action noting that endosulfan has been used in China tea production. While the Zhejiang Chamber of Commerce agrees with the phase out of endosulfan, it asserts that for tea, similar to other crops, additional time is needed to transition to an alternative to endosulfan. The Zhejiang Chamber of Commerce seeks a phase out period not to exceed 5 years. Finally, the Zhejiang Chamber of Commerce indicates that it did not comment on the proposed rule because EPA failed to follow established procedures for providing notice of such proposed actions under the World Trade Organization (WTO). The Zhejiang Chamber of Commerce objection can be found in docket number EPA–HQ–OPP–2011–0104 at *http://www.regulations.gov.*

After having reviewed this objection, EPA finds that it erred in basing its immediate revocation of the tea tolerance on the fact that there are no registrations for use of endosulfan on tea in the United States. Tea is not widely grown in the United States and the tea tolerance served as an ''import'' tolerance to allow importation of tea grown in foreign counties to the United States. However, EPA believes that revocation, albeit on a different timeframe, is still appropriate because the objector has indicated that China intends to phase out use of endosulfan on tea.

Accordingly, consistent with the phase out of tolerances for pineapple, strawberry, animal ear tag and vegetables grown for seed uses, EPA is granting the objection and re-instating the tea tolerance with an expiration date of July 31, 2016. This date, which is consistent with the objections, allows time for phase out of endosulfan and transition to alternatives as well as for treated commodities to clear the channels of trade. Although EPA would not normally consider an objection that could have been, but was not, filed as a comment, EPA believes an exception is appropriate here given EPA's failure to provide proper notice of the proposed revocation under WTO procedures to the foreign community.

The granting of this objection is in response to an objection calling to EPA's attention an error in the basis for the original action to revoke the tea tolerance. Granting the objection does not indicate that EPA has re-examined the endosulfan tea tolerance and found it to be in accord with the statutory standards of the Federal Food, Drug and Cosmetic Act (FFDCA) section 408. EPA may in the future initiate revocation proceedings as to this tolerance on other grounds.

B. What is the Agency's authority for taking this action?

Final rules issued under section 408(d)(4)(i) are subject to a statutorily-created administrative review process (21 U.S.C. 346a(g)(2)). Any person may file objections to a section 408(d)(4)(iii) order with EPA and request a hearing on those objections. EPA is required by section 408(g)(2)(C) to issue a final order resolving the objections to the section 408(d)(4)(iii) order (21 U.S.C. 346a(g)(2)(C)).

III. Regulatory Assessment Requirements

This action announces the Agency's final order regarding objections filed under section 408 of FFDCA. As such, this action is an adjudication and not a rule. Under the Administrative Procedures Act (APA), orders are expressly excluded from the definition of a rule. (5 U.S.C. 551(4)). The regulatory assessment requirements imposed on rulemaking do not, therefore, apply to this action.

A. Executive Order 12866 and Executive Order 13563

Because this order is not a ''regulatory action'' as that term is defined in Executive Order 12866 entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993), this action is not subject to review by the Office of Management and Budget (OMB) under Executive Orders 12866 and 13563 entitled ''Improving Regulation and Regulatory Review'' (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), *44 U.S.C. 3501 et seq.*

C. Regulatory Flexibility Act

Since this order is not a rule under the APA (5 U.S.C. 551(4)), and does not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

D. Unfunded Mandates Reform Act; and Executive Orders 13132, and 13175

This order directly regulates growers, food processors, food handlers and food retailers, not States or tribes; nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132 entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175 entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this order. In addition, this order does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531–1538).

E. Executive Orders 13045, 13211 and 12898

As indicated previously, this action is not a ''regulatory action'' as defined by Executive Order 12866. As a result, this action is not subject to Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'', (62 FR 19885, April 23, 1997) and Executive Order 13211 entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'', (66 FR 28355, May 22, 2001). In addition, this order also does not require any special considerations under Executive Order 12898 entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

F. National Technology Transfer and Advancement Act

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

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.* does not apply because this action is not a rule as that term is defined in 5 U.S.C. 804(3).

List of Subjects in 40 CFR Part 180

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

Dated: January 24, 2013.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.182 is amended as follows:

■ i. Redesignate paragraph (a) introductory text and the table as paragraph (a)(1); and

■ ii. Add paragraph (a)(2).

The addition reads as follows:

§ 180.182 Endosulfan; tolerances for residues.

(a) * * *

(2) A tolerance is established for the combined residues of the insecticide endosulfan, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-6,9-methano-2, 4,3-benzodioxathiepin-3-oxide (alpha and beta isomers), and its metabolite endosulfan sulfate, 6,7,8,9,10,10-hexachloro-1,5,5a,6,9,9a-hexahydro-6,9-methano-2, 4,3-benzodioxathiepin-3,3-dioxide in or on the commodity in the following table:

Commodity	Parts per million	Expiration/ revocation date
Tea, dried	24 (reflecting less than 0.1 ppm in beverage tea) resulting from application of the insecticide to growing tea.	7/31/16

* * * * *

[FR Doc. 2013–02392 Filed 2–5–13; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0311; FRL–9374–9]

Thiacloprid; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of thiacloprid in or on pepper; cherry subgroup 12–12A; peach subgroup 12–12B; and plum subgroup 12–12C. Interregional Research Project Number 4 (IR–4) requested the stone fruit tolerance and Bayer CropScience requested the pepper tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective February 6, 2013. Objections and requests for hearings must be received on or before April 8, 2013, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0311, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; email address: *ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

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

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

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.*

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0311 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before April 8, 2013. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0311, by one of the following methods:

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

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

II. Summary of Petitioned-for Tolerance

In the **Federal Register** of June 8, 2010 (75 FR 32463) (FRL–8827–5), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of pesticide petitions by IR–4, 681 US Highway #1 South, North Brunswick, NJ 08902 (PP0E7704) and Bayer CropScience LLC, 2 T. W. Alexander Drive, Research Triangle Park, NC 27709 (PP0F7706). The petitions requested that 40 CFR 180.594 be amended by establishing tolerances for residues of the insecticide thiacloprid ([3-[(6-chloro-3-pyridinyl)methyl]-2-thiazolidinylidene]cyanamide), in or on fruit, stone, group 12 at 0.5 parts per million (ppm) (PP0E7704) and pepper (bell and non-bell) at 1.1 ppm (PP0F7706). Bayer, in its petition (PP0F7706) also proposed to amend 40 CFR 180.594 for residues of thiacloprid by revising the tolerance expression under paragraph (a) to read: Tolerances are established for residues of thiacloprid, including its metabolites and degradates. Compliance with the tolerance levels specified is to be determined by measuring only thiacloprid ([3-[(6-chloro-3-pyridinyl)methyl]-2-thiazolidinylidene] cyanamide). That document referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the levels at which the tolerances are being established as well as some of the nomenclature. The reason for these changes is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a

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

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

A. Toxicological Profile

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

In mammalian systems, the liver appears to be the primary target organ of thiacloprid with some relatively minor effects in the thyroid. Liver effects (enzyme changes, hypertrophy, and histopathology) were noted in the 90-day dog, 2-generation reproduction, 2-year rat, 2-year mouse, and subchronic dermal and inhalation studies. Thyroid effects (hormone levels, weights, follicular cell hypertrophy) were noted in dog, rat, and mouse studies. Increased prostate weight and prostatic hypertrophy were observed in the 90-day dog study, but not in the 1-year dog study. Clinical signs were also noted in dermal (reduced motility, decreased activity, and spastic gait) and 5-day inhalation studies (respiratory effects, signs of ill health, piloerection, reduced mobility, tremors, and increased grip strength).

There was no increase in either qualitative or quantitative susceptibility of fetal animals or pups in the rabbit developmental or the 2-generation rat reproduction studies. In the rabbit developmental study, decreased fetal weights were observed in the presence of maternal toxicity (body weight changes and decreased food consumption and fecal output). In the reproduction study in rats, decreased body weights were seen in pups at the same dose which resulted in thyroid and liver effects in maternal animals.

In the rat developmental toxicity study, there was evidence of increased qualitative susceptibility. Increased resorptions; skeletal retardations and variations; dysplastic humerus, radius and scapulae; and decreased fetal weights were seen in fetuses at the same dose resulting in less severe maternal effects (decreased body weight, body weight gain and food consumption, increased urination, and changes in water consumption). In the developmental neurotoxicity study, increased qualitative susceptibility was also seen: Decreased body weights in both sexes as well as altered performance in passive avoidance testing were seen in offspring animals, while deceased body weight gain and food consumption were seen in maternal animals. However, there is a low degree of concern and no residual uncertainties for the increase in qualitative susceptibility since there are well-characterized dose responses with clear NOAELs and LOAELs in the studies. Additionally, the endpoints and PODs selected for risk assessment are protective of potential developmental effects.

Thiacloprid affects nerve function through inhibition of nicotinic acetylcholine receptors. In the neurotoxicity studies in rats, there was a reduction in motor and locomotor activity, slight tremors and ptosis of the eyelids, decreased hind limb grip strength, altered performance in passive avoidance testing, and altered brain morphometrics. Increased grip strength was also noted in a 5-day inhalation toxicity study. There were no indications of neurotoxicity in the remainder of the submitted toxicity studies.

A battery of genetic toxicity tests did not indicate a mutagenicity or clastogenicity concern. Thiacloprid is classified as ''Likely to be Carcinogenic to Humans'' based on increased uterine tumors in rats, thyroid follicular adenomas in rat and ovarian tumors in mice. A cancer slope factor of 4.06×10^{-2} milligrams/kilogram/day (mg/kg/day)$^{-1}$ was calculated based on the incidence of combined uterine tumors in female rats.

Specific information on the studies received and the nature of the adverse effects caused by thiacloprid as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* on pages 29–34 of the document titled ''Thiacloprid—Human Health Risk Assessment of New Uses on Stone Fruit and Peppers'' in docket ID number EPA–HQ–OPP–2010–0311.

B. Toxicological Points of Departure/Levels of Concern

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

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

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR THIACLOPRID FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (All Populations)	NOAEL = 4.4 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Acute RfD = 0.044 mg/kg/day aPAD = 0.044 mg/kg/day	Co-Critical Studies Developmental Neurotoxicity Study—rat LOAEL = 25.6 mg/kg bw based on offspring effects of altered performance in passive avoidance testing. Acute Neurotoxicity Study—rat LOAEL = 22 mg/kg bw based on a reduction of motor and locomotor activity in females (NOAEL = 3.1 mg/kg bw).
Chronic dietary (All populations)	NOAEL = 1.2 mg/kg/day UF_A = 10x UF_H = 10x FQPA SF = 1x	Chronic RfD = 0.012 mg/kg/day cPAD = 0.012 mg/kg/day	Chronic/Carcinogenicity Study—rat LOAEL = 2.5/3.3 (M/F) mg/kg bw based on liver hypertrophy and cytoplasmic changes as well as induction of enzymes, thyroid epithelial hypertrophy in males and retinal degeneration in females.
Cancer (Oral, dermal, inhalation)	''Likely to be Carcinogenic to Humans'' based on thyroid tumors in male rats, uterine tumors in rats and ovarian tumors in mice. Cancer slope factor = 4.06×10^{-2} $(mg/kg/day)^{-1}$		

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

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to thiacloprid, EPA considered exposure under the petitioned-for tolerances as well as all existing thiacloprid tolerances in 40 CFR 180.594. EPA assessed dietary exposures from thiacloprid in food as follows:

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

Such effects were identified for thiacloprid. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA), National Health and Nutrition Examination Survey, What We Eat in America, (NHANES/WWEIA). This dietary survey was conducted from 2003 to 2008. The acute assessment was based on tolerance-level residues and 100 percent crop treated (PCT) assumptions.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA NHANES/WWEIA. This dietary survey was conducted from 2003 to 2008. The chronic assessment was based on tolerance-level residues and 100 PCT assumptions.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. If quantitative cancer risk assessment is appropriate, cancer risk may be quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that thiacloprid should be classified as ''Likely to be Carcinogenic to Humans'' and a linear approach has been used to quantify cancer risk.

The cancer analysis is partially refined, using average residue field trial data, and estimated PCT data for existing and proposed new uses as appropriate.

iv. *Anticipated residue and PCT information.* Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such Data Call-Ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition A: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition B: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition C: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

In the cancer risk assessment, the Agency estimated the PCT for existing uses as follows: Apples, 10%; pears, 5%.

In most cases, EPA uses available data from USDA/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing

use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

In the cancer risk assessment, the Agency estimated the PCT for new uses as follows: Peaches, 43%; peppers, 45%.

EPA estimates of the PCT for new uses of thiacloprid represent the upper bound of use expected during the pesticide's initial 5 years of registration; that is, PCT for new uses for thiacloprid is a threshold of use that EPA is reasonably certain will not be exceeded for each registered use site. The PCT for new uses recommended for use in the chronic dietary assessment is calculated as the average PCT of the market leader or leaders, (*i.e.,* the one(s) with the greatest PCT) on that site over the three most recent years of available data. The PCT for new uses recommended for use in the acute dietary assessment is the maximum observed PCT over the same period. Comparisons are only made among pesticides of the same pesticide types (*e.g.,* the market leader for insecticides on the use site is selected for comparison with a new insecticide). The market leader included in the estimation may not be the same for each year since different pesticides may dominate at different times.

Typically, EPA uses USDA/NASS as the source data because it is publicly available and directly reports values for PCT. When a specific use site is not reported by USDA/NASS, EPA uses proprietary data and calculates the PCT given reported data on acres treated and acres grown. If no data are available, EPA may extrapolate PCT for new uses from other crops, if the production area and pest spectrum are substantially similar.

A retrospective analysis to validate this approach shows few cases where the PCT for the market leaders were exceeded. Further review of these cases identified factors contributing to the exceptionally high use of a new pesticide. To evaluate whether the PCT for new uses for thiacloprid could be exceeded, EPA considered whether there may be unusually high pest pressure, as indicated in emergency exemption requests for thiacloprid; the pest spectrum of the new pesticide in comparison with the market leaders and whether the market leaders are well established for that use; and whether pest resistance issues with past market leaders provide thiacloprid with significant market potential. Given currently available information, EPA concludes that it is unlikely that actual PCT for thiacloprid will exceed the estimated PCT for new uses during the next 5 years.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition A, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions B and C, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which thiacloprid may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for thiacloprid in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of thiacloprid. The drinking water estimates were also refined to account for both percent cropped area and for the impact of drinking water treatment processes. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of thiacloprid for acute exposures are estimated to be 18 parts per billion (ppb) for surface water and 0.25 ppb for ground water, for chronic exposures for non-cancer assessments are estimated to be 2.3 ppb for surface water and 0.25 ppb for ground water, and for chronic exposures for cancer assessments are estimated to be 1.2 ppb for surface water and <0.25 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the acute dietary risk assessment, the water concentration value of 18 ppb was used to assess the contribution to drinking water. For the chronic dietary risk assessment, the water concentration of value 2.3 ppb was used to assess the contribution to drinking water. For the cancer dietary risk assessment, the water concentration of value 1.2 ppb was used to assess the contribution to drinking water.

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

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

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

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

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity

and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There was no increase in either qualitative or quantitative susceptibility of fetal animals or pups in the rabbit developmental or the 2-generation rat reproduction studies. In the rabbit developmental study, decreased fetal weights were observed in the presence of maternal toxicity (body weight changes and decreased food consumption and fecal output). In the reproduction study in rats, decreased body weights were seen in pups at the same dose which resulted in thyroid and liver effects in maternal animals.

In the rat developmental study, there was an increase in qualitative susceptibility based on an increase in resorptions, skeletal retardations and variations, dysplastic humerus, radius and scapulae, as well as decreased fetal weights at the same dose (50 mg/kg/day) at which less severe maternal effects were noted (decreased body weight, body weight gain and food consumption, in addition to increased urination and changes in water consumption). In the developmental neurotoxicity study, increased qualitative susceptibility was also seen. Decreased body weights in both sexes as well as altered performance in passive avoidance testing were seen in offspring animals, while decreased body weight gain and food consumption were seen in maternal animals. However, there is a low degree of concern and no residual uncertainties for the increase in qualitative susceptibility since there is a well-characterized dose response with clear NOAELs and LOAELs in the studies. Additionally, the endpoints and PODs selected for risk assessment are protective of potential developmental effects.

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

i. The toxicology database concerning infants and children is considered to be complete with the exception of an immunotoxicity study. Submitted studies included: Developmental rat and rabbit, 2-generation reproduction in rats as well as acute, subchronic and developmental neurotoxicity in rats. Although an immunotoxicity study has not been received by the Agency, there is relatively little concern as it does not appear that thiacloprid directly targets the immune system based on available studies. Although there were increases in the incidence and severity of mesenteric and mandibular lymph node vacuolization in a cancer study in mice, the effects were seen at very high doses following long-term treatment. Additionally, thiacloprid does not belong to a class of chemicals (*e.g.,* the organotins, heavy metals, halogenated aromatic hydrocarbons) that would be expected to be immunotoxic. Furthermore, there were no indications of immunotoxicity in other studies in the toxicology database. The Agency does not believe that conducting the study will result in a lower POD than that currently used for overall risk assessment; therefore, a database uncertainty factor (UF_{DB}) is not needed to account for the lack of the study.

ii. Acute, subchronic and developmental neurotoxicity studies in rats are available for thiacloprid. In the acute study, there were reductions in motor and locomotor activities in females and slight tremors and ptosis of the eyelids in males. In the subchronic neurotoxicity study, decreased hind limb grip strength was seen in males. Increased grip strength was noted in a 5-day inhalation toxicity study. In the developmental neurotoxicity study, altered performance in passive avoidance testing and a 4% decrease in the size of the corpus striatum region of the brain were seen in offspring animals at the highest dose tested (HDT). No data were received by the Agency regarding the mid- and low-dose brain measurements. However, the lack of a NOAEL for brain morphometric measurements in this study does not warrant an additional uncertainty factor since the decrease in weight at the high dose is considered marginal and variable, and a lower dose would most likely result in less of an effect (the HDT was 10x greater than the lowest dose tested), and the endpoints and PODs selected for risk assessment are protective of the slight morphometric changes observed at the high dose. Even if a 10x factor is applied to the dose where the slight morphometric changes were seen in the developmental neurotoxicity study, the result would be a POD comparable to those currently selected for risk assessment. Therefore, the PODs currently selected are protective of any potential effects. There were no indications of neurotoxicity in the remainder of the submitted toxicity studies.

iii. As noted in Unit III.D.2., although there was an increase in qualitative susceptibility in the rat developmental study and developmental neurotoxicity study, there is a low degree of concern and no residual uncertainties for the increase in qualitative susceptibility since there is a well-characterized dose response with clear NOAELs and LOAELs.

iv. There are no residual uncertainties identified in the exposure databases. The acute and chronic dietary food exposure assessments were performed based on 100 PCT and tolerance-level residues. The cancer assessment used PCT and anticipated residues for new and registered uses. This is based on reliable data and will not underestimate the exposure and risk. The drinking water residues used in this assessment were partially refined to account for PCT area and drinking water treatment processes. However, these drinking water estimates are still considered to be conservative and upper-bound. These assessments will not underestimate the exposure and risks posed by thiacloprid.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to thiacloprid will occupy 19% of the aPAD for infants less than 1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to thiacloprid from food and water will utilize 26% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for thiacloprid.

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

(considered to be a background exposure level).

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

4. *Aggregate cancer risk for U.S. population.* Using the exposure assumptions described in this unit for cancer, EPA has concluded that the cancer risk estimate from exposure to thiacloprid through food and water for the U.S. population is 2×10^{-6}, which is below the Agency's level of concern.

EPA generally considers cancer risks in the range of 10^{-6} or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the log scale; for example, risks falling between 3×10^{-7} and 3×10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described above, cancer risk should generally not be assumed to exceed the benchmark level of concern of the range of 10^{-6} until the calculated risk exceeds approximately 3×10^{-6}. This is particularly the case where some conservatism is maintained in the exposure assessment. Here, substantial conservatism is incorporated by the use of food residue values from field trial studies using maximum application procedures and upper-bound modeled drinking water residues in the exposure assessment. Accordingly, EPA has concluded the cancer risk for all existing thiacloprid uses and the uses associated with the tolerances established in this action fall within the range of 1×10^{-6} and are thus negligible.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (high performance liquid chromatography-mass spectrometer/mass spectrometer (HPLC–MS/MS)) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

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

The Codex has established MRLs for thiacloprid in or on sweet peppers (including pimento or pimiento) at 1 ppm and stone fruit, crop group 12 at 0.5 ppm. These MRLs are the same as the tolerances being established for thiacloprid in the United States on these crops.

C. Revisions to Petitioned-for Tolerances

The Agency has modified the level at which the tolerance is being established for pepper from the proposed level of 1.1 ppm to 1.0 ppm in order to harmonize with the Codex MRL.

EPA has also revised the request for a tolerance for thiacloprid on the stone fruit group 12. Subsequent to the filing of the petition requesting a stone fruit group 12 tolerance, EPA issued a final rule that revised the crop grouping regulations (77 FR 50617, August 22, 2012) (FRL–9354–3). As part of this action, EPA expanded and revised the existing stone fruit group 12. Changes to crop group 12 included adding the following commodities: Japanese apricot, capulin, black cherry, nanking cherry, Chinese jujube, American plum, beach plum, Canada plum, cherry plum, Klamath plum, and sloe; creating new subgroups (the cherry subgroup 12–12A, the peach subgroup 12–12B, and the plum subgroup 12–12C); and naming the new crop group ''Crop Group 12–12: Stone Fruit Group.'' EPA indicated in the August 22, 2012 final rule as well as the earlier November 9, 2011 proposed rule (76 FR 69693) (FRL–8887–8) that, for existing petitions for which a notice of filing had been published, the Agency would attempt to conform these petitions to the rule. Therefore, consistent with this rule, and upon review of the petition, the Agency concluded that it was appropriate to establish tolerances for the cherry subgroup 12–12A and the peach subgroup 12–12B at 0.5 ppm, and the plum subgroup 12–12C at 0.05 ppm. A single tolerance for the entire stone fruit group 12–12 could not be established due to the significantly different residue levels in the trials with plums as compared to the other representative commodities in the stone fruit crop group and thus tolerances were established for each of the three separate subgroups.

V. Conclusion

Therefore, tolerances are established for residues of the insecticide thiacloprid, including its metabolites and degradates, in or on pepper at 1.0 ppm; cherry subgroup 12–12A at 0.5 ppm; peach subgroup 12–12B at 0.5 ppm; plum subgroup 12–12C at 0.05 ppm. Compliance with the tolerance levels is to be determined by measuring only thiacloprid, (Z)-[3-[(6-chloro-3-pyridinyl)methyl]-2-thiazolidinylidene]cyanamide.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This final rule does not contain any information collections

subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1501 *et seq.*).

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

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: January 29, 2013.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.594, in paragraph (a) revise the introductory text and add alphabetically the following commodities to the table to read as follows:

§ 180.594 Thiacloprid; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide thiacloprid, including its metabolites and degradates in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only thiacloprid ([3-[(6-chloro-3-pyridinyl)methyl]-2-thiazolidinylidene] cyanamide) in or on the commodity.

Commodity	Parts per million
* * * * *	
Cherry subgroup 12–12A ...	0.5
* * * * *	
Peach subgroup 12–12B	0.5
Pepper	1.0
Plum subgroup 12–12C	0.05
* * * * *	

* * * * *

[FR Doc. 2013–02692 Filed 2–5–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 65

[Docket ID FEMA–2013–0002]

Changes in Flood Elevation Determinations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: Modified Base (1% annual-chance) Flood Elevations (BFEs) are finalized for the communities listed below. These modified BFEs will be used to calculate flood insurance premium rates for new buildings and their contents.

DATES: The effective dates for these modified BFEs are indicated on the following table and revise the Flood Insurance Rate Maps (FIRMs) in effect for the listed communities prior to this date.

ADDRESSES: The modified BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

FOR FURTHER INFORMATION CONTACT: Luis Rodriguez, Chief, Engineering Management Branch, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646–4064, or (email) *Luis.Rodriguez3@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below of the modified BFEs for each community listed. These modified BFEs have been published in newspapers of local circulation and ninety (90) days have elapsed since that publication. The Deputy Associate Administrator for Mitigation has resolved any appeals resulting from this notification.

The modified BFEs are not listed for each community in this notice. However, this final rule includes the address of the Chief Executive Officer of the community where the modified BFE determinations are available for inspection.

The modified BFEs are made pursuant to section 206 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

For rating purposes, the currently effective community number is shown and must be used for all new policies and renewals.

The modified BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or to remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified BFEs, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities.

These modified BFEs are used to meet the floodplain management requirements of the NFIP and also are used to calculate the appropriate flood insurance premium rates for new buildings built after these elevations are made final, and for the contents in those buildings. The changes in BFEs are in accordance with 44 CFR 65.4.

National Environmental Policy Act. This final rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Consideration. An environmental impact assessment has not been prepared.

Regulatory Flexibility Act. As flood elevation determinations are not within the scope of the Regulatory Flexibility Act, 5 U.S.C. 601–612, a regulatory flexibility analysis is not required.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This final rule involves no policies that have federalism implications under Executive Order 13132, Federalism.

Executive Order 12988, Civil Justice Reform. This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 65

Flood insurance, Floodplains, Reporting and recordkeeping requirements.

Accordingly, 44 CFR part 65 is amended to read as follows:

PART 65—[AMENDED]

■ 1. The authority citation for part 65 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p.376.

§ 65.4 [Amended]

■ 2. The tables published under the authority of § 65.4 are amended as follows:

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Texas:					
Bexar (FEMA Docket No.: B–1234).	City of San Antonio (11–06–1217P).	September 27, 2011; October 4, 2011; *The San Antonio Express-News.*	The Honorable Julián Castro, Mayor, City of San Antonio, 100 Military Plaza, San Antonio, TX 78205.	September 20, 2011	480045
Grimes (FEMA Docket No.: B–1237).	Unincorporated areas of Grimes County (11–06–2364P).	November 9, 2011; November 16, 2011; *The Navasota Examiner.*	The Honorable Betty Shiflett, Grimes County Judge, 100 Main Street, Anderson, TX 77830.	May 2, 2012	481173
Guadalupe (FEMA Docket No.: B–1244).	City of Schertz (11–06–1933P).	November 28, 2011; December 5, 2011; *The Daily Commercial Recorder.*	The Honorable Harold Baldwin, Mayor, City of Schertz, 1400 Schertz Parkway, Schertz, TX 78154.	April 3, 2012	480269
Guadalupe (FEMA Docket No.: B–1244).	City of Selma (11–06–1933P).	November 28, 2011; December 5, 2011; *The Daily Commercial Recorder.*	The Honorable Tom Daly, Mayor, City of Selma, 9375 Corporate Drive, Selma, TX 78154.	April 3, 2012	480046
Hays (FEMA Docket No.: B–1248).	City of Buda (11–06–4776P).	December 7, 2011; December 14, 2011; *The Hays Free Press.*	The Honorable Sarah Mangham, Mayor, City of Buda, 121 Main Street, Buda, TX 78610.	April 12, 2012	481640
Tarrant (FEMA Docket No.: B–1225).	City of Keller (10–06–0163P).	April 8, 2010; April 15, 2010; *The Fort Worth Star-Telegram.*	The Honorable Pat McGrail, Mayor, City of Keller, 1100 Bear Creek Parkway, Keller, TX 76248.	April 1, 2010	480602
Wichita (FEMA Docket No.: B–1244).	City of Wichita Falls (11–06–1179P).	November 29, 2011; December 6, 2011; *The Times Record News.*	The Honorable Glenn Barham, Mayor, City of Wichita Falls, 1300 7th Street, Wichita Falls, TX 76301.	April 4, 2012	480662

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

James A. Walke,

Acting Deputy Associate Administrator for Mitigation, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2013–02597 Filed 2–5–13; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[IB Docket No. 06–154; FCC 12–116]

2006 Biennial Regulatory Review—Revision of the Commission's Rules

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission amends various provisions of the Commission's rules pertaining to licensing and operation of satellite service radio stations. With two exceptions, the amendments are non-substantive; that is, they neither impose new requirements nor eliminate or alter existing requirements. The two substantive amendments adopted in this Report and Order amend the rules in minor ways by eliminating requirements to identify a radio service and station location in correspondence and codifying an established practice of allowing applicants to cross-reference, rather than re-submit, previously filed information regarding non-U.S.-licensed satellites. Collectively, the changes adopted in this Report and Order will facilitate preparation of earth and space

station applications, promote compliance with the Commission's operating rules, and ease administrative burdens for applicants, licensees, and the Commission.

DATES: Effective March 8, 2013, except the amendments of 47 CFR 25.110 and 25.137, which contain modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The Commission will publish a document in the **Federal Register** announcing such approval and the effective date of these amendments.

FOR FURTHER INFORMATION CONTACT: William Bell, Satellite Division, International Bureau, at 202–418–0741 or via email at *William.Bell@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of Report and Order IB Docket No. 06–154, FCC 12–116, adopted September 24, 2012 and released September 28, 2012. The full text of the Report and Order is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or via email to FCC@BCPIWEB.com. When ordering copies from BCPI please provide the FCC document number (FCC12–116). The full text may also be downloaded at: *http://www.fcc.gov.* Alternative formats are available to person with disabilities by sending an email to *fcc504@fcc.gov* or calling the Consider & Governmental Affairs Bureau at 202–418–0530 (voice), or 202–418–0432 (tty).

Synopsis

1. The Commission has regularly taken action to revise and ''streamline'' its satellite and earth station licensing rules when warranted. In 2010, we proposed a number of streamlining changes to part 25 in a Notice of Proposed Rulemaking in this proceeding. Three parties filed comments on the NPRM: Comtech Mobile Datacom Corp. (Comtech), Globalstar Licensee LCC and affiliated companies (collectively, ''Globalstar''), and the Satellite Industry Association (SIA). No reply comments were filed.

2. Most of the changes proposed in the NPRM are unopposed and self-explanatory. These changes delete unnecessary definitions or superfluous text, add necessary definitions, clarify existing definitions, clarify revisions to rules, make format changes, delete or amend obsolete cross-references, and correct grammatical, spelling, and typographical errors. We adopt these changes without discussion.

3. In the following paragraphs, we discuss the changes that commenters opposed. We also discuss alternative proposals and additional rule changes suggested by the commenters. Finally, we discuss several non-substantive changes that we did not propose in the NPRM and that are not raised in the comments.

Definitions and Uniform Terminology

4. Section 25.201 defines technical terms pertaining to satellite communications services. In the NPRM, we proposed to amend section 25.201 in several respects. Although, as noted above, the majority of these amendments were unopposed, we received comments on our proposals to change the definitions of ''Fixed-Satellite Service'' and ''Mobile-Satellite Service'' and to add a definition of ''feeder link.'' SIA recommends retaining the existing definitions of ''Fixed-Satellite Service'' and ''Mobile-Satellite Service'' because those existing definitions are identical to corresponding definitions in section 2.1 of the Commission's rules and in the ITU's Radio Regulations. Similarly, SIA recommends that we define ''feeder link'' in section 25.201 in the same terms as it is defined in section 2.1. We agree and adopt SIA's recommendations. Globalstar also notes that the term ''Mobile-Satellite Service'' is not consistently capitalized and hyphenated in part 25 and recommends that we use the form ''Mobile-Satellite Service,'' which is used in section 2.1, consistently in part 25. We adopt this recommendation. Similarly, we correct inconsistent capitalization and hyphenation of the term ''Fixed-Satellite Service'' in part 25.

5. The NPRM also proposed to add a definition in section 25.201 for ''mobile earth terminal'' and its acronym, ''MET,'' which are synonymous with ''mobile earth station.'' The term ''mobile earth station'' is defined in both section 25.201 and section 2.1 and is used in many provisions in part 25. Globalstar recommends that instead of adding a definition for ''mobile earth terminal'' and ''MET,'' we replace these terms with ''mobile earth station.'' Because using multiple terms to mean the same thing may cause confusion, we adopt this recommendation, with one modification: we replace ''MET'' in section 25.149(c) with ''mobile station,'' which is more appropriate in that context than ''mobile earth station.''

6. In addition, commenters propose several changes to section 25.201 that were not included in the NPRM. Globalstar recommends adding a definition of ''Big LEO'' in section 25.201 or, in the alternative, deleting the term from section 25.149. The term ''Big LEO'' appears in section 25.254 of the Commission's rules, as well as in section 25.149. As used in these rule sections, ''Big LEO'' is synonymous with ''1.6/2.4 GHz Mobile-Satellite Service,'' which is defined in section 25.201. For the sake of consistency, we amend sections 25.149 and 25.254 to delete the term ''Big LEO'' and replace it with the defined term ''1.6/2.4 GHz Mobile-Satellite Service.''

7. Globalstar also advocates deleting the definition of ''land mobile earth station'' from section 25.201 because Land Mobile Satellite Service is not a ''recognized'' service in part 25. We understand Globalstar to mean by this that there are no rules in part 25 that apply only to operation of land mobile earth stations, as opposed to other types of earth stations. To the contrary, section 25.213(a)(1) includes a provision that applies exclusively to land mobile earth stations. Specifically, this rule bars 1.6/2.4 GHz land mobile earth stations from operating within defined geographic protection zones during periods of radioastronomy observation in the 1610.6–1613.8 MHz band. Because the term is used in a substantive provision in part 25, we decline to remove its definition from section 25.201.

Cross References

8. Section 25.109 indicates that certain types of satellite services are subject to licensing under rules not included in part 25. Specifically, it indicates that stations in the Amateur Satellite Service are licensed under part 97 and that ship earth stations in the Maritime Mobile Satellite Service are licensed under parts 80 and 83. We proposed to delete the cross-reference to part 83, which no longer exists, and insert a new paragraph to indicate that aircraft earth stations in the Aeronautical Mobile Satellite Service are licensed under part 87.

9. SIA and Comtech raised concern that these proposed amendments might incorrectly give the impression that all earth stations on ships or airplanes must be licensed under parts 80 and 87. We have modified the text of the cross-references to parts 80 and 87 to avoid fostering this misunderstanding.

10. We also proposed to insert a proviso in section 25.109 that Amateur Satellite operators must comply with section 25.111(b), which requires satellite service applicants and licensees to ''provide the Commission with all information it requires for the Advance Publication, Coordination, and Notification of frequency assignments pursuant to the International [Telecommunication Union's] Radio Regulations.'' We are not adopting this proposed amendment because there is an existing provision in part 97 of the Commission's rules, section 97.207(g), that requires amateur satellite operators to file pre-launch notifications with the Commission and include any information needed for international coordination under relevant ITU regulations.

11. The NPRM also proposed to add cross-references in section 25.109 to additional rule parts that include relevant requirements. Upon further review, we have decided not to add additional cross-references to broadly applicable provisions in parts 1, 2, and 17 of the Commission's rules. These proposed cross-references would be redundant and could cause confusion. On our own motion, however, we add a cross reference to part 5, which contains licensing rules for experimental operation, including experimental satellite service operation.

12. Section 25.140 is captioned ''Qualifications of fixed-satellite space station licensees,'' although most of the provisions in that rule section pertain to applications for 17/24 GHz Broadcasting-Satellite Service (BSS) space stations. We proposed to amend the caption to indicate that the section includes rules for 17/24 GHz BSS applicants. We adopt this proposed amendment with a minor change to make the caption more accurate. The caption will now read, ''Further requirements for license applications for space stations in the Fixed-Satellite Service and 17/24 GHz Broadcasting-Satellite Service.'' The NPRM also proposed minor clarifying changes in dection 25.140(a). SIA asks us to further amend section 25.140(a) by deleting the statement that applications for new Fixed-Satellite Service space stations ''shall comply with the requirements established in Report and Order, CC Docket No. 81–704.'' SIA contends that the cross-reference to the Report and Order is unnecessary because all currently relevant substantive requirements adopted in that order are incorporated elsewhere in the Commission rules. We agree. Further, the other provisions of section 25.140(a) repeat, in substance, provisions in other paragraphs of section 25.140 and in sections 25.111(a) and 25.112(a)(2). We therefore remove and reserve section 25.140(a).

13. Section 25.146(a) While not proposed in the NPRM, we adopt a recommendation from SIA to correct erroneous references to an ITU Recommendation in section 25.146(a). Section 25.146(a) sets forth requirements for license applications for non-geostationary-orbit FSS space stations operating in the 10.7–14.5 GHz band. Specifically, we amend references to Recommendation ITU–R B.O.1503 to reference Recommendation ITU–R S.1503 instead.

14. Section 25.161(b) provides that a station license will be automatically terminated upon the expiration of the license period, ''unless an application for renewal of the license has been filed with the Commission pursuant to section 25.120(e).'' Globalstar points out that the cross-reference to section 25.120(e) is incorrect and that section 25.121(e) should be referenced instead. We amend section 25.161(b) to effect this correction.

15. Section 25.276(c) states that ''[t]ransmission to or from foreign points over space stations in the Fixed-Satellite Service, other than those operated by the International Telecommunications Satellite Organization and Inmarsat, are subject to the policies set forth in the Report and Order, adopted January 19, 1996 in IB Docket No. 95–41.'' The cross-referenced Commission document is the ''*DISCO I*'' order that eliminated the previous distinction between domestic satellites and international separate systems, permitting all U.S.-licensed satellites to provide both domestic and international services. In the NPRM, we proposed to amend this provision by deleting the phrase ''other than those operated by the International Telecommunications Satellite Organization and Inmarsat'' and replacing the cross-reference to *DISCO I* with a reference to ''the requirements set forth in section 25.137 of this Chapter.'' SIA recommends that we delete section 25.276(c) in its entirety, since *DISCO I* did not impose any requirements that are not prescribed elsewhere in part 25. We agree and delete section 25.276(c).

16. Section 25.137(b) states that anyone requesting authority to operate a U.S. earth station with a non-U.S.-licensed space station must file exhibits providing legal and technical information for the non-U.S.-licensed space station. We proposed to amend this provision to add that the submission must include a completed Schedule S to FCC Form 312. SIA agrees with this proposed change but requests that we insert an additional sentence stating that an applicant seeking authority to communicate via a foreign-licensed space station that has previously been declared eligible for U.S. market access need not re-file the information otherwise required by section 25.137(b) but may instead cross-reference the market access grant. SIA maintains that this proposed change would conform to current practice and reduce confusion. We agree with this recommendation and implement it, adding text to indicate that the cross-referenced grant must pertain to operation in the same service and frequency band(s). By logical extension, we also add text to indicate that the requisite information may be provided by cross-referencing a pending application, which is also consistent with established practice.

17. Section 25.202(a)(1) lists some, but not all, of the frequency bands that are allocated for use by stations in the Fixed-Satellite Service, with notations regarding requirements or limitations pertaining to operation in particular bands. In the NPRM, we proposed to adopt a revised list of FSS frequencies that would include previously omitted FSS frequency bands and also include additional notations cross-referencing provisions in the Table of Frequency Allocations. After further consideration, we have decided to insert a general instruction to refer to the Table of Allocations and delete band-specific annotations that merely repeat or cross-reference provisions in the Table. We have also corrected several errors that SIA pointed out in its comments.

18. Section 25.210 Section 25.210(d) of the Commission's rules states that all space stations in the Fixed-Satellite Service operating in the 20/30 GHz bands shall employ ''state-of-the-art full frequency reuse.'' Section 25.210(f) prescribes an identical requirement for FSS space stations operating in other specified frequency bands, as well as for Broadcasting-Satellite Service space stations operating in the 17.3–17.8 GHz (space-to-Earth) band. In the NPRM, we proposed to consolidate these two rule provisions. SIA supports this proposed change, which we adopt.

19. SIA also advocates amending section 25.210(f) by inserting a sentence stating that the full frequency reuse requirement does not apply to telemetry, tracking, and command transmissions at the edges of frequency bands assigned for FSS operation. We adopt this change. This is a clarifying, rather than a substantive amendment, as we have never construed the full frequency reuse rule to apply to

telemetry, tracking, and command operations.

20. Section 25.210(k) states that the co-polarized and cross-polarized performance of FSS space station antennas must be measured, both within the primary coverage area to facilitate coordination with other Commission space station licensees and outside the primary coverage area to facilitate international frequency coordination. The rule also states that licensees must submit the measurements to the Commission within thirty days after completing preliminary in-orbit testing. We proposed to delete the phrases ''to facilitate coordination with other Commission space station licensees'' and ''to facilitate international frequency coordination,'' which are of no substantive import. SIA suggests, instead, that we delete section 25.210(k) in its entirety because, according to SIA, it requires licensees to re-submit the same information that section 25.114(d)(3) requires applicants to provide in space station license applications. We do not agree that section 25.210(k) is redundant vis-à-vis section 25.114(d)(3). Section 25.114(d)(3) requires license applicants to provide predicted antenna gain contours, whereas section 25.210(k) requires licensees to submit measured antenna performance data obtained from in-orbit testing. Therefore, we retain the requirement in section 25.210(k), with the non-substantive changes proposed in the NPRM.

21. Finally, we delete the phrase ''in the Fixed-Satellite Service'' from the caption to section 25.210 because this section includes provisions that apply to space stations other than FSS space stations.

22. In its comments on the NPRM, Globalstar recommends significant substantive changes in several provisions in part 25. These recommendations are beyond the scope of this proceeding.

Procedural Matters

23. *Final Regulatory Flexibility Certification.* The Regulatory Flexibility Act of 1980, as amended (RFA) requires that a regulatory flexibility analysis be prepared for rulemaking proceedings unless the agency certifies that ''the rule will not have a significant economic impact on a substantial number of small entities.'' The RFA generally defines the term ''small entity'' as referring to any ''small business,'' ''small organization,'' or ''small governmental jurisdiction.'' The term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). A small organization is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''

24. In this Report and Order, we have decided to amend the text of rule provisions pertaining to the licensing and/or operation of radio stations used for telecommunication via satellite. The amendments will make the rules in question more concise, more coherent, and/or more lucid without changing or eliminating existing regulatory requirements. We certify that these amendments will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the Report and Order, including a copy of this certification, in a report to Congress pursuant to the Congressional Review Act. A copy of the Report and Order and this certification will also be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the **Federal Register**.

25. *Paperwork Reduction Act.* This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. We invite OMB, the general public, and other Federal agencies to comment on the new or modified information collection requirements. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

Ordering Clauses

26. Accordingly, *it is ordered,* pursuant to Sections 4(i), 7(a), 11, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 157(a), 161, 303(c), 303(f), 303(g), 303(r), that Part 25 of the Commission's rules *is amended* as set forth in the Appendix to this Order. The rule revisions in the Appendix will take effect 30 days after a summary of this Report and Order is published in the **Federal Register**, with the exception of the revisions to 47 CFR 25.110 and 25.137. These rule revisions contain modified information collection requirements that require approval by the Office of Management and Budget (OMB) under the PRA. The Federal Communications Commission will publish a document in the **Federal Register** announcing such approval and the relevant effective date.

27. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center shall send a copy of this Report and Order, including the final regulatory flexibility act certification, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. (1981).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 25 as follows:

PART 25—SATELLITE COMMUNICATIONS

■ 1. The authority citation for part 25 is revised to read as follows:

Authority: Interprets or applies Sections 4, 301, 302, 303, 307, 309, 332, and 705 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309, 332, and 705, unless otherwise noted.

§ 25.103 [Amended]

■ 2. In § 25.103, remove and reserve paragraphs (a) through (f).

■ 3. Revise § 25.109 to read as follows:

§ 25.109 Cross-reference.

(a) Space and earth stations in the Amateur Satellite Service are licensed under 47 CFR part 97.

(b) Ship earth stations in the Maritime Mobile-Satellite Service transmitting in the 1626.5–1646.5 MHz band are subject to licensing under 47 CFR part 80.

(c) Earth stations in the Aeronautical Mobile-Satellite (Route) Service are subject to licensing under 47 CFR part 87.

(d) Space and earth stations in the Experimental Radio Service may be subject to licensing under 47 CFR part 5.

■ 4. In § 25.110, revise paragraphs (a) and (c) to read as follows:

§ 25.110 Filing of applications, fees, and number of copies.

(a) Applications may be filed by going online at licensing.fcc.gov/myibfs and submitting the application through the International Bureau Filing System (IBFS).

* * * * *

(c) All correspondence concerning any application must identify:

(1) The applicant's name,

(2) The call sign of the space station or earth station, and

(3) The file number of the application.

* * * * *

■ 5. In § 25.111, revise the first and last sentences in paragraph (c) to read as follows:

§ 25.111 Additional information.

* * * * *

(c) In the Direct Broadcast Satellite service, applicants and licensees shall also provide the Commission with all information it requires in order to modify the plans for the Broadcasting-Satellite Service (BSS) in Appendix 30 of the ITU Radio Regulations (RR) and associated feeder-link plans in Appendix 30A of the ITU RR, if the system has technical characteristics differing from those specified in the Appendix 30 BSS Plans, the Appendix 30A feederlink Plans, Annex 5 to Appendix 30, or Annex 3 to Appendix 30A. * * * Applicants and licensees shall also provide the Commission with the information required by Appendix 4 of the ITU RR for advance publication and notification or coordination of the frequencies to be used for tracking, telemetry and control functions of DBS systems.

■ 6. In § 25.113, revise the first sentence of paragraph (a) to read as follows:

§ 25.113 Station licenses and launch authority.

(a) Construction permits are not required for earth stations. * * *

* * * * *

■ 7. In § 25.114, in paragraph (d)(7), remove ''fixed-satellite service'' and ''broadcasting-satellite service'' and add in their place ''Fixed-Satellite Service'' and ''Broadcasting-Satellite Service'', respectively and revise paragraph (d)(12) to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(d) * * *

(12) Applications for authorizations in the non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) in the 10.7–14.5 GHz bands shall also provide all information specified in § 25.146.

* * * * *

■ 8. In § 25.115, revise paragraph (a)(2)(i) and in paragraph (f) remove ''fixed-satellite service'' and add in its place ''Fixed-Satellite Service''.

The revision reads as follows:

§ 25.115 Application for earth station authorizations.

(a) * * *

(2) * * *

(i) The earth station will operate in the 3700–4200 MHz and 5925–6425 MHz bands and/or in the 11.7–12.2 GHz and 14.0–14.5 GHz bands; and

* * * * *

■ 9. In § 25.116, revise the third sentence of paragraph (e) to read as follows:

§ 25.116 Amendments to applications.

* * * * *

(e) * * * Amendments to earth station applications must be filed on Form 312 and Schedule B.

■ 10. In § 25.117, add paragraph (b), revise paragraph (c), and add paragraph (e) to read as follows:

§ 25.117 Modification of station licenses.

* * * * *

(b) Both earth station and space station modification applications must be filed electronically through the International Bureau Filing System (IBFS) in accordance with the applicable provisions of part 1, subpart Y of this chapter.

(c) Applications for modification of earth station authorizations must be submitted on FCC Form 312, Main Form and Schedule B. Applications for modification of space station authorizations must be submitted on FCC Form 312, Main Form and Schedule S. Only those items that change need to be specified, provided that the applicant certifies that the remaining information has not changed.

* * * * *

(e) Any application for modification of authorization to extend a required date of completion, as set forth in § 25.133 for earth station authorizations or § 25.164 for space stations, or included as a condition of any earth station or space station authorization, must include a verified statement from the applicant:

(1) That states that the additional time is required due to unforeseeable circumstances beyond the applicant's control, describes these circumstances with specificity, and justifies the precise extension period requested; or

(2) That states there are unique and overriding public interest concerns that justify an extension, identifies these interests and justifies a precise extension period.

* * * * *

■ 11. In § 25.119, revise paragraph (b)(2) to read as follows:

§ 25.119 Assignment or transfer of control of station authorization.

* * * * *

(b) * * *

(2) Effect any change in a controlling interest in the ownership of the licensee, including changes in legal or equitable ownership.

* * * * *

§ 25.131 [Amended]

■ 12. In 47 CFR 25.131(b), remove the words ''fixed-satellite service'' and ''fixed service'' and add in their place the words ''Fixed-Satellite Service'' and ''Fixed Service''.

■ 13. In § 25.133, revise the first sentence of paragraph (a)(1) and revise paragraph (a)(2) to read as follows:

§ 25.133 Period of construction; certification of commencement of operation.

(a)(1) Each license for an earth station governed by this part, except for mobile earth stations, shall specify as a condition therein the period in which construction of facilities must be completed and station operation commenced. * * *

(2) Each license for mobile earth stations shall specify as a condition therein the period in which station operation must be commenced. The networks in which the mobile earth stations will be operated must be brought into operation within 12 months from the date of the license grant except as may be determined by the Commission for any particular application.

* * * * *

■ 14. In § 25.134, revise the section heading, remove and reserve paragraph (d), and revise paragraph (h) to read as follows:

§ 25.134 Licensing provisions for Very Small Aperture Terminal (VSAT) and C-band Small Aperture Terminal (CSAT) networks.

* * * * *

(h) VSAT operators licensed pursuant to this section are prohibited from using remote earth stations in their networks that are not designed to stop transmission when synchronization with the signal received from the target satellite fails.

■ 15. In § 25.136, remove the words ''Mobile Satellite Services'' in the section heading and the introductory text and add in their place words ''Mobile-Satellite Service''; remove the words ''Mobile Satellite Service'' in the first sentence of paragraph (c) and add in their place the words ''Mobile-Satellite Service''; and revise paragraph (d) introductory text and the first

sentence in paragraph (e) to read as follows:

§ 25.136 Licensing provisions for user transceivers in the 1.6/2.4 GHz, 1.5/1.6 GHz, and 2 GHz Mobile-Satellite Services.

* * * * *

(d) Any mobile earth station (MES) associated with the Mobile-Satellite Service operating in the 1530–1544 MHz and 1626.5–1645.5 MHz bands shall have the following minimum set of capabilities to ensure compliance with Footnote 5.353A in 47 CFR 2.106 and the priority and real-time preemption requirements imposed by Footnote US315 in that rule section.

* * * * *

(e) Any Land Earth Station (LES) associated with the Mobile-Satellite Service operating in the 1530–1544 MHz and 1626.5–1645.5 MHz bands must have the following minimum set of capabilities to ensure that the MSS system complies with Footnote 5.353A and the priority and real-time preemption requirements imposed by Footnote US315. * * *

* * * * *

■ 16. In § 25.137, revise paragraphs (b), (c) introductory text, (c)(1), and (e) to read as follows:

§ 25.137 Application requirements for earth stations operating with non-U.S. licensed space stations.

* * * * *

(b) Any request pursuant to paragraph (a) of this section must be filed electronically through the International Bureau Filing System and must include an exhibit providing legal and technical information for the non-U.S.-licensed space station of the kind that § 25.114 would require in a license application for that space-station, including but not limited to, information required to complete Schedule S. An applicant may satisfy this requirement by cross-referencing a pending application containing the requisite information or by citing a prior grant of authority to communicate via the space station in question in the same frequency bands to provide the same type of service.

(c) A non-U.S.-licensed NGSO-like satellite system seeking to serve the United States can be considered contemporaneously with other U.S. NGSO-like satellite systems pursuant to § 25.157 and considered before later-filed applications of other U.S. satellite system operators, and a non-U.S.-licensed GSO-like satellite system seeking to serve the United States can have its request placed in a queue pursuant to § 25.158 and considered before later-filed applications of other U.S. satellite system operators, if the non-U.S.-licensed satellite system:

(1) Is in orbit and operating;

* * * * *

(e) A non-U.S.-licensed satellite operator that is seeking to serve the United States pursuant to a Letter of Intent may amend its request by submitting an additional Letter of Intent. Such additional Letters of Intent will be treated on the same basis as amendments filed by U.S. space station applicants for purposes of determining the order in which the Letters of Intent will be considered relative to other pending applications.

* * * * *

■ 17. In § 25.140, revise the section heading, remove and reserve paragraph (a), and revise the first sentence in paragraph (b) to read as follows:

§ 25.140 Qualifications of Fixed-Satellite space station licensees.

* * * * *

(b) Each applicant for a space station authorization in the Fixed-Satellite Service must demonstrate, on the basis of the documentation contained in its application, that it is legally, technically, and otherwise qualified to proceed expeditiously with the construction, launch and/or operation of each proposed space station facility immediately upon grant of the requested authorization. * * *

* * * * *

■ 18. In § 25.142, revise the section heading, paragraph (a)(2), and the first and last sentences in paragraph (b)(2)(ii) to read as follows:

§ 25.142 Licensing provisions for the non-voice, non-geostationary Mobile-Satellite Service.

(a) * * *

(2) Applicants for a non-voice, non-geostationary Mobile-Satellite Service space station license must identify the power flux density produced at the Earth's surface by each space station of their system in the 137–138 MHz and 400.15–401 MHz bands, to allow determination of whether coordination with terrestrial services is required under any applicable footnote to the Table of Frequency Allocations in § 2.106 of this chapter. In addition, applicants must identify the measures they would employ to protect the radio astronomy service in the 150.05–153 MHz and 406.1–410 MHz bands from harmful interference from unwanted emissions.

* * * * *

(b) * * *

(2) * * *

(ii) The Commission will use its existing procedures for liaison with NTIA to reach agreement with respect to achieving compatible operations between Federal Government users under the jurisdiction of NTIA and non-voice, non-geostationary Mobile-Satellite Service systems (including user transceivers subject to blanket licensing under § 25.115(d)) through the frequency assignment and coordination practices established by NTIA and the Interdepartment Radio Advisory Committee (IRAC). * * * The frequency assignment and coordination of the satellite system with Federal Government users shall be completed prior to grant of authorization.

* * * * *

■ 19. In § 25.143, revise the section heading and paragraphs (b)(2)(ii) through (iv), (e)(1)(iii), (e)(2), (h), and (i) to read as follows:

§ 25.143 Licensing provisions for the 1.6/2.4 GHz Mobile-Satellite Service and 2 GHz Mobile-Satellite Service.

* * * * *

(b) * * *

(2) * * *

(ii) That a system proposed to operate using non-geostationary satellites be capable of providing Mobile-Satellite Service to all locations as far north as 70° North latitude and as far south as 55° South latitude for at least 75% of every 24-hour period, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day within the described geographic area;

(iii) That a system proposed to operate using non-geostationary satellites be capable of providing Mobile-Satellite Service on a continuous basis throughout the fifty states, Puerto Rico and the U.S. Virgin Islands, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° at all times within the described geographic areas; and

(iv) That a system only using geostationary orbit satellites, at a minimum, be capable of providing Mobile-Satellite Service on a continuous basis throughout the 50 states, Puerto Rico, and the U.S. Virgin Islands, if technically feasible.

* * * * *

(e) * * *

(1) * * *

(iii) A detailed description of the use made of the in-orbit satellite system. That description should identify the percentage of time that the system is actually used for U.S. domestic transmission, the amount of capacity (if any) sold but not in service within U.S. territorial geographic areas, and the amount of unused system capacity. 2

GHz Mobile-Satellite Service systems receiving expansion spectrum as part of the unserved areas spectrum incentive must provide a report on the actual number of subscriber minutes originating or terminating in unserved areas as a percentage of the actual U.S. system use; and

(2) All operators of 1.6/2.4 GHz Mobile-Satellite Service systems shall, within 10 days after a required implementation milestone as specified in the system authorization, certify to the Commission by affidavit that the milestone has been met or notify the Commission by letter that it has not been met. At its discretion, the Commission may require the submission of additional information (supported by affidavit of a person or persons with knowledge thereof) to demonstrate that the milestone has been met.

* * * * *

(h) Prohibition of certain agreements. No license shall be granted to any applicant for a space station in the Mobile-Satellite Service operating at 1610–1626.5 MHz/2483.5–2500 MHz if that applicant, or any persons or companies controlling or controlled by the applicant, shall acquire or enjoy any right, for the purpose of handling traffic to or from the United States, its territories or possession, to construct or operate space segment or earth stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling or controlled by the Licensee are parties.

(i) Incorporation of ancillary terrestrial component base stations into a 1.6/2.4 GHz Mobile-Satellite Service network or a 2 GHz Mobile-Satellite Service network. Any licensee authorized to construct and launch a 1.6/2.4 GHz or a 2 GHz Mobile-Satellite Service system may construct ancillary terrestrial component (ATC) base stations as defined in § 25.201 at its own risk and subject to the conditions specified in this subpart any time after commencing construction of the Mobile-Satellite Service system.

* * * * *

■ 20. In § 25.145, revise the section heading and paragraphs (c)(1), (c)(2), and (e) to read as follows:

§ 25.145 Licensing provisions for the Fixed-Satellite Service in the 20/30 GHz bands.

* * * * *

(c) * * *

(1) That the proposed system is capable of providing Fixed-Satellite Service to all locations as far north as 70° North Latitude and as far south as 55° South Latitude for at least 75% of every 24-hour period; and

(2) That the proposed system is capable of providing Fixed-Satellite Service on a continuous basis throughout the fifty states, Puerto Rico and the U.S. Virgin Islands.

* * * * *

(e) Prohibition of certain agreements. No license shall be granted to any applicant for a space station in the Fixed-Satellite Service operating in the 20/30 GHz band if that applicant, or any persons or companies controlling or controlled by the applicant, shall acquire or enjoy any right, for the purpose of handling traffic to or from the United States, its territories or possession, to construct or operate space segment or earth stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling or controlled by the Licensee are parties.

* * * * *

■ 21. In § 25.146:

■ a. Revise the section heading and the first sentence in paragraph (a) introductory text;

■ b. Revise paragraphs (a)(1)(i) and (iii), (a)(2) introductory text, (a)(2)(i) and (iii), (b) introductory text, and (b)(1)(i), (iii), and (v);

■ c. Revise the last two sentences of paragraph (b)(2); and

■ d. Revise paragraphs (c), (e), (h), and (i)(2) and (3).

The revisions read as follows:

§ 25.146 Licensing and operating rules for the non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) in the 10.7 GHz-14.5 GHz bands.

(a) A comprehensive technical showing shall be submitted for the proposed non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) system in the 10.7–14.5 GHz bands. * * *

(1) * * *

(i) Provide a set of power flux-density (PFD) masks, on the surface of the Earth, for each space station in the NGSO FSS system. The PFD masks shall be generated in accordance with the specification stipulated in the most recent version of ITU–R Recommendation S.1503, ''Functional Description to be used in Developing Software Tools for Determining Conformity of Non-GSO FSS Networks with Limits Contained in Article 22 of the Radio Regulations.'' In particular, the PFD masks must encompass the power flux-density radiated by the space station regardless of the satellite transmitter power resource allocation and traffic/beam switching strategy that are used at different periods of a NGSO FSS system's life. The PFD masks shall also be in an electronic form that can be accessed by the computer program specified in paragraph (a)(1)(iii) of this section.

* * * * *

(iii) If a computer program that has been approved by the ITU for determining compliance with the single-entry $EPFD_{down}$ validation limits is not yet available, the applicant shall provide a computer program for the single-entry $EPFD_{down}$ validation computation, including both the source code and the executable file. This computer program shall be developed in accordance with the specification stipulated in the most recent version of Recommendation ITU–R S.1503. If the applicant uses the ITU approved software, the applicant shall indicate the program name and the version used.

* * * * *

(2) *Single-entry additional operational equivalent power flux-density, in the space-to-Earth direction, (additional operational $EPFD_{down}$) limits.* (i) Provide a set of NGSO FSS earth station maximum equivalent isotropically radiated power (EIRP) masks as a function of the off-axis angle generated by an NGSO FSS earth station. The maximum EIRP mask shall be generated in accordance with the specification stipulated in the most recent version of ITU–R Recommendation S.1503. In particular, the results of calculations encompass what would be radiated regardless of the earth station transmitter power resource allocation and traffic/beam switching strategy are used at different periods of an NGSO FSS system's life. The EIRP masks shall be in an electronic form that can be accessed by the computer program specified in paragraph (a)(2)(iii) of this section.

* * * * *

(iii) If a computer program that has been approved by the ITU for determining compliance with the single-entry $EPFD_{up}$ validation limits is not yet available, the applicant shall provide a computer program for the single-entry $EPFD_{up}$ validation computation, including both the source code and the executable file. This computer program shall be developed in accordance with the specification stipulated in the most recent version of Recommendation ITU–R S.1503. If the applicant uses the ITU approved software, the applicant shall

indicate the program name and the version used.

* * * * *

(b) Ninety days prior to the initiation of service to the public, the NGSO FSS system licensee shall submit a comprehensive technical showing for the non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) system in the 10.7–14.5 GHz bands. The technical information shall demonstrate that the NGSO FSS system is expected not to operate in excess of the additional operational $EPFD_{down}$ limits and the operational $EPFD_{down}$ limits as specified in § 25.208(i) and (j), and notes 2 and 3 to Table 1L in § 25.208(*l*). If the technical demonstration exceeds the additional operational $EPFD_{down}$ limits or the operational $EPFD_{down}$ limits at any test points within the United States for domestic service and at any test points outside of the United States for international service, the NGSO FSS system licensee shall not initiate service to the public until the deficiency has been rectified by reducing satellite transmission power or other adjustments. This must be substantiated by subsequent technical showings. The technical showings consist of the following:

(1) * * *

(i) Provide a set of anticipated operational power flux density (PFD) masks, on the surface of the Earth, for each space station in the NGSO FSS system. The anticipated operational PFD masks could be generated by using the method specified in the most recent version of ITU–R Recommendation S.1503. In particular, the anticipated operational PFD mask shall take into account the expected maximum traffic loading distributions and geographic specific scheduling of the actual measured space station antenna patterns (see § 25.210(k)). The anticipated operational PFD masks shall also be in an electronic form that can be accessed by the computer program contained in paragraph (b)(1)(iii) of this section.

* * * * *

(iii) Provide a computer program for the single-entry additional operational $EPFD_{down}$ verification computation, including both the source code and the executable file. This computer program could be developed by using the method specified in the most recent version of ITU–R Recommendation S.1503.

* * * * *

(v) Provide the result, the cumulative probability distribution function of EPFD, of the execution of the verification computer program described in paragraph (b)(1)(iii) of this section by using only the input parameters contained in paragraphs (b)(1)(i) and (iv) of this section for each of the submitted test points provided by the Commission. These test points are based on information from U.S.-licensed geostationary satellite orbit Fixed-Satellite Service and Broadcasting-Satellite Service operators in the 10.7–14.5 GHz bands. Each U.S.-licensed geostationary satellite orbit Fixed-Satellite Service and Broadcasting-Satellite Service operator in the 10.7–14.5 GHz bands may submit up to 10 test points for this section containing the latitude, longitude, altitude, azimuth, elevation angle, antenna size, efficiency to be used by non-geostationary satellite orbit Fixed-Satellite Service licensees in the 10.7–14.5 GHz bands during the upcoming year.

(2) * * * Submitted test points are based on inputs from U.S.-licensed geostationary satellite orbit Fixed-Satellite Service and Broadcasting-Satellite Service operators in the 10.7-14.5 GHz bands. Each U.S.-licensed geostationary satellite orbit Fixed-Satellite Service and Broadcasting-Satellite Service operator in the 10.7–14.5 GHz bands may submit up to 10 test points for this section containing the latitude, longitude, altitude, azimuth, elevation angle, antenna size, efficiency to be used by non-geostationary satellite orbit Fixed-Satellite Service licensees in the 10.7–14.5 GHz bands during the upcoming year.

* * * * *

(c) The NGSO FSS system licensee shall, on June 30 of each year, file a report with the International Bureau and the Commission's Columbia Operations Center in Columbia, Maryland, certifying that the system continues to operate within the bounds of the masks and other input parameters specified under § 25.146(a) and (b) as well as certifying the status of the additional operational EPFDdown levels into the 3 m and 10 m geostationary satellite orbit Fixed-Satellite Service receiving Earth station antennas, the operational EPFDdown levels into the 3 m, 4.5 m, 6.2 m and 10 m geostationary satellite orbit Fixed-Satellite Service receiving Earth station antennas and the operational EPFDdown levels into the 180 cm geostationary satellite orbit Broadcasting-Satellite Service receiving Earth station antennas in Hawaii and 240 cm geostationary satellite orbit Broadcasting-Satellite Service receiving Earth station antennas in Alaska.

* * * * *

(e) An NGSO FSS system licensee operating a system in compliance with the limits specified in § 25.208(g), (i), (j), (k), (l), and (m) shall be considered as having fulfilled its obligations under ITU Radio Regulations Article 22.2 with respect to any GSO network. However, such NGSO FSS system shall not claim protection from GSO FSS and BSS networks operating in accordance with part 25 of this chapter and the ITU Radio Regulations.

* * * * *

(h) System License. Applicants authorized to construct and launch a system of technically identical non-geostationary satellite orbit Fixed-Satellite Service satellites will be awarded a single ''blanket'' license covering a specified number of space stations to operate in a specified number of orbital planes.

(i) * * *

(2) A demonstration that the proposed system is capable of providing Fixed-Satellite Services to all locations as far north as 70° North Latitude and as far south as 55° South Latitude for at least 75 percent of every 24-hour period; and

(3) Sufficient information on the NGSO FSS system characteristics to properly model the system in computer sharing simulations, including, at a minimum, NGSO hand-over and satellite switching strategies, NGSO satellite antenna gain patterns, and NGSO earth station antenna gain patterns. In particular, each NGSO FSS applicant must explain the switching protocols it uses to avoid transmitting while passing through the geostationary satellite orbit arc, or provide an explanation as to how the PFD limits in § 25.208 are met without using geostationary satellite orbit arc avoidance. In addition, each NGSO FSS applicant must provide the orbital parameters contained in Section A.4 of Annex 2A to Appendix 4 of the ITU Radio Regulations (2008). Further, each NGSO FSS applicant must provide a sufficient technical showing to demonstrate that the proposed non-geostationary satellite orbit system meets the PFD limits contained in § 25.208, as applicable, and

* * * * *

■ 22. In § 25.149, revise the section heading and paragraphs (a)(1) introductory text, (a)(2)(iii), (a)(3), (b)(1)(iii), (b)(5)(ii), (c)(1), and (c)(3) to read as follows:

§ 25.149 Application requirements for ancillary terrestrial components in the Mobile-Satellite Service networks operating in the 1.5./1.6 GHz, 1.6/2.4 GHz and 2 GHz Mobile-Satellite Service.

(a) * * *

(1) ATC shall be deployed in the forward-band mode of operation

whereby the ATC mobile terminals transmit in the MSS uplink bands and the ATC base stations transmit in the MSS downlink bands in portions of the 2000–2020 MHz/2180–2200 MHz bands (2 GHz band), the 1626.5–1660.5 MHz/1525–1559 MHz bands (L-band), and the 1610–1626.5 MHz/2483.5–2500 MHz bands.

* * * * *

(2) * * *

(iii) In the 1610–1626.5 MHz/2483.5–2500 MHz bands, ATC operations are limited to the 1610–1617.775 MHz, 1621.35–1626.5 MHz, and 2483.5–2495 MHz bands and to the specific frequencies authorized for use by the MSS licensee that seeks ATC authority.

(3) ATC operations shall not exceed the geographical coverage area of the Mobile-Satellite Service network of the applicant for ATC authority.

* * * * *

(b) * * *

(1) * *

(iii) For the 1.6/2.4 GHz Mobile-Satellite Service bands, an applicant must demonstrate that it can provide space-segment service to all locations as far north as 70° North latitude and as far south as 55° South latitude for at least seventy-five percent of every 24-hour period, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day, and on a continuous basis throughout the fifty states, Puerto Rico and the U.S. Virgin Islands, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° at all times.

* * * * *

(5) * * *

(ii) In the 1.6/2.4 GHz Mobile-Satellite Service bands, MSS ATC is limited to no more than 7.775 MHz of spectrum in the L-band and 11.5 MHz of spectrum in the S-band. Licensees in these bands may implement ATC only on those channels on which MSS is authorized, consistent with the 1.6/2.4 GHz Mobile-Satellite Service band-sharing arrangement.

* * * * *

(c) *Equipment certification.* (1) Each ATC mobile station utilized for operation under this part and each transmitter marketed, as set forth in § 2.803 of this chapter, must be of a type that has been authorized by the Commission under its certification procedure for use under this part.

* * * * *

(3) Licensees and manufacturers are subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b), 2.1091, and 2.1093 of this chapter, as appropriate. MSS ATC base stations must comply with the requirements specified in § 1.1307(b) of this chapter for PCS base stations. MSS ATC mobile stations must comply with the requirements specified for mobile and portable PCS transmitting devices in § 1.1307(b) of this chapter. MSS ATC mobile terminals must also comply with the requirements in §§ 2.1091 and 2.1093 of this chapter for Satellite Communications Services devices. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

■ 23. Revise § 25.150 to read as follows:

§ 25.150 Receipt of applications.

Applications received by the Commission are given a file number and a unique station identifier for administrative convenience. Neither the assignment of a file number and/or other identifier nor the listing of the application on public notice as received for filing indicates that the application has been found acceptable for filing or precludes subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.

■ 24. In § 25.161, revise paragraph (b) to read as follows:

§ 25.161 Automatic termination of station authorization.

* * * * *

(b) The expiration of the license period, unless an application for renewal of the license has been filed with the Commission pursuant to § 25.121(e); or

* * * * *

■ 25. In § 25.201:

■ a. Remove the definitions of *active satellite, base earth station, passive satellite, space operation service, space telecommand, space telemetering, space tracking,* and *structural attenuation;*

■ b. Revise the definitions of *2 GHz Mobile-Satellite Service, Earth Station on Vessel (''ESV''), equivalent power flux density, fixed earth station, Fixed-Satellite Service, land earth station, Non-Voice, Non-Geostationary Mobile-Satellite Service, power spectral density, protection areas, routine processing or licensing,* and *vehicle-mounted earth station (VMES);* and

■ c. Add definitions for *feeder link* and *1.5/1.6 GHz Mobile-Satellite Service.*

The revisions and additions read as follows:

§ 25.201 Definitions.

1.5/1.6 GHz Mobile-Satellite Service. Mobile-Satellite Service provided in any portions of the 1525–1559 MHz downlink band and the 1626.5–1660.5 MHz uplink band, which are referred to in this rule part as the ''1.5/1.6 GHz MSS bands.''

* * * * *

2 GHz Mobile-Satellite Service. A Mobile-Satellite Service that is operated in the 2000–2020 MHz and 2180–2200 MHz bands, or in any portion thereof.

* * * * *

Earth Station on Vessel (''ESV''). An ESV is an earth station onboard a craft designed for traveling on water receiving from and transmitting to Fixed-Satellite Service space stations.

* * * * *

Equivalent power flux density. Equivalent power flux density (EPFD) is the sum of the power flux-densities produced at a geostationary satellite orbit (GSO) receive earth or space station on the Earth's surface or in the geostationary satellite orbit, as appropriate, by all the transmit stations within a non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) system, taking into account the off-axis discrimination of a reference receiving antenna assumed to be pointing in its nominal direction. The equivalent power flux density, in dB(W/m²) in the reference bandwidth, is calculated using the following formula:

$$EPFD = 10\log_{10}\left[\sum_{i=1}^{N_a} 10^{\frac{P_i}{10}} \frac{G_t(\theta_i)}{4\pi d_i^2} \frac{G_r(\phi_i)}{G_{r,\max}}\right]$$

Where:

N_a is the number of transmit stations in the non-geostationary satellite orbit system that are visible from the GSO receive station considered on the Earth's surface

or in the geostationary satellite orbit, as appropriate;

i is the index of the transmit station considered in the non-geostationary satellite orbit system;

P_i is the RF power at the input of the antenna of the transmit station, considered in the non-geostationary satellite orbit system in dBW in the reference bandwidth;

θ_i is the off-axis angle between the boresight of the transmit station considered in the non-geostationary satellite orbit system and the direction of the GSO receive station;

$G_t(\theta_i)$ is the transmit antenna gain (as a ratio) of the station considered in the non-geostationary satellite orbit system in the direction of the GSO receive station;

d_i is the distance in meters between the transmit station considered in the non-geostationary satellite orbit system and the GSO receive station;

Φ_i is the off-axis angle between the boresight of the antenna of the GSO receive station and the direction of the ith transmit station considered in the non-geostationary satellite orbit system;

$G_r(\Phi_i)$ is the receive antenna gain (as a ratio) of the GSO receive station in the direction of the ith transmit station considered in the non-geostationary satellite orbit system;

$G_{r,\max}$ is the maximum gain (as a ratio) of the antenna of the GSO receive station.

Feeder link. A radio link from an earth station at a given location to a space station, or vice versa, conveying information for a space radiocommunication service other than the Fixed-Satellite Service. The given location may be at a specified fixed point or at any fixed point within specified areas. (RR)

Fixed earth station. An earth station intended to be used at a fixed position. The position may be a specified fixed point or any fixed point within a specified area.

Fixed-Satellite Service. A radiocommunication service between earth stations at given positions, when one or more satellites are used; the given position may be a specified fixed point or any fixed point within specified areas; in some cases this service includes satellite-to-satellite links, which may also be operated in the inter-satellite service; the Fixed-Satellite Service may also include feeder links of other space radiocommunication services. (RR)

* * * * *

Land earth station. An earth station in the Fixed-Satellite Service or, in some cases, in the Mobile-Satellite Service, located at a specified fixed point or within a specified area on land to provide a feeder link for the Mobile-Satellite Service. (RR)

* * * * *

Non-Voice, Non-Geostationary Mobile-Satellite Service. A Mobile-Satellite Service reserved for use by non-geostationary satellites in the provision of non-voice communications which may include satellite links between land earth stations at fixed locations.

* * * * *

Power spectral density. The amount of an emission's transmitted carrier power applied at the antenna input falling within the stated bandwidth. The units of power spectral density are watts per hertz and are generally expressed in decibel form as dB(W/Hz) when measured in a 1 Hz bandwidth, dB(W/4kHz) when measured in a 4 kHz bandwidth, or dB(W/1MHz) when measured in a 1 MHz bandwidth.

Protection areas. The geographic regions on the surface of the Earth where U.S. Department of Defense meteorological satellite systems or National Oceanic and Atmospheric Administration meteorological satellite systems, or both such systems, are receiving signals from low earth orbiting satellites. Also, geographic protection areas around Ka-band feeder-link earth stations in the 1.6/2.4 GHz Mobile-Satellite Service are determined in the manner specified in § 25.203(j).

* * * * *

Routine processing or licensing. A licensing process whereby applications are processed in an expedited manner. To be eligible for routine processing, an application must be complete in all regards, must be consistent with all Commission Rules, and must not raise any policy issues. With respect to fixed earth station licensing (including temporary fixed stations), an application is ''routine'' only if it is for an individual earth station that conforms to all applicable provisions of the Commission's rules pertaining to antenna performance, power, frequency coordination, radiation hazard, and FAA notification, and accesses only ''Permitted Space Station List'' satellites in the conventional C-band or Ku-band frequency bands.

* * * * *

Vehicle-mounted earth station (VMES). A VMES is an earth station, operating from a motorized vehicle that travels primarily on land, that receives from and transmits to geostationary satellite orbit Fixed-Satellite Service space stations and operates within the United States pursuant to the requirements set out in § 25.226.

■ 26. In § 25.202, revise paragraphs (a)(1) and (a)(4)(iii)(A) to read as follows:

§ 25.202 Frequencies, frequency tolerance and emission limitations.

(a)(1) *Frequency band.* The following frequencies are available for use by the Fixed-Satellite Service. Precise frequencies and bandwidths of emission shall be assigned on a case-by-case basis. Refer to the U.S. Table of Frequency Allocations, 47 CFR 2.106, including relevant footnotes, for band-specific use restrictions and coordination requirements. Restrictions and coordination conditions not mentioned in the Table of Frequency Allocations are set forth in the annotations to the following list:

Space-to-earth (GHz)	Earth-to-space (GHz)
3.6–3.65	5.091–5.25
3.65–3.7	5.85–5.925
3.7–4.2	5.925–6.425
4.5–4.8	6.425–6.525
6.7–7.025	6.525–6.7
7.025–7.075	6.7–7.025
10.7–11.7	7.025–7.075
11.7–12.2	12.7–12.75
12.2–12.7	12.75–13.25
18.3–18.58 [1] [2]	13.75–14
18.58–18.8	14–14.2
18.8–19.3	14.2–14.5
19.3–19.7	15.43–15.63
19.7–20.2	17.3–17.8
37.5–40 [3]	24.75–25.05
40–42	25.05–25.25
	[2] 27.5–28.35
	[4] 28.35–28.6
	[5] 28.6–29.1
	[6] 29.1–29.25
	[7] 29.25–29.5
	[4] 29.5–30.0
	47.2–50.2

[1] The 18.3–18.58 GHz band is shared co-equally with existing terrestrial radiocommunication systems until November 19, 2012.

[2] FSS is secondary to LMDS in this band.

[3] Use of this band by the Fixed-Satellite Service is limited to gateway earth station operations, provided the licensee under this Part obtains a license under part 101 of this chapter or an agreement from a part 101 licensee for the area in which an earth station is to be located. Satellite earth station facilities in this band may not be ubiquitously deployed and may not be used to serve individual consumers.

[4] This band is primary for GSO FSS and secondary for NGSO FSS.

[5] This band is primary for NGSO FSS and secondary for GSO FSS.

[6] This band is primary for MSS feeder links and LMDS hub-to-subscriber transmission.

[7] This band is primary for MSS feeder links and GSO FSS.

* * * * *

(4) * * *

(iii)(A) The following frequencies are available for use by the 1.5/1.6 GHz Mobile-Satellite Service:

1525–1559 MHz: space-to-Earth

1626.5–1660.5 MHz: Earth-to-space

* * * * *

■ 27. In § 25.203, revise paragraphs (g)(2), (g)(4), and (j) to read as follows:

§ 25.203 Choice of sites and frequencies.

* * * * *

(g) * * *

(2) In the event that the calculated value of the expected field strength exceeds 10 mV/m (−65.8 dBW/m²) at the reference coordinates, or if there is any question whether field strength levels might exceed the threshold value, advance consultation with the FCC to discuss any protection necessary should be considered. See § 0.401 of this chapter for contact information.

* * * * *

(4) Advance coordination for stations operating above 1000 MHz is recommended only where the proposed station is in the vicinity of a monitoring station designated as a satellite monitoring facility in § 0.121(c) of this chapter and also meets the criteria outlined in paragraphs (g)(2) and (3) of this section.

* * * * *

(j) Applicants for non-geostationary 1.6/2.4 GHz Mobile-Satellite Service/Radiodetermination-Satellite Service feeder links in the 17.7–20.2 GHz and 27.5–30.0 GHz bands shall indicate the frequencies and spacecraft antenna gain contours towards each feeder-link earth station location and will coordinate with licensees of other Fixed-Satellite Service and terrestrial-service systems sharing the band to determine geographic protection areas around each non-geostationary Mobile-Satellite Service/Radiodetermination-Satellite Service feeder-link earth station.

* * * * *

■ 28. In § 25.204, revise the first sentence in paragraph (f) and revise paragraph (g) to read as follows:

§ 25.204 Power limits.

* * * * *

(f) In the 13.75–14 GHz band, an earth station in the Fixed-Satellite Service shall have a minimum antenna diameter of 4.5 m and the e.i.r.p. of any emission should be at least 68 dBW and should not exceed 85 dBW. * * *

* * * * *

(g) All earth stations in the Fixed-Satellite Service in the 20/30 GHz band, and feeder-link earth stations operating in the 24.75–25.25 GHz band (Earth-to-space) and providing service to geostationary satellites in the 17/24 GHz BSS, shall employ uplink adaptive power control or other methods of fade compensation such that the earth station transmissions shall be conducted at the power level required to meet the desired link performance while reducing the level of mutual interference between networks.

* * * * *

■ 29. In § 25.208, revise the introductory text in paragraphs (g), (h), (i), (j), (k), (l), (m), (n), and (s) to read as follows:

§ 25.208 Power flux density limits.

* * * * *

(g) In the 10.7–11.7 GHz and 11.7–12.2 GHz bands, the single-entry equivalent power-flux density in the space-to-Earth direction ($EPFD_{down}$), at any point on the Earth's surface, produced by emissions from all co-frequency space stations of a single non-geostationary-satellite orbit (NGSO) system operating in the Fixed-Satellite Service (FSS) shall not exceed the following limits for the given percentages of time. Tables 1G and 2G follow:

* * * * *

(h) In the 10.7–11.7 GHz and 11.7–12.2 GHz bands, the aggregate equivalent power-flux density in the space-to-Earth direction ($EPFD_{down}$), at any point on the Earth's surface, produced by emissions from all co-frequency space stations of all non-geostationary-satellite orbit systems operating in the Fixed-Satellite Service (FSS) shall not exceed the following limits for the given percentages of time. Tables 1H and 2H follow:

* * * * *

(i) In the 10.7–11.7 GHz and 11.7–12.2 GHz bands, the additional operational equivalent power-flux density, in the space-to-Earth direction, (additional operational $EPFD_{down}$) at any point on the Earth's surface, produced by actual operational emissions from all co-frequency space stations of a non-geostationary-satellite orbit (NGSO) system operating in the Fixed-Satellite Service (FSS) shall not exceed the following operational limits for the given percentages of time:

* * * * *

(j) In the 10.7–11.7 GHz and 11.7–12.2 GHz bands, the operational equivalent power-flux density, in the space-to-Earth direction, (operational $EPFD_{down}$) at any point on the Earth's surface, produced by actual operational emissions from the in-line co-frequency space station of a non-geostationary-satellite orbit (NGSO) system operating in the Fixed-Satellite Service (FSS) shall not exceed the following operational limits for 100% of the time:

* * * * *

(k) In the 12.75–13.15 GHz, 13.2125–13.25 GHz and 13.75–14.5 GHz bands, the equivalent power flux-density, in the Earth-to-space direction, ($EPFD_{up}$) produced at any point on the geostationary satellite orbit (GSO) by the emissions from all co-frequency earth stations in a non-geostationary satellite orbit Fixed-Satellite Service (NGSO FSS) system, for all conditions and for all methods of modulation, shall not exceed the following limits for the specified percentages of time limits:

* * * * *

(l) In the 11.7–12.2 GHz and 12.5–12.75 GHz bands in Region 3, 11.7–12.5 GHz bands in Region 1, and 12.2–12.7 GHz band in Region 2, the single-entry equivalent power-flux density, in the space-to-Earth direction, ($EPFD_{down}$), at any point on the Earth's surface, produced by emissions from all co-frequency space stations of a single non-geostationary-satellite orbit (NGSO) system operating in the Fixed-Satellite Service (FSS) shall not exceed the following limits in Tables 1L and 2L for the given percentages of time:

* * * * *

(m) In the 11.7–12.2 GHz and 12.5–12.75 GHz bands in Region 3, 11.7–12.5 GHz bands in Region 1, and 12.2–12.7 GHz band in Region 2, the aggregate equivalent power-flux density, in the space-to-Earth direction, ($EPFD_{down}$) at any point on the Earth's surface, produced by emissions from all co-frequency space stations of all non-geostationary-satellite orbit systems operating in the Fixed-Satellite Service (FSS) shall not exceed the following limits in Tables 1M and 2M for the given percentages of time:

* * * * *

(n) The power-flux density at the Earth's surface produced by emissions from a space station in the Fixed-Satellite Service (space-to-Earth), for all conditions and for all methods of modulation, shall not exceed the limits given in Table N. These limits relate to the power flux-density which would be obtained under assumed free-space conditions.

* * * * *

(s) In the 40.0–40.5 GHz band, the power flux density at the Earth's surface produced by emissions from a space station for all conditions and for all methods of modulation shall not exceed the following values:

* * * * *

■ 30. In § 25.209, revise the section heading and paragraphs (a) introductory text, (b) introductory text, and (c)(1) to read as follows:

§ 25.209 Earth station antenna performance standards.

(a) The gain of any antenna to be employed in transmission from an earth station in the Fixed-Satellite Service shall lie below the envelope defined in

paragraphs (a)(1) through (4) of this section:

* * * * *

(b) The off-axis cross-polarization gain of any antenna to be employed in transmission from an earth station to a space station in the domestic Fixed-Satellite Service shall be defined as follows:

* * * * *

(c)(1) Earth station antennas licensed for reception of radio transmissions from a space station in the Fixed-Satellite Service are protected from radio interference caused by other space stations only to the degree to which harmful interference would not be expected to be caused to an earth station employing an antenna conforming to the referenced patterns defined in paragraphs (a) and (b) of this section, and protected from radio interference caused by terrestrial radio transmitters identified by the frequency coordination process only to the degree to which harmful interference would not be expected to be caused to an earth station conforming to the reference pattern defined in paragraphs (a)(3) and (4) of this section.

* * * * *

■ 31. In § 25.210, revise the section heading, remove and reserve paragraph (d), and revise paragraphs (f) and (k) to read as follows:

§ 25.210 Technical requirements for space stations.

* * * * *

(f) All space stations in the Fixed-Satellite Service operating in any portion of the 3600–4200 MHz, 5091–5250 MHz, 5850–7025 MHz, 10.7–12.7 GHz, 12.75–13.25 GHz, 13.75–14.5 GHz, 15.43–15.63 GHz, 18.3–20.2 GHz, 24.75–25.25 GHz, or 27.5–30.0 GHz bands, including feeder links for other space services, and in the Broadcasting-Satellite Service in the 17.3–17.8 GHz band (space-to-Earth), shall employ state-of-the-art full frequency reuse, either through the use of orthogonal polarizations within the same beam and/or the use of spatially independent beams.

* * * * *

(k) Antenna measurements of both co-polarized and cross-polarized performance must be made on all antennas employed by space stations both within and outside the primary coverage area. The results of such measurements shall be submitted to the Commission within thirty days after preliminary in-orbit testing is completed.

* * * * *

■ 32. In § 25.211, revise paragraphs (e) and (f) to read as follows:

§ 25.211 Analog video transmissions in the Fixed-Satellite Service.

* * * * *

(e) Antennas smaller than those specified in paragraph (d) of this section are subject to the provisions of § 25.220. These antennas will not be routinely licensed for transmission of full transponder services.

(f) Each applicant for authorization for analog transmissions in the Fixed-Satellite Service proposing to use maximum power into the antenna in excess of those specified in § 25.211(d), must comply with the procedures set forth in § 25.220.

■ 33. In § 25.212, revise the section heading and paragraphs (c), (d)(2) and (3), and (e) to read as follows:

§ 25.212 Narrowband analog transmissions and digital transmissions in the GSO Fixed Satellite Service.

* * * * *

(c)(1) In the 14.0–14.5 GHz band, an earth station with an antenna equivalent diameter of 1.2 meters or greater may be routinely licensed for transmission of narrowband analog services with bandwidths up to 200 kHz if the maximum input power spectral density into the antenna does not exceed −8 dBW/4 kHz and the maximum transmitted satellite carrier EIRP density does not exceed 17 dBW/4 kHz.

(2) In the 14.0–14.5 GHz band, an earth station with an antenna equivalent diameter of 1.2 meters or greater may be routinely licensed for transmission of narrowband and/or wideband digital services, including digital video services, if the maximum input spectral power density into the antenna does not exceed −14 dBW/4 kHz, and the maximum transmitted satellite carrier EIRP density does not exceed +10.0 dBW/4 kHz.

(3) Antennas transmitting in the 14.0–14.5 GHz band with a major and/or minor axis smaller than 1.2 meters are subject to the provisions of either § 25.218 or § 25.220.

(d) * * *

(2) For earth stations licensed after March 10, 2005 in the 5925–6425 MHz band, an earth station with an equivalent diameter of 4.5 meters or greater may be routinely licensed for transmission of SCPC services if the maximum power densities into the antenna do not exceed +0.5 dBW/4 kHz for analog SCPC carriers with bandwidths up to 200 kHz, and do not exceed $-2.7 - 10\log(N)$ dBW/4 kHz for digital SCPC carriers. For digital SCPC using a frequency division multiple access (FDMA) or time division multiple access (TDMA) technique, N is equal to one. For digital SCPC using a code division multiple access (CDMA) technique, N is the maximum number of co-frequency simultaneously transmitting earth stations in the same satellite receiving beam.

(3) Antennas with an equivalent diameter smaller than 4.5 meters in the 5925–6425 MHz band are subject to the provisions of either § 25.218 or § 25.220.

(e) Each applicant for authorization for transmissions in the Fixed-Satellite Service proposing to use transmitted satellite carrier EIRP densities, and/or maximum antenna input power densities in excess of those specified in paragraph (c) of this section in the 14.0–14.5 GHz band, or in paragraph (d) of this section in the 5925–6425 MHz band, respectively, must comply with the procedures set forth in either § 25.218 or § 25.220.

* * * * *

■ 34. In § 25.213, revise the section heading, the first sentence in paragraph (a)(1) introductory text, and paragraph (a)(1)(vi) to read as follows:

§ 25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz Mobile-Satellite Service.

(a) * * *

(1) *Protection zones.* All 1.6/2.4 GHz Mobile-Satellite Service systems shall be capable of determining the position of the user transceivers accessing the space segment through either internal radiodetermination calculations or external sources such as LORAN–C or the Global Positioning System. * * *

* * * * *

(vi) The ESMU shall notify Mobile-Satellite Service space station licensees authorized to operate mobile earth stations in the 1610.0–1626.5 MHz band of periods of radio astronomy observations. The Mobile-Satellite systems shall be capable of terminating operations within the frequency bands and protection zones specified in paragraphs (a)(1)(i) through (iv) of this section, as applicable, after the first position fix of the mobile earth station either prior to transmission or, based upon its location within the protection zone at the time of initial transmission of the mobile earth station. Once the Mobile-Satellite Service system determines that a mobile earth station is located within an RAS protection zone, the Mobile-Satellite Service system shall immediately initiate procedures to relocate the mobile earth station operations to a non-RAS frequency.

* * * * *

■ 35. In § 25.214, revise the section heading to read as follows:

§ 25.214 Technical requirements for space stations in the Satellite Digital Audio Radio Service and associated terrestrial repeaters.

* * * * *

■ 36. In § 25.218, revise paragraphs (a) introductory text and (a)(2) to read as follows:

§ 25.218 Off-axis EIRP envelopes for FSS earth station operations.

(a) This section applies to all applications for FSS earth stations operating in the C-band, Ku-band, or extended Ku-band, except for:

* * * * *

(2) Analog video earth station applications, and

* * * * *

■ 37. In § 25.221, revise the first sentence in paragraph (a) introductory text, the third sentence in paragraph (a)(5), paragraph (a)(7), the introductory text in paragraph (b), and paragraph (b)(1)(ii) to read as follows:

§ 25.221 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 3700–4200 MHz (space-to-Earth) band and transmitting in the 5925–6425 MHz (Earth-to-space) band, operating with Geostationary Satellite Orbit (GSO) Satellites in the Fixed-Satellite Service.

(a) The following ongoing requirements govern all ESV licensees and operations in the 3700–4200 MHz (space-to-Earth) and 5925–6425 MHz (Earth-to-space) bands transmitting to GSO satellites in the Fixed-Satellite Service.

* * * * *

(5) * * * The ESV operator will make this data available upon request to a coordinator, fixed system operator, Fixed-Satellite system operator, or the Commission within 24 hours of the request.

* * * * *

(7) ESV operators transmitting in the 5925–6425 MHz (Earth-to-space) bands to GSO satellites in the Fixed-Satellite Service (FSS) shall not seek to coordinate, in any geographic location, more than 36 megahertz of uplink bandwidth on each of no more than two GSO FSS satellites.

* * * * *

(b) Applications for ESV operation in the 5925–6425 MHz (Earth-to-space) band to GSO satellites in the Fixed-Satellite Service must include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the applicable technical demonstrations in paragraphs (b)(1) or (2) of this section and the documentation identified in paragraphs (b)(3) through (5) of this section.

(1) * * *

(ii) A certification, in Schedule B, that the ESV antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with the maximum input power density calculated from the EIRP density less the antenna gain, which is entered in Schedule B, demonstrates that the off-axis EIRP spectral density envelope set forth in paragraphs (a)(1)(i)(A) through (C) of this section will be met under the assumption that the antenna is pointed at the target satellite. If an antenna proposed for use by the applicant does not comply with the antenna performance standards in § 25.209(a) and (b), the applicant must provide, as an exhibit to its application, antenna gain test plots pursuant to § 25.132(b)(3).

* * * * *

■ 38. In § 25.222, revise the section heading, the first sentence in paragraph (a) introductory text, the third sentence in paragraph (a)(5), paragraph (b) introductory text, and paragraph (b)(1)(ii) to read as follows:

§ 25.222 Blanket Licensing provisions for Earth Stations on Vessels (ESVs) receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) bands and transmitting in the 14.0–14.5 GHz (Earth-to-space) band, operating with Geostationary Orbit (GSO) Satellites in the Fixed-Satellite Service.

(a) The following ongoing requirements govern all ESV licensees and operations in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) and 14.0–14.5 GHz (Earth-to-space) bands transmitting to GSO satellites in the Fixed-Satellite Service.

* * *

* * * * *

(5) * * * The ESV operator will make this data available upon request to a coordinator, fixed system operator, Fixed-Satellite system operator, NTIA, or the Commission within 24 hours of the request.

* * * * *

(b) Applications for ESV operation in the 14.0–14.5 GHz (Earth-to-space) band to GSO satellites in the Fixed-Satellite Service must include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the applicable technical demonstrations in paragraphs (b)(1) or (2) of this section and the documentation identified in paragraphs (b)(3) through (5) of this section.

(1) * * *

(ii) A certification, in Schedule B, that the ESV antenna conforms to the gain pattern criteria of § 25.209(a) and (b), that, combined with the maximum input power density calculated from the EIRP density less the antenna gain, which is entered in Schedule B, demonstrates that the off-axis EIRP spectral density envelope set forth in paragraphs (a)(1)(i)(A) through (C) of this section will be met under the assumption that the antenna is pointed at the target satellite. If an antenna proposed for use by the applicant does not comply with the antenna performance standards contained in § 25.209(a) and (b), the applicant must provide, as an exhibit to its application, antenna gain test plots pursuant to § 25.132(b)(3).

* * * * *

■ 39. In § 25.226, revise the section heading, the first sentence in paragraph (a) introductory text, the third sentence in paragraph (a)(6), paragraph (b) introductory text, and paragraph (b)(1)(ii) to read as follows:

§ 25.226 Blanket Licensing provisions for domestic, U.S. Vehicle-Mounted Earth Stations (VMESs) receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), and 11.7–12.2 GHz (space-to-Earth) bands and transmitting in the 14.0–14.5 GHz (Earth-to-space) band, operating with Geostationary Satellites in the Fixed-Satellite Service.

(a) The following ongoing requirements govern all VMES licensees and operations in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), 11.7–12.2 GHz (space-to-Earth) and 14.0–14.5 GHz (Earth-to-space) bands receiving from and transmitting to geostationary orbit satellites in the Fixed-Satellite Service.

* * *

* * * * *

(6) * * * The VMES operator shall make this data available upon request to a coordinator, fixed system operator, Fixed-Satellite Service system operator, NTIA, or the Commission within 24 hours of the request.

* * * * *

(b) Applications for VMES operation in the 14.0–14.5 GHz (Earth-to-space) band to GSO satellites in the Fixed-Satellite Service shall include, in addition to the particulars of operation identified on Form 312, and associated Schedule B, the applicable technical demonstrations in paragraphs (b)(1), (2) or (3) of this section and the documentation identified in paragraphs (b)(4) through (8) of this section.

(1) * * *

(ii) A VMES applicant shall include a certification, in Schedule B, that the

VMES antenna conforms to the gain pattern criteria of §§ 25.209(a) and (b), that, combined with the maximum input power density calculated from the EIRP density less the antenna gain, which is entered in Schedule B, demonstrates that the off-axis EIRP spectral density envelope set forth in paragraphs (a)(1)(i)(A) through (C) of this section will be met under the assumption that the antenna is pointed at the target satellite. If an antenna proposed for use by the applicant does not comply with the antenna performance standards contained in § 25.209(a) and (b), the applicant must provide, as an exhibit to its application, antenna gain test plots pursuant to § 25.132(b)(3).

* * * * *

■ 40. In § 25.251, revise paragraph (b) to read as follows:

§ 25.251 Special requirements for coordination.

* * * * *

(b) The technical aspects of coordination are based on Appendix 7 of the International Telecommunication Union Radio Regulations and certain recommendations of the ITU Radiocommunication Sector (available at the address in § 0.445 of this chapter).

■ 41. In § 25.254, revise the first sentence in paragraph (c) and the section note to read as follows:

§ 25.254 Special requirements for ancillary terrestrial components operating in the 1610–1626.5 MHz/2483.5–2500 MHz bands.

* * * * *

(c) Applicants for an ancillary terrestrial component to be used in conjunction with a Mobile-Satellite Service system using CDMA technology shall coordinate the use of the 1.6/2.4 GHz Mobile-Satellite Service spectrum designated for CDMA systems using the framework established by the ITU in Recommendation ITU–R M.1186 ''Technical Considerations for the Coordination Between Mobile Satellite Service (MSS) Networks Utilizing Code Division Multiple Access (CDMA) and Other Spread Spectrum Techniques in the 1–3 GHz Band'' (1995). * * *

* * * * *

Note to § 25.254: The preceding rules of § 25.254 are based on cdma2000 and IS–95 system architecture. To the extent that a 1.6/2.4 GHz Mobile-Satellite Service licensee is able to demonstrate that the use of different system architectures would produce no greater potential interference than would be produced as a result of implementing the rules of this section, the licensee may apply for ATC authorization based on another system architecture.

§ 25.256 [Amended]

■ 42. In § 25.256, remove the words ''fixed satellite service'' and add in their place the words ''Fixed-Satellite Service''.

§ 25.257 [Amended]

■ 43. In § 25.257, remove the words ''mobile satellite service'' in paragraph (a) and add in their place the words ''Mobile-Satellite Service''.

■ 44. In § 25.259, revise paragraph (a) to read as follows:

§ 25.259 Time sharing between NOAA meteorological satellite systems and non-voice, non-geostationary satellite systems in the 137–138 MHz band.

(a) The space stations of a non-voice, non-geostationary Mobile-Satellite Service (NVNG MSS) system time-sharing downlink spectrum in the 137–138 MHz band with National Oceanic and Atmospheric Administration (NOAA) satellites shall not transmit signals into the ''protection areas'' of the NOAA satellites.

(1) With respect to transmission in the 137.333–137.367 MHz, 137.485–137.515 MHz, 137.605–137.635 MHz, and 137.753–137.787 MHz bands, the protection area for a NOAA satellite is the area on the Earth's surface in which the NOAA satellite is in line of sight from the ground at an elevation angle of five degrees or more above the horizon. No NVNG MSS satellite shall transmit in these bands when it is in line of sight at an elevation angle of zero degrees or more from any point on the ground within a NOAA satellite's protected area for that band.

(2) With respect to transmission in the 137.025–137.175 MHz and 137.825–138 MHz bands, the protection area for a NOAA satellite is the area on the Earth's surface in which the NOAA satellite is in line of sight from the ground at any elevation angle above zero degrees. No NVNG MSS satellite shall transmit in these bands when at a line-of-sight elevation angle of zero degrees or more from any point on the ground within a NOAA satellite's protected area for that band. In addition, such an NVNG MSS satellite shall cease transmitting when it is at an elevation angle of less than zero degrees from any such point, if reasonably necessary to protect reception of the NOAA satellite's signal.

(3) An NVNG MSS licensee is responsible for obtaining the ephemeris data necessary for compliance with these restrictions. The ephemeris information must be updated system-wide on at least a weekly basis. For calculation required for compliance with these restrictions an NVNG MSS licensee shall use an orbital propagator algorithm with an accuracy equal to or greater than the NORAD propagator used by NOAA.

* * * * *

■ 45. In § 25.260, revise paragraph (a) to read as follows:

§ 25.260 Time sharing between DoD meteorological satellite systems and non-voice, non-geostationary satellite systems in the 400.15–401 MHz band.

(a) The space stations of a non-voice, non-geostationary Mobile-Satellite Service (NVNG MSS) system time-sharing downlink spectrum in the 400.15–401.0 MHz band with Department of Defense (DoD) satellites shall not transmit signals into the ''protection areas'' of the DoD satellites.

(1) The protection area for such a DoD satellite is the area on the Earth's surface in which the DoD satellite is in line of sight from the ground at an elevation angle of five degrees or more above the horizon.

(2) An NVNG MSS space station shall not transmit in the 400.15–401 MHz band when at a line-of-sight elevation angle of zero degrees or more from any point on the ground within the protected area of a DoD satellite operating in that band.

(3) An NVNG MSS licensee is responsible for obtaining the ephemeris data necessary for compliance with this restriction. The ephemeris information must be updated system-wide at least once per week. For calculation required for compliance with this restriction an NVNG MSS licensee shall use an orbital propagator algorithm with an accuracy equal to or greater than the NORAD propagator used by DoD.

* * * * *

■ 46. In § 25.261, revise the section heading to read as follows:

§ 25.261 Procedures for avoidance of in-line interference events for Non Geostationary Satellite Orbit (NGSO) Satellite Network Operations in the Fixed-Satellite Service (FSS) Bands.

* * * * *

■ 47. In § 25.271, revise paragraphs (c)(1) and (3) to read as follows:

§ 25.271 Control of transmitting stations.

* * * * *

(c) * * *

(1) The parameters of the transmissions of the remote station monitored at the control point, and the operational functions of the remote earth stations that can be controlled by the operator at the control point, are sufficient to ensure that the operations of the remote station(s) are at all times

in full compliance with the remote station authorization(s);

* * * * *

(3) Upon detection by the licensee, or upon notification from the Commission of a deviation or upon notification by another licensee of harmful interference, the operation of the remote station shall be immediately suspended by the operator at the control point until the deviation or interference is corrected, except that transmissions concerning the immediate safety of life or property may be conducted for the duration of the emergency; and

* * * * *

■ 48. In § 25.272, revise paragraph (a) to read as follows:

§ 25.272 General inter-system coordination procedures.

(a) Each space station licensee in the Fixed-Satellite Service shall establish a satellite network control center which will have the responsibility to do the following:

(1) Monitor space-to-Earth transmissions in its system (thus indirectly monitoring uplink earth station transmissions in its system) and

(2) Coordinate transmissions in its satellite system with those of other systems to prevent harmful interference incidents or, in the event of a harmful interference incident, to identify the source of the interference and correct the problem promptly.

* * * * *

■ 49. In § 25.273, revise paragraph (a)(2) to read as follows:

§ 25.273 Duties regarding space communications transmissions.

(a) * * *

(2) Conduct transmissions over a transponder unless the operator is authorized to transmit at that time by the satellite licensee or the satellite licensee's successor in interest; or

* * * * *

■ 50. In § 25.274, revise paragraph (b) to read as follows:

§ 25.274 Procedures to be followed in the event of harmful interference.

* * * * *

(b) The earth station operator shall then check all other earth stations in the licensee's network that could be causing the harmful interference to ensure that none of them is the source of the interference and to verify that the interference is not from a local terrestrial source.

* * * * *

§ 25.276 [Amended]

■ 51. In § 25.276, remove paragraph (c).

§ 25.278 [Amended]

■ 52. In § 25.278, remove the words ''fixed-satellite service'' and add in their place the words ''Fixed-Satellite Service'' each place it appears.

■ 53. In § 25.283, revise paragraph (a) to read as follows:

§ 25.283 End-of-life disposal.

(a) *Geostationary orbit space stations.* Unless otherwise explicitly specified in an authorization, a space station authorized to operate in the geostationary satellite orbit under this part shall be relocated, at the end of its useful life, barring catastrophic failure of satellite components, to an orbit with a perigee with an altitude of no less than:

$$36{,}021 \text{ km} + (1000 \cdot C_R \cdot A/m)$$

where C_R is the solar radiation pressure coefficient of the spacecraft, and A/m is the Area to mass ratio, in square meters per kilogram, of the spacecraft.

* * * * *

§ 25.284 [Amended]

■ 43. In § 25.284, remove the words ''mobile satellite service'' and add in their place the words ''Mobile-Satellite Service'' each place it appears.

§ 25.601 [Amended]

■ 44. In § 25.601, remove the words ''fixed-satellite service,'' ''direct broadcast satellite service,'' and ''broadcasting-satellite service'' and add in their place the words ''Fixed-Satellite Service,'' ''Direct Broadcast Satellite Service,'' and Broadcasting-Satellite Service'', respectively.

§ 25.701 [Amended]

■ 45. In § 25.701, remove the words ''fixed satellite service'' in paragraph (a)(2) and add in their place the words ''Fixed-Satellite Service.''

[FR Doc. 2013–01159 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 172

[Docket Nos. PHMSA–2012–0027 (HM–215L)]

RIN 2137–AE87

Hazardous Materials: Harmonization with International Standards (RRR)

Correction

In rule document 2012–31243 appearing on pages 988 through 1100 in the issue of Monday, January 7, 2013, make the following correction:

§ 172.101 [Corrected]

On page 1051, the table should read in part as follows:

* * * * *

G	Chlorosilanes, toxic, corrosive, flammable, n.o.s.	6.1	UN3362	II	6.1,8,3	T14, TP2, TP7, TP13, TP27	None	206	243	Forbidden	30 L	C	40, 125
G	Chlorosilanes, toxic, corrosive, n.o.s	6.1	UN3361	II	6.1, 8	T14, TP2, TP7, TP13, TP27	None	206	243	Forbidden	30 L	C	40
	*		*		*	*	*	*		*			
G	Components, explosive train, n.o.s	1.2B	UN0382	II	1.2B	101	None	62	None	Forbidden	Forbidden	05	25
G	Components, explosive train, n.o.s	1.4B	UN0383	II	1.4B	101	None	62	None	Forbidden	75 kg	05	25
G	Components, explosive train, n.o.s	1.4S	UN0384	II	1.4S	101	None	62	None	25 kg	100 kg	01	25
G	Components, explosive train, n.o.s	1.1B	UN0461	II	1.1B	101	None	62	None	Forbidden	Forbidden	05	25
	*		*		*	*	*	*		*			
G	Contrivances, water-activated, *with burster, expelling charge or propelling charge*.	1.2L	UN0248	II	1.2L		None	62	None	Forbidden	Forbidden	05	25, 14E, 15E, 17E
G	Contrivances, water-activated, *with burster, expelling charge or propelling charge*.	1.3L	UN0249	II	1.3L		None	62	None	Forbidden	Forbidden	05	25, 14E, 15E, 17E
	*		*		*	*	*	*		*			
A W	Copra	4.2	UN1363	III	4.2	IB8, IP3, IP7	None	213	241	Forbidden	Forbidden	A	13, 25, 119

* * * * *

[FR Doc. C1–2012–31243 Filed 2–5–13; 8:45 am]

BILLING CODE 1505–01–P

Proposed Rules

Federal Register
Vol. 78, No. 25
Wednesday, February 6, 2013

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

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

7 CFR Part 6

RIN 0551–AA82

Dairy Tariff-Rate Import Quota Licensing Program

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Request for public comment on the Dairy Tariff-Rate Import Quota Licensing Program.

DATES: We will consider comments that we receive by April 8, 2013.

ADDRESSES: We invite you to submit comments as requested in this notice. In your comment, include the Regulation Identifier Number (RIN) and volume, date, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail, hand delivery, or courier:* Abdelsalam El-Farra, Agricultural Marketing Specialist, Sugar and Dairy Branch, Import Programs and Export Reporting Division, Office of Trade Programs, Foreign Agricultural Service, U.S. Department of Agriculture, Room 5526, 1400 Independence Avenue SW., Washington, DC 20250–1021, (202) 720–9439; fax (202) 720–0876; *Abdelsalam.El-Farra@fas.usda.gov.*

Comments will be available for inspection online at *www.regulations.gov* and at the mail address listed above between 8:00 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Abdelsalam El-Farra, Agricultural Marketing Specialist, Sugar and Dairy Branch, Import Programs and Export Reporting Division, Office of Trade Programs, Foreign Agricultural Service, U.S. Department of Agriculture, (202) 720–9439; fax (202) 720–0876; *Abdelsalam.El-Farra@fas.usda.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Foreign Agricultural Service (FAS), under a delegation of authority from the Secretary of Agriculture, administers the Dairy Tariff-Rate Import Quota Licensing regulation codified at 7 CFR 6.20–6.37 that provides for the issuance of licenses to import certain dairy articles under tariff-rate quotas (TRQs) as set forth in the Harmonized Tariff Schedule of the United States. These dairy articles may only be entered into the United States at the low-tier tariff by or for the account of a person, as defined in the regulation, to whom such licenses have been issued and only in accordance with the terms and conditions of the regulation. Licenses are issued on a calendar year basis, and each license authorizes the licensee to import a specified quantity and type of dairy article from a specified country of origin.

TRQs replaced Section 22 import quotas for dairy products on January 1, 1995, as a result of the implementation by the United States of Uruguay Round Agreement on Agriculture. Under these TRQs, a low tariff rate, commonly referred to as the in-quota rate, applies to imports up to a specified quantity. A higher tariff rate, commonly referred to as the over-quota rate, applies to any imports in excess of that amount. High-tier tariff rates were reduced by 15 percent over the 6 years following Uruguay Round Agreement implementation in 1995, while quantities subject to low-tier rates were increased gradually over that same period. TRQ rates and quantities vary by product. For dairy products subject to TRQs, an import license issued by USDA is generally required to bring in items at the in-quota tariff rate. No license is required to import products at the over-quota tariff rate.

USDA issues three types of licenses: historical, nonhistorical (lottery), and designated. For all three license types, the current regulation provides that persons must apply every year between September 1 and October 15.

(1) *Historical licenses* originated in 1950s and are reissued each year only to importers who originally qualified by importing the product during representative base periods. If an importer with a historical license meets all requirements, the license will be issued to the same importer for the following year.

(2) *Nonhistorical (lottery) licenses* are available each year to any qualified applicant. Lottery licenses were first issued in the late 1960s, and expanded when the United State implemented the Uruguay Round Agreement. Applicants for the lottery licenses have no guarantee that they will receive the same license every year, or that they will receive any license in any given year.

(3) *Designated licenses* are issued to importers nominated by a foreign government or entity to which the United States has granted the right to designate an allocation. The licenses are then issued by USDA to the designated importer, so long as the designated importer has qualified for that year.

2012 DAIRY IMPORT LICENSE AMOUNTS
(Kilograms)

	Historical	Nonhistorical (lottery)	Designated	Total
NON–CHEESE ARTICLES	4,737,167	17,127,614	0	21,864,781
CHEESE ARTICLES	63,170,778	24,729,865	47,685,145	135,585,788
Total	67,907,945	41,857,479	47,685,145	157,450,569

Historical and designated licensees may apply for lottery licenses, subject to certain limitations if they are affiliated or associated with another licensee holding a license for that same item from the same country of origin. Licensees may fail to qualify for a license for a specific item from a specific country in the following year if they do not meet certain requirements. Licensees must (i) Apply for the license each year, (ii) pay an annual fee, and (iii) have imported at least 85 percent of the final license amount from the previous year. To avoid ineligibility due to the 85 percent rule, licensees may surrender up to 100 percent of the license, but must import 85 percent of any quantity not surrendered.

Section 6.25(b)(i) of the Dairy Tariff-Rate Import Quota Licensing Program regulation currently provides, beginning with the 2016 quota year, an additional import requirement which applies only to historical licensees, that any historical licensee who surrenders more than 50 percent of the license amount for the same item from the same country during at least three of the most recent five years will be issued a license thereafter, in an amount equal to the average amount imported under that license for those five quota years.

The only non-technical modifications to the program since 1996 have been temporary suspensions of the provision in section 6.25(b) providing for the reduction in the license amount. Citing changed market conditions, including reduced export subsidies from the European Union, USDA temporarily suspended the provision three times: for five years from 1998–2002, for two years from 2009 to 2010, and most recently for five years from 2011 to 2015.

Upon promulgating the Dairy Tariff-Rate Import Quota Licensing Program regulation in 1996, the Secretary of Agriculture determined that this regulation resulted to the fullest extent practicable in a fair and equitable allocation of the right to import dairy products subject to licensing. The regulation also maximized the utilization of the tariff-rate quotas for such articles, taking due account of any special factors which may have affected or may be affecting the trade in the products. Regarding section 6.25(b), in light of the small number of licenses available to new entrants or others who wish to increase imports of a given article, USDA determined that it was sound public policy to reallocate license amounts that were consistently not being used and the 6.25(b) reduction provision would increase the amount available in the non-historical pool, while still giving historical licensees a fair opportunity to demonstrate that they are using their licenses.

Many stakeholders, particularly importers holding historical licenses, believe that section 6.25(b)(i) no longer serves its original purpose and have requested its elimination. They point out that in the last decade, for those items with low fill-rates, the non-historical license fill-rates are no higher than the historical license fill-rates. Stakeholders have also proposed as an alternative to eliminating section 6.25(b)(i), that the standard against which historical license fill-rates are measured should not be 50 percent, but rather the industry overall average fill-rate for each year. Under this type of rule, a historical license for a particular item would only be reduced if the licensee imported less than 50 percent of the industry's average imports of that item for three out of the most recent five years.

The U.S. dairy market has changed a great deal since the Dairy Tariff-Rate Import Quota Licensing Program regulation was promulgated in 1996. In the intervening years there have been significant advances in technology and telecommunications, and certain processes such as issuing new or reallocated licenses can now be managed in less time. Stakeholders have requested changes to some of the timelines and deadlines in the current regulation. For example, some would prefer that reallocation be done prior to October 1 of each year. Permitting reallocation earlier in the year would provide more time to identify supplies and arrange shipping and handling for entry into U.S. Customs territory before the quota year ends on December 31.

Some stakeholders have requested a review of the method for calculating the annual fee, which is currently levied per license, but could be levied in other ways such as per kilogram. A small number of importers control a large percentage of the quota allocations. These import licenses enable the licensee to import certain dairy products at the lower in-quota tariff-rate and, under the current licensing program, much of this value likely accrues to these licensed importers, due to the extent of control they have over imported dairy products subject to licensing. Given the length of time since the initial historical allocations were made almost 60 years ago, suggestions have been made that a more equitable license allocation system could be implemented.

USDA is requesting public comment on all of the issues mentioned above, or on any other part of the regulation at 7 CFR part 6, Subpart—Dairy Tariff-Rate Import Quota Licensing. In particular, comments are invited on these questions:

(1) Does the historical and nonhistorical license system still serve a purpose?

(2) Should any provisions of the current regulation be modified in light of significant advances in technology and telecommunications?

(3) Should methods be developed for issuing licenses that would increase competition among importers?

(4) Should licenses be auctioned or issued on another basis?

(5) Should section 6.25(b)(i) regarding historical license reductions be eliminated, revised, or indefinitely suspended?

(6) Should the basis upon which license fees are assessed be changed from the current flat-fee per license?

(7) Should the deadlines for the surrender and reallocation of licenses in section 6.26 be changed to allow earlier reallocations?

Dated: January 31, 2013.

Suzanne E. Heinen,

Administrator, Foreign Agricultural Service.

[FR Doc. 2013–02530 Filed 2–5–13; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS–2011–0060]

RIN 0579–AD59

Importation of Fresh Citrus Fruit From Uruguay, Including Citrus Hybrids and *Fortunella* spp., Into the Continental United States

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the fruits and vegetables regulations to allow the importation of several varieties of fresh citrus fruit, as well as *Citrus* hybrids and the *Citrus*-related genus *Fortunella,* from Uruguay into the continental United States. As a condition of entry, the fruit would have to be produced in accordance with a systems approach that would include requirements for importation in commercial consignments, pest monitoring and pest control practices, orchard sanitation and packinghouse procedures designed to exclude the quarantine pests, and treatment. The fruit would also be required to be

accompanied by a phytosanitary certificate issued by the national plant protection organization of Uruguay with an additional declaration confirming that the fruit is free from all quarantine pests and has been produced in accordance with the systems approach. This action would allow for the importation of fresh citrus fruit, including *Citrus* hybrids and the *Citrus*-related genus *Fortunella,* from Uruguay while continuing to provide protection against the introduction of plant pests into the United States.

DATES: We will consider all comments that we receive on or before April 8, 2013.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0060-0001.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2011–0060, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHIS 2011-0060* or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7032 before coming.

FOR FURTHER INFORMATION CONTACT: Ms. Meredith C. Jones, Regulatory Coordination Specialist, Regulatory Coordination and Compliance, PPQ, APHIS, 4700 River Road Unit 156, Riverdale, MD 20737; (301) 851–2289.

SUPPLEMENTARY INFORMATION:

Background

The regulations in ''Subpart–Fruits and Vegetables'' (7 CFR 319.56–1 through 319.56–57, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The national plant protection organization (NPPO) of Uruguay has requested that the Animal and Plant Health Inspection Service (APHIS) amend the regulations to allow sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), four species of mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow, *Citrus* hybrids, and two species of the *Citrus*-related genus *Fortunella* (*F. japonica* Thunb. Swingle and *F. margarita* (Lour.) Swingle) to be imported into the continental United States. Hereafter we refer to these species as ''citrus fruit.'' As part of our evaluation of Uruguay's request, we prepared a pest risk assessment (PRA) and a risk management document (RMD). Copies of the PRA and RMD may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT** or viewed on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room).

The PRA, titled ''Importation of Fresh Citrus Fruit, including Sweet Orange (Citrus sinensis (L.) Osbeck), Lemon (C. limon (L.) Burm. f.), Mandarin (C. reticulata Blanco, C. clementina Hort. ex Tanaka, C. deliciosa Ten., C. unshiu Marcow.), Citrus Hybrids, and the Citrus-Related Genus Fortunella (F. japonica (Thunb.) Swingle, F. margarita (Lour.) Swingle), from Uruguay into the Continental United States'' (Dec. 16, 2012), evaluates the risks associated with the importation of fresh citrus fruit into the continental United States from Uruguay.

The PRA and supporting documents identified six pests of quarantine significance present in Uruguay that could be introduced into the United States through the importation of citrus fruit. These include two fruit flies, *Anastrepha fraterculus* (South American fruit fly) and *Ceratitis capitata* (Mediterranean fruit fly); two moths, *Cryptoblabes gnidiella* (the honeydew moth) and *Gymnandrosoma aurantianum* (citrus fruit borer); one fungus (*Elsinoë australis,* causal agent of sweet orange scab); and a pathogen (*Xanthomonas citri* subsp. *citri,* causal agent of citrus canker). In a previous revision of the PRA, citrus black spot (*Guignardia citricarpa* Kiely) was included as a quarantine pathogen likely to follow the pathway. However we have since determined that fresh or dried citrus fruit is not epidemiologically significant as a pathway for the introduction of citrus black spot because the combination of conditions required for disease transmission from harvested fruit is highly unlikely. Therefore, analysis of this pathogen was removed from the document.

APHIS has determined that measures beyond standard port-of-arrival inspections are required to mitigate the risks posed by these plant pests. Therefore, we are proposing to allow the importation of citrus fruit from Uruguay into the continental United States only if it is produced under a systems approach. The systems approach would require the fruit to be imported only in commercial consignments; the Uruguayan NPPO to provide a workplan to APHIS that details the activities that the Uruguayan NPPO will, subject to APHIS' approval of the workplan, carry out to meet the proposed requirements; pest monitoring and pest control practices; orchard sanitation and packinghouse procedures designed to exclude the quarantine pests; and the fruit to be treated in accordance with 7 CFR part 305 and the Plant Protection and Quarantine (PPQ) Treatment Manual.[1] Consignments of citrus fruit from Uruguay would also be required to be accompanied by a phytosanitary certificate with an additional declaration stating that the fruit in the consignment is free of all quarantine pests and has been produced in accordance with the requirements of the systems approach. We are proposing to add the systems approach to the regulations in a new § 319.56–58.

Commercial Consignments

Paragraph (a) of proposed § 319.56–58 would state that only commercial consignments of citrus fruit from Uruguay would be allowed to be imported into the continental United States. Produce grown commercially is less likely to be infested with plant pests than noncommercial consignments. Noncommercial consignments are more prone to infestations because the commodity is often ripe to overripe, could be of a variety with unknown susceptibility to pests, and is often grown with little or no pest control. Commercial consignments, as defined in § 319.56–2, are consignments that an inspector identifies as having been imported for sale and distribution. Such identification is based on a variety of indicators, including, but not limited to: Quantity of produce, type of packing, identification of grower or packinghouse on the packaging, and documents consigning the fruits or vegetables to a wholesaler or retailer.

General Requirements

Paragraph (b) of proposed § 319.56–58 would set out general requirements for

[1] *http://www.aphis.usda.gov/import_export/plants/manuals/ports/downloads/treatment.pdf.*

the Uruguayan NPPO and for growers and packers producing citrus fruit for export to the United States.

The Uruguayan NPPO would be required to provide a workplan to APHIS that details the activities that the Uruguayan NPPO will, subject to APHIS' approval of the workplan, carry out to meet the proposed requirements. A bilateral workplan is an agreement between APHIS' PPQ program, officials of the NPPO of a foreign government, and, when necessary, foreign commercial entities that specifies in detail the phytosanitary measures that will comply with our regulations governing the import or export of a specific commodity. Bilateral workplans apply only to the signatory parties and establish detailed procedures and guidance for the day-to-day operations of specific import/export programs. Bilateral workplans also establish how specific phytosanitary issues are dealt with in the exporting country and make clear who is responsible for dealing with those issues. The implementation of a systems approach typically requires a bilateral workplan to be developed. APHIS would be directly involved with the Uruguayan NPPO in monitoring and auditing implementation of the systems approach.

All places of production and packinghouses that participate in the export program would have to be registered with the Uruguayan NPPO. Places of production that are registered with the Uruguayan NPPO would be required to follow specific field guidelines, including field monitoring, treatments, trapping and sampling, and sanitation. Packinghouses that are registered with the Uruguayan NPPO would be required to have in place general sanitation procedures and programs for training packinghouse workers to cull fruit with evidence of pest damage, among other things. If issues should arise, registration would also allow for the traceback of a box of fruit to its place of production and packinghouse and would allow APHIS and the Uruguayan NPPO to determine what remedial actions are necessary.

Citrus fruit would be required to be grown at places of production that meet the requirements for fruit and plant debris removal, orchard monitoring, and pest control described later in this document.

In addition, the fruit would have to be packed for export to the United States in a packinghouse that meets the requirements for safeguarding, culling, identification, and treatment that are described later in this document. The place of production where the fruit was grown would also be required to remain identifiable when the fruit leaves the place of production, at the packinghouse, and throughout the export process. Maintaining the identity of the fruit would allow for the use of the traceback procedures described earlier.

This paragraph would also require safeguarding to be maintained at all times during the movement of the fruit to the United States and to be intact upon arrival of the fruit in the United States. Maintaining safeguarding would prevent the fruit from being infested with insect pests during transit. The safeguarding requirements are discussed in greater detail later in this document under the heading ''Packinghouse Requirements.''

Monitoring and Oversight

The systems approach we are proposing includes monitoring and oversight requirements in paragraph (c) of proposed § 319.56–58 to ensure that the required phytosanitary measures are properly implemented throughout the process of growing and packing of citrus fruit for export to the United States. Oversight is important in ensuring that the requirements of the systems approach are implemented.

This paragraph would require the Uruguayan NPPO to visit and inspect registered places of production monthly, starting at least 30 days before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements for grove monitoring, pest control, and fruit and plant debris removal described later in this document. In addition to conducting fruit inspections at the packinghouses, the Uruguayan NPPO would also be required to monitor packinghouse operations to verify that the packinghouses are complying with the packinghouse requirements for safeguarding, culling, and treatment that are described later in this document.

If the Uruguayan NPPO finds that a place of production or a packinghouse is not complying with the relevant requirements of the regulations, no fruit from the place of production or packinghouse would be eligible for export to the United States until APHIS and the Uruguayan NPPO conduct an investigation and appropriate remedial actions have been implemented.

Grove Monitoring and Pest Control

Paragraph (d) of proposed § 319.56–58 would specify that trapping for Mediterranean fruit fly and South American fruit fly must be conducted to demonstrate that the places of production have a low prevalence of those fruit flies.

Specific trapping requirements would be included in the bilateral workplan and would be adjusted as necessary to ensure that trapping is effective. Consistent with the recommendations of the RMD, the bilateral workplan would initially require trapping in the places of production to monitor fruit fly populations to be conducted beginning at least 1 year before harvest begins and continue throughout the harvest. There would have to be at least two traps per square kilometer in all commercial production areas with at least two traps placed in each place of production. APHIS-approved traps baited with APHIS-approved plugs would have to be used and serviced at least once every 2 weeks. The personnel conducting trapping and pest surveys would have to be hired, trained, and supervised by the Uruguayan NPPO.

During the trapping, when traps are serviced, if more than 0.7 fruit flies are trapped per trap per day at a particular place of production, pesticide bait treatments would be required to be applied in order for the place of production to remain eligible to export fruit. The Uruguayan NPPO would have to keep records of fruit fly detections for each trap and make the records available to APHIS upon request. The records would have to be maintained for at least 1 year.

Orchard Sanitation

Under paragraph (e) of proposed § 319.56–58, places of production would have to be maintained free of fallen fruit and plant debris. Sanitation measures, such as removing and discarding fallen fruit, are essential components of good agricultural practices and are mainstays of commercial fruit production. These procedures would reduce the amount of material in the groves that could serve as potential disease inoculum for *E. australis* and *X. citri* subsp. *citri* or as host material for insect pests.

Fruit that has fallen from citrus trees to the ground tends to be damaged and over-mature. Therefore, to provide further assurance that fruit harvested for export is not a potential host for fruit flies, fallen fruit would not be allowed to be included in field containers of fruit brought to the packinghouse to be packed for export.

Packinghouse Requirements

We are proposing several requirements for packinghouse activities, which would be contained in paragraph (f) of proposed § 319.56–58. The packinghouse would have to be equipped with double self-closing doors

at the entrance to the packinghouse and at the interior entrance to the area where fruit is packed to prevent inadvertent introduction of pests into the packinghouse. In addition, any vents or openings in the packinghouse (other than the double self-closing doors) would have to be covered with screening 1.6 mm or smaller in order to prevent the entry of pests into the packinghouse. The 1.6 mm maximum screening size is adequate to exclude the insect pests of quarantine significance named earlier in this document.

Citrus fruit would have to be packed within 24 hours of harvest in the pest-exclusionary packinghouse or stored in a degreening chamber in the pest-exclusionary packinghouse. The fruit would have to be safeguarded by an insect-proof mesh, screen, or plastic tarpaulin while in transit from the production site to the packinghouse and while awaiting packing. The citrus fruit would have to be packed for shipment to the continental United States in insect-proof cartons or containers, or covered with insect-proof screen or plastic tarpaulin. These safeguards would have to remain intact until the arrival of the fruit in the United States or the consignment would not be allowed to enter the United States.

During the time the packinghouse is in use for exporting citrus fruit to the United States, the packinghouse would only be able to accept fruit from registered places of production. This requirement would prevent citrus fruit intended for export to the United States from being exposed to or mixed with fruit that are not produced according to the requirements of the systems approach.

Any symptomatic or damaged fruit would have to be removed from the commodity destined for export to the United States. This is a standard practice in packing commercial fruit that has been shown to effectively remove high proportions of fruit with visible pest damage or disease symptoms. In addition, all fruit for export would have to be practically free of leaves, twigs, and other plant parts, except for stems that are less than 1 inch long and attached to the fruit. Leaves, twigs, and other plant parts can serve as pathways for the introduction of diseases and should be excluded from consignments of citrus fruit from Uruguay.

Citrus fruit would also have to be prepared for shipping using packinghouse procedures that include washing, brushing, surface disinfection in accordance with 7 CFR part 305 and the PPQ Treatment Manual, treatment with an APHIS-approved fungicide in accordance with labeled instructions, and waxing. These measures are equivalent to our domestic requirements in § 301.75–7 for the interstate movement of citrus fruit from areas quarantined for *X. citri* subsp. *citri* and in the April 18, 2011, Federal Order [2] (DA–2011–22) for the interstate movement of citrus fruit from areas quarantined for *E. australis.* While washing and brushing are unlikely to directly kill either *E. australis* or *X. citri* subsp. *citri,* washing fruits may help to remove any hitchhiking insects. In addition, surface disinfection, fungicide application, and waxing are intended to reduce the viability of *X. citri* subsp. *citri* and *E. australis.* In particular, surface disinfection with an approved disinfectant has been demonstrated to be effective in reducing the numbers of *X. citri* subsp. *citri* cells or similar bacteria. In a Federal Order issued on March 23, 2011 (DA–2011–14), this procedure was approved for use against *E. australis.*

Treatment

Under paragraph (g)(1) of proposed § 319.56–58, the fruit (excluding lemon fruit), would have to be treated in accordance with 7 CFR part 305 with an approved treatment listed in the PPQ Treatment Manual for Mediterranean fruit fly and South American fruit fly. Such treatments may include, for Mediterranean fruit fly, methyl bromide fumigation using treatment schedule T101–w–1–2, cold treatment using treatment schedule T107–a, or methyl bromide fumigation followed by cold treatment using treatment schedule T108–a, and for South American fruit fly, methyl bromide fumigation using treatment schedule T101–j–2–1, or cold treatment using treatment schedules T107–a–1 or T107–c. Quarantine treatments are effective in eliminating South American fruit fly and Mediterranean fruit fly from citrus fruits. These treatments have been used successfully to mitigate pest risk for importing different types of fruits from many countries and would also mitigate the pest risk from citrus fruit from Uruguay.

APHIS has determined that lemons are not hosts for South American fruit fly and are a conditional nonhost for Mediterranean fruit fly, meaning that, while Mediterranean fruit fly generally does not infest lemons, it will do so under certain conditions. Green lemons are not hosts of Mediterranean fruit fly, but lemons' susceptibility to infestation increases as lemons mature and populations of Mediterranean fruit fly increase. The female Mediterranean fruit fly ovipositor normally cannot pierce through the rind of the lemon fruit to lay eggs in the toxin-free pulp; therefore, the eggs laid within the rind are killed by the toxic compounds. However, if the rind is thin or damaged, or existing oviposition puncture holes are present, females can exploit the damage or holes by ovipositing into them and the Mediterranean fruit fly eggs and larvae will be more likely to survive and develop. Additionally, high population pressure increases the likelihood that Mediterranean fruit fly will infest lemons; resistance of lemons to Mediterranean fruit fly infestation is causally linked to the chemical toxicity of the lemon rind and the thickness and toughness of the rind, but repeated oviposition by females into an existing oviposition puncture hole can overcome those barriers.

Therefore, we are proposing in paragraph (g)(2) of proposed § 319.56–58 that lemon fruit would be eligible for importation without treatment and if harvested green and if the phytosanitary certificate accompanying the lemons contains an additional declaration stating that the lemons were harvested green between May 15 and August 31. During this period (the winter season in Uruguay), Mediterranean fruit fly populations in Uruguay are low. If harvested outside of this timeframe or if harvested yellow, the lemons would have to be treated with an approved treatment as stated above.

Phytosanitary Certificate

To certify that citrus fruit from Uruguay have been grown and packed in accordance with the requirements of proposed § 319.56–58, proposed paragraph (h) would require each consignment of citrus fruit to be accompanied by a phytosanitary certificate of inspection issued by the Uruguayan NPPO bearing an additional declaration stating that the fruit in the consignment is free of all quarantine pests and has been produced in accordance with the requirements of the systems approach in proposed § 319.56–58. The phytosanitary certificate and additional declaration are intended to raise the awareness of port-of-entry inspectors of those requirements.

Miscellaneous Amendments to Subpart—Citrus Fruit § 319.28

The regulations in § 319.28(a) prohibit the importation of citrus from Uruguay, as well as from eastern and southeastern Asia, Japan, Brazil, Paraguay, and other designated areas. However, paragraphs

[2] *http://www.aphis.usda.gov/plant_health/plant_pest_info/citrus/downloads/sweet_orange/2011-22.pdf.*

(b) through (e) of § 319.28 set out various exceptions to this prohibition. To allow the importation of citrus fruit from Uruguay under § 319.56–58, we would add a new paragraph (d) to § 319.28 stating that the prohibition does not apply to citrus fruit from Uruguay that meets the requirements of proposed § 319.56–58. To accommodate the addition of the new paragraph (d) in § 319.28, we would redesignate current paragraphs (d) through (j) as paragraphs (e) through (k), respectively.

Finally, in the note under the subpart heading ''Subpart—Citrus Fruit,'' we would remove the reference to §§ 319.56 through 319.56–8, because it is now outdated. We would replace it with a general reference to ''Subpart—Fruits and Vegetables.''

Executive Order 12866 and Regulatory Flexibility Act

This proposed rule has been determined to be not significant for the purposes of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget.

In accordance with 5 U.S.C. 603, we have performed an initial regulatory flexibility analysis, which is summarized below, regarding the economic effects of this proposed rule on small entities. Copies of the full analysis are available by contacting the person listed under **FOR FURTHER INFORMATION CONTACT** or on the Regulations.gov Web site (see **ADDRESSES** above for instructions for accessing Regulations.gov).

Based on the information we have, there is no reason to conclude that adoption of this proposed rule would result in any significant economic effect on a substantial number of small entities. However, we do not currently have all of the data necessary for a comprehensive analysis of the effects of this proposed rule on small entities. Therefore, we are inviting comments on potential effects. In particular, we are interested in determining the number and kind of small entities that may incur benefits or costs from the implementation of this proposed rule.

U.S. entities that may be impacted by imports of fresh citrus from Uruguay are producers and packers of fresh oranges, lemons, tangerines, and mandarin varieties. Fresh oranges (including Navel, Valencia, Temple, and other varieties) are produced in California (87 percent), Florida (11 percent), and Texas (2 percent). Lemons are produced in California (97 percent) and Arizona (3 percent). Tangerines and mandarins (including tangelos and tangors) are produced in California (76 percent), Florida (23 percent), and Arizona (less than 1 percent). Louisiana commercially produces a variety of Satsuma that is mostly sold locally.

Impacts of the proposed rule on U.S. entities would be dependent upon the quantity of fresh citrus imported from Uruguay and the substitutability of these fresh citrus varieties for U.S.-grown citrus varieties. Historically, Uruguay has produced less than 3 percent of total U.S. citrus production, including processed citrus, and total exports of fresh citrus from Uruguay to world markets have been equivalent to less than 3 percent of the combined U.S. production of fresh orange, lemon, tangerine, and mandarin varieties. We anticipate that exports directed to the U.S. domestic market would be a small fraction of Uruguay's total exports of these fresh citrus fruits based on availability and currently established export markets in Europe and Russia. Given the small quantity expected to be imported from Uruguay, it is very unlikely that there would be a significant impact on the U.S. markets for fresh oranges, lemons, tangerines, and mandarin varieties. Given the sizable amounts of fresh lemons and mandarins, for example, imported by the United States and the fact that the time of year that citrus is produced in Uruguay is the same as that for current South American sources, we expect that any product displacement that may occur because of the proposed rule would be largely borne by other foreign suppliers of fresh citrus.

The majority of citrus producers and packinghouses are considered small entities. APHIS welcomes informed public comment in order to better determine the extent to which U.S. small entities may be affected by this proposed rule.

Executive Order 12988

This proposed rule would allow citrus fruit to be imported into the continental United States from Uruguay. If this proposed rule is adopted, State and local laws and regulations regarding citrus fruit imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

National Environmental Policy Act

To provide the public with documentation of APHIS' review and analysis of any potential environmental impacts associated with the importation of citrus fruit from Uruguay, we have prepared an environmental assessment. The environmental assessment was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 et seq.), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372).

The environmental assessment may be viewed on the Regulations.gov Web site or in our reading room. (A link to Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

In accordance with section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection or recordkeeping requirements included in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB). Please send written comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for APHIS, Washington, DC 20503. Please state that your comments refer to Docket No. APHIS–2011–0060. Please send a copy of your comments to: (1) Docket No. APHIS–2011–0060, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238, and (2) Clearance Officer, OCIO, USDA, room 404–W, 14th Street and Independence Avenue SW., Washington, DC 20250. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this proposed rule.

APHIS is proposing to amend the fruits and vegetables regulations to allow, under certain conditions, the importation into the continental United States of commercial consignments of fresh citrus fruit from Uruguay. The conditions for the importation of citrus fruit from Uruguay include requirements for importation in commercial consignments, pest monitoring and pest control practices,

orchard sanitation and packinghouse procedures. The citrus fruit would also be required to be accompanied by a phytosanitary certificate issued by the NPPO of Uruguay with an additional declaration confirming that the fruit had been produced in accordance with the proposed requirements. This action would allow for the importation of citrus fruit from Uruguay while continuing to provide protection against the introduction of injurious plant pests into the United States.

Implementing this rule will require the use of information collection activities, including completion of a bilateral workplan, registering of production sites, labeling, inspections and recordkeeping, and phytosanitary certificates.

We are soliciting comments from the public (as well as affected agencies) concerning our proposed information collection and recordkeeping requirements. These comments will help us:

(1) Evaluate whether the proposed information collection is necessary for the proper performance of our agency's functions, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the proposed information collection, 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 information collection on those who are to respond (such as 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).

Estimate of burden: Public reporting burden for this collection of information is estimated to average 0.36109 hours per response.

Respondents: Citrus producers, packers, importers, and the NPPO of Uruguay.

Estimated annual number of respondents: 16.

Estimated annual number of responses per respondent: 127.562.

Estimated annual number of responses: 2,041.

Estimated total annual burden on respondents: 737 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

Copies of this information collection can be obtained from Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the EGovernment Act to promote the use of the Internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. For information pertinent to E-Government Act compliance related to this proposed rule, please contact Mrs. Celeste Sickles, APHIS' Information Collection Coordinator, at (301) 851–2908.

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

PART 319–FOREIGN QUARANTINE NOTICES

■ 1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701–7772, and 7781–7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

Subpart—Citrus Fruit [Amended]

■ 2. In Subpart—Citrus Fruit, in the note below the subpart heading, remove the words ''fruit and vegetable quarantine No. 56 (§§ 319.56 to 319.56–8)'' and add the words ''Subpart—Fruits and Vegetables of this part'' in their place.

■ 3. Section 319.28 is amended as follows:

■ a. By redesignating paragraphs (d) through (j) as paragraphs (e) through (k), respectively, and adding a new paragraph (d).

■ b. By revising newly redesignated paragraph (g).

The addition and revision read as follows:

§ 319.28 Notice of quarantine.

* * * * *

(d) The prohibition does not apply to sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow), *Citrus* hybrids, *Fortunella. japonica* (Thunb.) Swingle, and *F. margarita* (Lour.) Swingle, from Uruguay that meet the requirements of 7 CFR 319.56–58.

* * * * *

(g) Importations allowed under paragraphs (b) through (e) of this section shall be subject to the permit and other requirements under the regulations in Subpart—Fruits and Vegetables of this part.

* * * * *

■ 4. A new § 319.56–58 is added to read as follows:

§ 319.56–58 Fresh citrus fruit from Uruguay.

Sweet oranges (*Citrus sinensis* (L.) Osbeck), lemons (*C. limon* (L.) Burm. f.), mandarins (*C. reticulata* Blanco, *C. clementina* Hort. ex Tanaka, *C. deliciosa* Ten., and *C. unshiu* Marcow), *Citrus* hybrids, *Fortunella japonica* (Thunb.) Swingle, and *F. margarita* (Lour.) Swingle may be imported into the continental United States from Uruguay only under the conditions described in this section. These species are referred to collectively in this section as ''citrus fruit.'' These conditions are designed to prevent the introduction of the following quarantine pests: *Anastrepha fraterculus, Ceratitis capitata, Cryptoblabes gnidiella, Elsinoë australis, Gymnandrosoma aurantianum,* and *Xanthomonas citri* subsp. *citri.*

(a) *Commercial consignments.* Citrus fruit from Uruguay may be imported in commercial consignments only.

(b) *General requirements.* (1) The national plant protection organization (NPPO) of Uruguay must provide a workplan to APHIS that details the activities that the Uruguayan NPPO will, subject to APHIS' approval of the workplan, carry out to meet the requirements of this section. APHIS will be directly involved with the Uruguayan NPPO in monitoring and auditing implementation of the systems approach.

(2) All places of production and packinghouses that participate in the export program must be registered with the Uruguayan NPPO.

(3) The fruit must be grown at places of production that meet the requirements of paragraphs (d) and (e) of this section.

(4) The fruit must be packed for export to the United States in a packinghouse that meets the requirements of paragraph (f) of this section. The place of production where the lemons were grown must remain identifiable when the fruit leaves the grove, at the packinghouse, and throughout the export process. Boxes containing citrus fruit must be marked with the identity and origin of the fruit. Safeguarding in accordance with paragraph (f)(3) of this section must be maintained at all times during the

movement of the citrus fruit to the United States and must be intact upon arrival of the citrus fruit in the United States.

(c) *Monitoring and oversight.* (1) The Uruguayan NPPO must visit and inspect registered places of production monthly, starting at least 30 days before harvest and continuing until the end of the shipping season, to verify that the growers are complying with the requirements of paragraphs (d) and (e) of this section.

(2) In addition to conducting fruit inspections at the packinghouses, the Uruguayan NPPO must monitor packinghouse operations to verify that the packinghouses are complying with the requirements of paragraph (f) of this section.

(3) If the Uruguayan NPPO finds that a place of production or packinghouse is not complying with the relevant requirements of this section, no fruit from the place of production or packinghouse will be eligible for export to the United States until APHIS and the Uruguayan NPPO conduct an investigation and appropriate remedial actions have been implemented.

(d) *Grove monitoring and pest control.* Trapping must be conducted in the places of production to demonstrate that the places of production have a low prevalence of *A. fraterculus* and *C. capitata.* If the prevalence rises above levels specified in the bilateral workplan, remedial measures must be implemented. The Uruguayan NPPO must keep records of fruit fly detections for each trap and make the records available to APHIS upon request. The records must be maintained for at least 1 year.

(e) *Orchard sanitation.* Places of production must be maintained free of fallen fruit and plant debris. Fallen fruit may not be included in field containers of fruit brought to the packinghouse to be packed for export.

(f) *Packinghouse procedures.* (1) The packinghouse must be equipped with double self-closing doors at the entrance to the packinghouse and at the interior entrance to the area where fruit is packed.

(2) Any vents or openings (other than the double self-closing doors) must be covered with 1.6 mm or smaller screening in order to prevent the entry of pests into the packinghouse.

(3) Fruit must be packed within 24 hours of harvest in a pest-exclusionary packinghouse or stored in a degreening chamber in a pest-exclusionary packinghouse. The fruit must be safeguarded by an insect-proof screen or plastic tarpaulin while in transit to the packinghouse and while awaiting packing. Fruit must be packed in insect-proof cartons or containers, or covered with insect-proof mesh or a plastic tarpaulin, for transport to the United States. These safeguards must remain intact until the arrival of the fruit in the continental United States or the consignment will not be allowed to enter the United States.

(4) During the time the packinghouse is in use for exporting citrus fruit to the continental United States, the packinghouse may only accept fruit from registered places of production.

(5) Culling must be performed in the packinghouse to remove any symptomatic or damaged fruit. Fruit must be practically free of leaves, twigs, and other plant parts, except for stems that are less than 1 inch long and attached to the fruit.

(6) Fruit must be washed, brushed, surface disinfected in accordance with part 305 of this chapter, treated with an APHIS-approved fungicide in accordance with labeled instructions, and waxed.

(g) *Treatment.* (1) Citrus fruit other than lemons may be imported into the continental United States only if it is treated in accordance with part 305 of this chapter for *A. fraterculus* and *C. capitata.*

(2)(i) Lemons may be shipped without a treatment if harvested green and if the phytosanitary certificate accompanying the lemons contains an additional declaration stating that the lemons were harvested green between May 15 and August 31.

(ii) If the lemons are harvested between September 1 and May 14, or if the fruit is harvested yellow, the lemons must be treated in accordance with part 305 of this chapter for *C. capitata.*

(h) *Phytosanitary certificate.* Each consignment of citrus fruit must be accompanied by a phytosanitary certificate of inspection issued by the Uruguayan NPPO stating that the fruit in the consignment is free of all quarantine insects and has been produced in accordance with the requirements of the systems approach in 7 CFR 319.56–58.

Done in Washington, DC, this 31st day of January 2013.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2013–02647 Filed 2–5–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1206

[Document No. AMS–FV–12–0041]

Mango Promotion, Research, and Information Order; Nominations of Foreign Producers and Election of Officers

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule would allow foreign producers, from major countries exporting mangos to the United States, who are not members of a foreign producer organization to submit names to the Secretary for appointment to the National Mango Board (Board). At this time, only foreign producer associations from major countries exporting mangos to the United States can submit names to the Secretary for consideration. In addition, this proposal seeks to provide flexibility to the timing of election of officers to the Board. The changes were proposed by the Board, which administers the program, in accordance to the provisions of the Mango Promotion, Research, and Information Order (Order) which is authorized under the Commodity Promotion, Research, and Information Act of 1996 (Act).

DATES: Comments must be received by February 26, 2013.

ADDRESSES: Comments may be submitted electronically at *http://www.regulations.gov.* Comments may also be sent to the Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, Room 1406–S, Stop 0244, 1400 Independence Avenue SW., Washington, DC 20250–0244; fax (202) 205–2800. All comments submitted should reference the document number and title of this proposed rule, and will be included in the record and made available for public inspection. Comments may be viewed on the internet at *http://www.regulations.gov*, or at the above office. Please be advised that the identity of individuals or entities submitting comments will be made public on the internet at the above Web site.

FOR FURTHER INFORMATION CONTACT: Jeanette Palmer, Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, AMS, USDA, 1400 Independence Avenue

SW., Room 1406–S, Stop 0244, Washington, DC 20250–0244; telephone: (888) 720–9917; fax: (202) 205–2800; email: *Jeanette.Palmer@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: This rule is issued under the Mango Promotion, Research, and Information Order (Order) (7 CFR part 1206). The Order is authorized under the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425).

Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as ''non-significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has waived the review process.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect.

Section 524 of the Act provides that the Act shall not affect or preempt any other State or Federal law authorizing promotion or research relating to an agricultural commodity.

Under the Act, a person subject to an order may file a petition with the U.S. Department of Agriculture (Department) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and requesting a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, shall be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner will have the opportunity for a hearing on the petition. Thereafter, the Department will issue a ruling on the petition. The Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Department's final ruling.

Regulatory Flexibility Analysis and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on the small entities that would be affected by this rule. The purpose of the RFA is to fit regulatory action to scale on businesses subject to such action so that small businesses will not be disproportionately burdened.

The Small Business Administration defines small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms as those having annual receipts of no more than $7 million (13 CFR part 121). First handlers and importers would be considered agricultural service firms, and the majority of mango producers, first handlers and importers would be considered small businesses. Although this criterion does not factor in additional monies that may be received by producers, handlers and importers of mangos, it is an inclusive standard for identifying small entities.

Mango producers are not subject to the assessment. First handlers and importers who market or import less than 500,000 pounds of mangos annually are exempt from the assessment. Mangos that are exported out of the United States are also exempt from assessment. Furthermore, while domestic and foreign producers are not subject to assessment under the Order, such individuals are eligible to serve on the Board along with importers and first handlers. Currently, approximately three first handlers and 193 importers are subject to assessment under the Order.

U.S. production of mangos is located in California, Florida, Hawaii, Texas, and Puerto Rico according to the most recent U.S. Census of Agriculture (Agricultural Census) which was conducted in 2007. The Agricultural Census does not include California production because California has so few producers that publishing production data would reveal confidential information. According to the 2007 Agricultural Census published by the Department's National Agricultural Statistics Service, the U.S. had a total of 2,259 acres of mangos in 2007, which is the most recent data available. Out of the total acreage, 1,212 acres (54 percent) were in Florida, and the remaining 1,047 acres (46 percent) were in Hawaii, California, and Texas. The Agricultural Census does not collect mango production data for Puerto Rico. Individual acreage for Hawaii, California and Texas are not available. U.S. mango acreage rose by 321 acres between 2002 and 2007. Florida saw a decrease of 161 acres between 2002 and 2007 census, but acres in other States rose by 482 acres. Census data is published every five years.

Seven countries account for 99 percent of the mangos imported into the United Sates. These countries and their share of the imports (from April 1, 2011, through March 31, 2012) are: Mexico (68 percent); Ecuador (9 percent); Brazil (7 percent); Peru (7 percent); Guatemala (4 percent); Haiti (3 percent); and Nicaragua (1 percent). For the period from April 1, 2011, through March 31, 2012, the United States imported a total of 353,629 tons of mangos, valued at $280 million.

The Board is composed of 18 members, including eight importers; two domestic producers; one first handler; and seven foreign producers. Nominations and appointments to the Board are conducted pursuant to section 1206.31 of the Order. Nominations for the importer, domestic producer, and first handler seats are made by U.S. importers, domestic producers, and first handlers, respectively. Foreign producers are nominated by foreign producer associations. The Board wants to increase the pool of nominees from the major countries that export mangos to the United States by allowing foreign producers who are in areas without a producer organization to nominate foreign producers to the Board.

Section 515(b)(2)(C) of the Act states the Secretary may make appointments from nominations made pursuant to the method set forth in the order. The Board wants to receive representation from all mango growing regions within the major mango exporting countries to the United States. Section 1206.31(g) of the Order limits the nominations for the foreign producer seats to the foreign mango organizations. At a meeting on September 11, 2009, the Board voted (9 out of 14 in favor) to allow foreign producers from the major countries exporting mangos to the United States to provide nominees directly to the Secretary. At a recent Board meeting, the Board decided to request this change. The proposed change does not limit the foreign producer organizations ability to submit nominations. It will increase the slate of candidates from which the Secretary may choose to appoint to the Board. It also provides an

opportunity to increase diversity on the Board.

In addition, on July 11, 2012, the Board voted unanimously to amend the Order to provide the Board flexibility in the election of officers. Currently, section 1206.34 (b) of the Order requires the Board to select a chairperson and a vice chairperson at the start of its fiscal period. The Board must schedule Board meetings around several domestic and international growing regions in the mango industry. This challenge has caused the Board to hold its first meeting of the year three months into the fiscal year. The language in the Order would leave the Board without a chairperson for several months. The Board had considered changing its fiscal year, but it was rejected by Board members because the Board's fiscal year flows with the mango production cycle which is a calendar year.

Section 515(c)(3) of the Act allows the Board to meet, organize, and select among its members its officers as the Board determines appropriately. In practice, the Board has learned that waiting three months into its fiscal year to elect officers is impractical. The Board believes that electing its officers at the last meeting of the fiscal year is more advantageous. Therefore, the Board proposes to update the Order to reflect the particular needs of the mango industry and to provide for a more efficient management method.

This rule does not impose additional recordkeeping requirements on first handlers, importers, or producers of mangos. There are no Federal rules that duplicate, overlap, or conflict with this rule.

In accordance with the Office of Management and Budget (OMB) regulation (5 CFR part 1320) that implements the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements that are imposed by the Order have been approved previously under OMB control number 0581–0093. This rule does not result in a change to the information collection and recordkeeping requirements previously approved.

We have performed this initial Regulatory Flexibility Analysis regarding the impact of this proposed amendment to the Order on small entities and we invite comments concerning potential effects of this amendment on small businesses.

Background

The Order became effective on November 3, 2004, and it is authorized under the Act. The Board is composed of 18 members, including eight importers; two domestic producers; one first handler; and seven foreign producers. Nominations for the importer, domestic producer, and first handler seats are made by U.S. importers, domestic producers, and first handlers, respectively. Foreign producers are nominated by foreign producer associations.

Under the Order, the Board administers a nationally coordinated program of research and promotion designed to strengthen the position of mangos in the marketplace and to establish, maintain, and expand U.S. markets for mangos. The program is financed by an assessment of three quarters of a cent per pound on first handlers and importers of 500,000 pounds or more of mangos annually. The Order specifies that first handlers are responsible for submitting assessments to the Board on a monthly basis and maintaining records necessary to verify their reporting. Importers are responsible for paying assessments on mangos imported for marketing in the United States through the U.S. Customs and Border Protection Service of the U.S. Department of Homeland Security.

The Board wants to increase the pool of nominees from the major countries that export mangos to the United States by allowing foreign producers who are in areas without a producer organization to nominate foreign producers to the Board. The Board wants to receive representation from all mango growing regions within the major countries that export mangos to the United States. Section 1206.31(g) of the Order limits the nominations for the foreign producer seats to the foreign mango organizations. At a meeting on September 11, 2009, the Board voted to allow foreign producers from the major countries exporting mangos to the United States to provide nominees directly to the Secretary. At a recent meeting, the Board decided to request this change. The propose change does not limit the foreign producer organizations ability to submit nominations. It will increase the slate of candidates from which the Secretary may choose to appoint members to the Board.

This propose change is consistent with section 515(b)(2)(C) of the Act which states the Secretary may make appointments from nominations made pursuant to the method set forth in the Order. The Board wants to expand its slate of candidates for the Secretary's decision for appointment to the Board. Accordingly, section 1206.31(g) of the Order would be revised to allow foreign producers who are not members of a producer organization to nominate foreign producers to the Secretary for consideration for appointment to the Board.

In addition, on July 11, 2012, the Board voted unanimously to amend the Order to provide the Board flexibility in the election of officers. Currently, section 1206.34(b) of the Order requires the Board to select a chairperson and a vice chairperson at the start of its fiscal period. The Board must schedule Board meetings around several domestic and international growing regions in the mango industry. This challenge has caused the Board to hold its first meeting of the year three months into the fiscal year. The current procedure in the Order would leave the Board without a chairperson for several months. The Board had considered changing its fiscal year, but it was rejected because the Board's fiscal year flows with the mango production cycle which is a calendar year.

In practice, the Board has learned that waiting three months into its fiscal year to elect officers is impractical. The Board believes that electing its officers at the last meeting of the fiscal year is more advantageous. Therefore, the Board proposes to update the Order to reflect the particular needs of the mango industry and to provide for a more efficient management method. This proposed change is consistent with section 515(c)(3) of the Act which permits the Board to meet, organize, and select among its members its officers as the Board determines appropriately. This rule would amend section 1206.34(b) of the Order to provide the Board flexibility in the timing to elect its officers.

A 20-day comment period is provided to allow interested persons to respond to this proposal. Twenty days is deemed appropriate so that the proposed amendments, if adopted, may be implemented for the next nomination process which begins early Spring 2013 and to reflect the current practices of the election of officers. If this process is not in effect by Spring of 2013, then the foreign producers without an organization would not be able to have representation on the Board until the year 2015. In addition, this nomination revision was disseminated to the mango industry which supports this change. All written comments received in response to this rule by the date specified would be considered prior to finalizing this action.

Pursuant to 5 U.S.C. 553, it is also found that good cause exists for not postponing the effective date of this action until twenty days after publication in the **Federal Register**

because a final rule needs to be in effect before the Board makes a call for nominations for the term of office beginning January 1, 2014.

List of Subjects in 7 CFR Part 1206

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Mango promotion, Reporting and recording requirements.

For the reasons set forth in the preamble, 7 CFR part 1206 is proposed to be amended as follows:

PART 1206—MANGO PROMOTION, RESEARCH, AND INFORMATION ORDER

■ 1. The authority citation for 7 CFR part 1206 continues to read as follows:

Authority: 7 U.S.C. 7411–7425 and 7401.

■ 2. In § 1206.31, paragraph (g) is revised to read as follows:

§ 1206.31 Nominations and appointments.

* * * * *

(g) Nominees to fill the foreign producer member positions on the Board shall be solicited from organizations of foreign mango producers and from foreign mango producers. Organizations of foreign mango producers shall submit two nominees for each position, and foreign mango producers may submit their name or the names of other foreign mango producers directly to the Board. The nominees shall be representative of the major countries exporting mangos to the United States.

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■ 3. In § 1206.34, paragraph (b) is revised to read as follows:

§ 1206.34 Procedure.

* * * * *

(b) The Board shall select officers from its membership, including a chairperson and vice chairperson, whose terms shall be one year. The chairperson and vice-chairperson will conduct meetings throughout the period.

* * * * *

Dated: February 1, 2013.

David R. Shipman,

Administrator.

[FR Doc. 2013–02615 Filed 2–5–13; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1710

Energy Efficiency and Conservation Loan Program Programmatic Environmental Assessment

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of availability of a Programmatic Environmental Assessment.

SUMMARY: The U.S. Department of Agriculture, Rural Utilities Service (RUS), has prepared a Programmatic Environmental Assessment (PEA) for a new program that will implement the Energy Efficiency and Conservation Loan Program (EE). The PEA is available for a 30-day public review and comment period. Subsequent to the comment period RUS plans to issue a finding of no significant impact.

DATES: Written comments on this Notice must be received on or before March 8, 2013.

FOR FURTHER INFORMATION CONTACT: Deirdre M. Remley, Environmental Protection Specialist, RUS, Water and Environmental Programs, Engineering and Environmental Staff, 1400 Independence Avenue SW, Stop 1571, Washington, DC 20250–1571, Telephone: (202) 720–9640 or email: deirdre.remley@wdc.usda.gov . The PEA is available online at *http://www.rurdev.usda.gov/UWP-ea.htm* or you may contact Ms. Remley for a hard copy.

SUPPLEMENTARY INFORMATION: On May 22, 2008, the U.S. Congress enacted the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) as Public Law 110–234. The 2008 Farm Bill amended Section 12 to authorize energy audits and energy efficiency measures and devices to reduce demand on electric systems. Section 6101 of the 2008 Farm Bill amended Sections 2(a) and 4 of the Rural Electrification Act (RE Act) by inserting ''efficiency and'' before ''conservation'' each place it appears. Under the authority of the ''efficiency'' provisions added to the RE Act by the 2008 Farm Bill, RUS proposes to amend 7 CFR part 1710 by adding a new subpart H entitled ''Energy Efficiency and Conservation Loan Program,'' which expands upon policies and procedures specific to loans for a new Energy Efficiency and Conservation Loan program. The program would provide loans to eligible rural utility providers (Primary Recipients) who would act as intermediaries to make Energy Efficiency (EE) loans to consumers in the Primary Recipients' service territories (Ultimate Recipients) for EE improvements at the Ultimate Recipients' premises.

This program is funded through existing authorizations and appropriations. RUS expects that $250 million per year will be dedicated to the EE program. On July 26, 2012, RUS published a proposed rulemaking in the **Federal Register** at 77 FR 43723, with a 60-day comment period, for the subpart H of 7 CFR part 1710, which would implement the EE program. The final rule will outline the procedures for providing loans to eligible Primary Recipients who will establish EE activities in their service territories and to pay reasonable administrative expenses associated with their loans under the program. The proposed rule defines an ''Eligible Borrower'' (Primary Recipient) as an electric utility that has direct or indirect responsibility for providing retail electric service to persons in a rural area.

Certain financing actions taken by RUS are Federal actions subject to compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.), the Council on Environmental Quality (CEQ) regulations implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), and RUS ''Environmental Policies and Procedures'' (7 CFR part 1794). There are two Federal actions under the new EE program being considered in this PEA: (1) Loans awarded by RUS to Primary Recipients, and (2) loans and other EE activities that the Primary Recipient executes for the benefit of Ultimate Recipients.

The levels of environmental review for RUS actions are classified in 7 CFR part 1794, subpart C, Classification of Proposals. Both agency actions for the EE program are classified in § 1794.22(b)(1) (loan approvals) as categorically excluded proposals requiring an Environmental Report (ER). Due to the limited scope and magnitude of most EE loan activities, RUS finds that a programmatic environmental analysis of the new EE program will reduce paperwork, duplication of effort, and promote a more efficient decision-making process for program implementation. RUS reserves the right to update this programmatic analysis to take additional information into account or develop particular elements of the analysis more fully as may be warranted in individual circumstances.

In summary, RUS has determined that the implementation of the EE program would not significantly affect the human or natural environment.

However, to minimize any potential for adverse effects to specific environmental resources, Primary Recipients will be required to comply with the following mitigation measures. These mitigation measures will be incorporated in Primary Recipients' EE program work plans and loan documents.

1. Land Use/Formally Designated Lands

RUS would provide guidance to Primary Recipients as part of the Environmental Compliance Tool Kit informing Primary Recipients of their obligations to coordinate with Federal, state and local agencies for approval of any activities that may occur on lands for which these agencies may have jurisdiction.

2. Indian Trust Resources

To ensure that RUS takes into consideration tribal concerns about EE program activities and to maintain the government-to-government relationship between RUS and tribal sovereign nations, RUS will provide guidance to Primary Recipients as part of the Environmental Compliance Tool Kit for implementing activities on Indian lands. If necessary, mitigation measures for effects to tribal trust resources will be developed and implemented on a case-by-case basis.

3. Floodplains

No mitigation measures or further review of floodplain impacts is required if the EE activity is: (1) Restricted to the footprint of existing structures, or (2) not restricted to the footprint of existing structures, but a review of floodplain maps shows that the Ultimate Recipient's premise is not within a floodplain. In accordance with Rural Development Instruction 426.2 II.C., and under the authority of the National Flood Insurance Protection Act of 1968 as amended by the Flood Disaster Protection Act of 1973, RUS is prohibited from providing assistance to communities that do not participate in the National Flood Insurance Program (NFIP) administered by the Federal Emergency Management Agency. Therefore, if a proposed EE activity does not meet either of the two exceptions listed above, and if a proposed structure cannot be placed outside a floodplain, the Ultimate Recipient must obtain flood insurance, if the structure is insurable.

4. Wetlands

No mitigation measures or further review of wetlands impacts is required if the EE activity is: (1) Restricted to the footprint of the existing structures or area of previous disturbance, or (2) not restricted to the footprint of existing structures or area of previous disturbance, but a review of National Resources Conservation Service (NRCS) soils maps shows that the Ultimate Recipient's premises is not within a hydric soil unit which is one of the three positive indicators of identifying wetlands (USACE Wetlands Delineation Manual, 1987).

EE program activities that involve new construction of facilities outside the footprint of existing structures or areas of previous disturbance will require a review of NRCS soil maps, and the Environmental Compliance Tool Kit would provide guidance on using NRCS soils data and on interpreting U.S. Army Corps of Engineers (USACE) requirements for wetlands. The tool kit will also provide guidance on whether an existing Nationwide Permit may apply to the action, or if hydric soils are present at a proposed project site and cannot be avoided. If wetlands are potentially affected and if the proposed action is under the jurisdiction and is authorized under the general conditions of a USACE Nationwide Permit(s), the tool kit would also provide a template Preconstruction Notice for a Primary or Ultimate Recipient to prepare and send to the District Engineer, USACE having jurisdiction over the proposed project area.

5. Coastal Barrier Resources

The Coastal Barrier Resources Act of 1982 designated units of the Coastal Barrier Resources System (CBRS) and created restrictions on most new Federal expenditures and financial assistance in these units to prevent Federal actions that may encourage development on barrier islands. If a Primary Recipient has reason to believe that any of its Ultimate Recipients may have premises in a unit of the CBRS, they will coordinate with RUS to consult with the U.S. Fish and Wildlife System (USFWS). RUS must receive written approval from the USFWS before any proposed action within a unit of the CBRS can be taken.

6. Species of Concern

To mitigate the potential for a ''take'' under the Endangered Species Act or the Migratory Bird Treaty Act, the Environmental Compliance Tool Kit would provide guidance on identifying potential impacts to special status species that could result from EE program activities. The tool kit would provide instructions on how to find site-specific information for a given activity and how and when to consult with the USFWS.

7. Health and Safety

To mitigate the potential for exposure to lead paint, work that may disturb painted surfaces in pre-1978 structures would be performed by a contractor with the appropriate lead certification. To mitigate the potential for exposure to asbestos, field personnel planning EE program activities at Ultimate Recipients' premises would be trained to identify asbestos. If asbestos is found and if there is potential for it to be disturbed by a given activity, the asbestos must be removed by an asbestos remediation professional prior to the start of work on the project.

8. Historic Properties

To meet responsibilities under Section 106 of the NHPA and its implementing regulation (36 CFR Part 800) for the EE program and its activities, RUS is pursuing the development of a program alternative in accordance with 36 CFR 800.14. In August 2012, RUS invited the ACHP, State Historic Preservation Officers (SHPO), Indian tribes, and selected industry and tribal organizations to participate in consultation to develop this program alternative. With the invitation, RUS included a Conceptual Outline which described the EE Program and the challenges it presents for Section 106 review, and provided an analysis that concluded that a nationwide Programmatic Agreement (PA) developed pursuant to 36 CFR 800.14(b) to be the program alternative appropriate for the EE Program. The objective of the program alternative is to streamline Section 106 review, focusing Federal, state and tribal resources where they are most needed. On August 23 and 24, 2012, RUS hosted a series of webinars for SHPOs and Indian tribes, respectively, to discuss and solicit their comments on a nationwide PA, as the appropriate program alternative, and topical areas it might address.

While explicit terms of a nationwide PA have not yet been drafted, RUS recognizes, as presented in the Conceptual Outline, that any proposed program alternative must establish programmatic exemptions or thresholds for EE program activities that have little or no potential to cause effects to historic properties and standard methods for the EE Program to treat defined categories of historic properties, activities, and effects.

As part of the Environmental Compliance Tool Kit, RUS will develop a specialized toolkit for Section 106 requirements that will be part of the loan commitment documentation which RUS provides to Primary Recipients.

RUS will require Primary Recipients to evaluate each action taken with an Ultimate Recipient to ensure consistency with the terms of the executed program alternative.

Primary Recipients will be responsible for documenting activities that fall below the established threshold. RUS will review the Primary Recipient's documentation of actions that fall below the threshold prior to providing reimbursement with Federal funds.

Any EE Program activity for which exemptions and standard treatments are not applicable would be subject to Section 106 review under procedures established by the PA or other program alternative. Therefore, the program alternative must define a clear threshold for RUS involvement in Section 106 review.

Although few in number, the comments on the Conceptual Outline received thus far have been supportive of the development of a nationwide PA, the need for streamlining, especially given the large number of reviews expected to be generated by EE Program activities, and the approach reflected in the Conceptual Outline. Based on these comments, RUS is proceeding with development of the first draft of the nationwide PA. The program alternative will be executed prior to RUS issuing a finding of no significant impact (FONSI). Both the FONSI and documents related to the program alternative will be made available to the public on RUS's Web site at *http://www.rurdev.usda.gov/UWP-ea.htm.*

Dated: January 29, 2013.

Nivin Elgohary,

Assistant Administrator, Electric Programs, USDA, Rural Utilities Service.

[FR Doc. 2013–02393 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0013; Directorate Identifier 2012–CE–046–AD]

RIN 2120–AA64

Airworthiness Directives; GROB–WERKE Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: The FAA is correcting a Notice of Proposed Rulemaking (NPRM) that published in the **Federal Register**. That NPRM applies to all GROB–WERKE Model G115EG airplanes. The docket number in the preamble and in the section titled PART 39—AIRWORTHINESS DIRECTIVES, paragraph 2, is incorrect. This document corrects that error. In all other respects, the original document remains the same.

DATES: The last date for submitting comments to the NPRM (78 FR 2910, January 15, 2013) remains March 1, 2013.

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

FOR FURTHER INFORMATION CONTACT: Taylor Martin, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4138; fax: (816) 329–4090; email: *taylor.martin@faa.gov.*

SUPPLEMENTARY INFORMATION: Notice of Proposed Rulemaking (NPRM), Directorate Identifier 2012–CE–046–AD (78 FR 2910, January 15, 2013), currently proposes to require inspections of the elevator trim tab arms for cracks and replacement if necessary.

As published, the docket number in the preamble and in the section titled PART 39—AIRWORTHINESS DIRECTIVES, paragraph 2, is incorrect.

No other part of the preamble or regulatory information has been changed; therefore, only the changed portion of the NPRM is being published in the **Federal Register**.

The last date for submitting comments to the NPRM remains March 1, 2013.

Correction of Non-Regulatory Text

In the **Federal Register** of January 15, 2013, Directorate Identifier 2012–CE–046–AD is corrected as follows:

On page 2910, in the 2nd column, on line 4 under the preamble (below DEPARTMENT OF TRANSPORTATION), change Docket No. to ''FAA–2013–0013.''

Correction of Regulatory Text

§ 39.13 [Corrected]

■ In the **Federal Register** of January 15, 2013, on page 2911, in the 3rd column, on line 20, in paragraph (2) under PART 39—AIRWORTHINESS DIRECTIVES of Directorate Identifier 2012–CE–046–AD is corrected to read as follows:

* * * * *

* * * ''FAA–2013–0013;''

* * * * *

Issued in Kansas City, Missouri, on January 28, 2013.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–02578 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201, 314, and 601

[Docket No. FDA–2013–N–0059]

Center for Drug Evaluation and Research; Prescription Drug Labeling Improvement and Enhancement Initiative; Request for Comments and Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of an initiative; request for comments and information.

SUMMARY: The Food and Drug Administration (FDA) is announcing the establishment of a docket to receive comments on the proposed implementation of FDA's Prescription Drug Labeling Improvement and Enhancement Initiative and on a proposed pilot project relating to the voluntary conversion of labeling to the ''Physician Labeling Rule (PLR)'' format described in the 2006 FDA final rule, ''Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products.'' The purpose of the initiative and the pilot project is to enhance the safe and effective use of prescription drugs by facilitating optimal communication through labeling. FDA is seeking public comment on this initiative, and the pilot project, particularly from stakeholders who develop and use prescription drug labeling. Comments received from stakeholders will assist the Agency in identifying and addressing feasibility and implementation issues associated with this initiative.

DATES: Submit either electronic or written comments by March 8, 2013.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–301), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Connie Wisner, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6360, Silver Spring, MD 20993–0002, 301–796–8509, FAX: 301–847–3529, email: *connie.wisner@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Prescription drug labeling, commonly called the package insert or prescribing information, is a compilation of information approved by FDA about the safe and effective use of the product, based on FDA's thorough analysis of the new drug application (NDA) or biologics license application (BLA) submitted by the applicant. Its primary purpose is to provide health care practitioners with the essential information needed to facilitate prescribing decisions, thereby enhancing the safe and effective use of prescription drug products and reducing the likelihood of medication errors.

FDA implemented standardized prescription drug labeling in 1979 (44 FR 37434, June 26, 1979). However, over the ensuing 25 years, labeling became increasingly lengthy and complex, which affected its usefulness to healthcare professionals. To address this issue, FDA evaluated the usefulness of prescription drug labeling among healthcare professionals to determine whether and how its content and format could be improved and completed a rulemaking focused on enhanced prescription drug labeling.

In 2006, FDA published the final rule, ''Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products,'' which revised the content and format requirements for labeling to make it easier to access, read, and use (71 FR 3922, January 24, 2006). The rule is commonly referred to as the ''Physician Labeling Rule'' (PLR or final rule) because it addresses prescription drug labeling that is used by prescribers, including physicians and other healthcare practitioners.[1]

The final rule applies to products for which an NDA, BLA, or efficacy supplement (ES) was approved between June 30, 2001, and June 30, 2006, and to NDAs, BLAs, and ESs submitted after June 30, 2006. The rule established a staggered implementation schedule, under which cohorts of drugs, from newest to oldest would be converted to the new labeling format over time.[2] The staged implementation for PLR conversion expires on June 30, 2013.[3] Older drugs approved before June 30, 2001, are not subject to the mandatory PLR conversion requirement, but FDA strongly encourages all applicants to voluntarily convert the labeling of their drug products to the PLR format, regardless of the date of approval.

As of November 2012, approximately 15 percent of all prescription drugs and biological products have labeling in the PLR format.[4] If no further action is taken, the only additional drug products with labeling in the PLR format will be new NDAs, BLAs, and ES, which are required to be submitted in PLR format, and labeling for drug products for which the NDA or BLA holder voluntarily converts to PLR format.

Generic drugs approved under an abbreviated new drug application (ANDA) are not required to convert their labeling to PLR format unless the reference-listed drug (RLD) approved in an NDA has converted to PLR format. Recent data show that only 10 percent of generic drug labeling has been converted to the PLR format.[5] Since nearly 80 percent of prescriptions today are filled with generic drugs,[6] FDA believes that it is in the best interest of the public health to facilitate conversion of generic drug labeling to the PLR format so the labeling is equally useful to prescribers as the labeling for more recently approved drug products.

Additional FDA outreach corroborates the usefulness of drug labeling in PLR format. On April 20, 2012, the Brookings Institute Engelberg Center for Health Care Reform, in cooperation with FDA, held an expert meeting[7] to obtain feedback from healthcare practitioners on the utility of the prescription drug labeling as a communication tool and to discuss strategies for making it more accessible. In general, meeting participants were very supportive of the PLR format and in agreement that it improves accessibility and use in electronic systems. Moreover, stakeholders, particularly physicians and pharmacists, requested that all labeling be available in PLR format, including labeling for generic drugs and older drug products outside the current PLR implementation schedule.

All holders of marketing applications for drugs and biological products have an ongoing obligation to ensure their labeling is accurate and up-to-date. For example, when new information comes to light that causes information in labeling to become inaccurate, the application holder must take steps to change the content of its labeling, in accordance with 21 CFR 314.70, 314.97, and 601.12. The PLR format represents a more useful and modern approach for communicating accurate and up-to-date information on the safe and effective use of drugs and makes prescription information more accessible for use with electronic prescribing tools and other electronic information resources. For these reasons, FDA is proposing to implement the Prescription Drug Labeling Improvement and Enhancement Initiative to ensure that the safe and effective use of prescription drugs is communicated optimally through labeling.

II. Prescription Drug Labeling Improvement and Enhancement Initiative

The focus of the initiative is to increase the number of drugs with labeling that complies with the PLR content and format requirements (§§ 201.56(d) and 201.57) for drugs approved before June 30, 2001, and for generic drugs. The initiative is anticipated to take place over several years. FDA intends to request that applicants with NDAs, BLAs, or ESs approved before June 30, 2001, and generic drugs for which the NDA for the RLD has been withdrawn (for reasons

[1] In this **Federal Register** document, the term ''PLR format'' refers to labeling that meets the content and format requirements at §§ 201.56(d) and 201.57 (21 CFR 201.56(d) and 201.57). The term ''old format'' refers to labeling that meets the requirements at § 201.56(e) and 21 CFR 201.80.

[2] See § 201.56(c). The Agency adopted this approach because research conducted during the final rule's development indicated that this was the ''most reasonable approach to maximizing the public health benefit and best utilizing available resources.'' See 71 FR 3922 at 3962, January 24, 2006.

[3] The last cohort of drugs approved from June 30, 2001, to June 29, 2002, must submit PLR conversion supplements to FDA by June 30, 2013.

[4] Data obtained from *http://labels.fda.gov.*

[5] Ibid.

[6] See *http://www.fda.gov/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/UnderstandingGenericDrugs/ucm167991.htm.*

[7] For more information on the Expert Meeting, see *http://www.brookings.edu/events/2012/04/20-expert-workshop-prescribing-info.* (FDA has verified the Web site address, but FDA is not responsible for any subsequent changes to the Web site after this document publishes in the **Federal Register**.)

other than safety or effectiveness) voluntarily convert their labeling to PLR format and submit it to FDA for approval.[8] FDA intends to identify and prioritize certain drugs and drug classes based on public health impact (e.g., most prescribed, higher risk).

As part of the initiative, FDA is considering, through the use of a Government contractor, providing PLR conversion resources and services, including preparation of draft PLR labeling for applicants who request FDA's assistance to convert labeling to PLR format. For draft labeling converted to PLR format by a Government contractor, FDA would review the draft labeling prepared by the contractor and then send the applicant the proposed draft PLR format labeling. The applicant would then submit a labeling supplement to FDA with its proposed PLR format labeling (which may include proposed revisions to the draft PLR labeling). It should be emphasized that the application holder always bears responsibility for the content of its product labeling, and FDA's provision of contract resources is intended to facilitate conversion to the PLR format.

This initiative differs from the original PLR implementation plan in the final rule in that the Agency is not proposing rulemaking at this time. Rather, FDA would like to explore a voluntary approach to PLR conversions with NDA and BLA holders for drugs approved before June 30, 2001, and ANDA holders for drugs for which the NDA for the RLD has been withdrawn. In light of the public health benefit realized by labeling in PLR format, and previous interest by many ANDA holders in converting labeling for their drug products to PLR format, FDA anticipates that application holders will be interested in participating in this voluntary approach to enhance communication of information about the drug's safe and effective use through product labeling.

To determine the best approach to accomplish the objectives of this initiative, FDA is considering performing a pilot project to identify best practices and to standardize the approach for voluntary PLR format conversions. FDA is seeking interested applicants with NDAs, BLAs, or ESs approved before June 30, 2001, and generic drugs for which the NDA for the RLD has been withdrawn to voluntarily participate in this pilot project.

III. Establishment of a Docket and Request for Comments and Information

FDA is soliciting public comments on the Prescription Drug Improvement and Enhancement Initiative. FDA is specifically seeking feedback on the following:

1. What specific feasibility issues or other factors should FDA consider in its proposed pilot project and implementation of the Prescription Drug Labeling Improvement and Enhancement Initiative?

2. What factors should FDA consider in identifying and prioritizing drugs and/or drug classes for voluntary PLR conversions?

3. What approaches would application holders find helpful in facilitating voluntary PLR conversions for the specified drugs or drug classes? For example, please comment on the following approaches for communicating with applicants:

- Inquiry letter that identifies a drug proposed for PLR format conversion and requests information from the application holder regarding its preferred approach for possible PLR conversion (i.e., application holder or Government contractor)?
- Supplement request letter with draft labeling that has been converted to the PLR format attached?

4. For generic drugs for which the NDA for the RLD has been withdrawn, what procedures should FDA use to harmonize feedback from multiple ANDA holders on proposed draft labeling in the PLR format?

5. Would your company be interested in participating in the pilot project and the broader Prescription Drug Improvement and Enhancement Initiative? Why or why not?

Suggestions, recommendations, or comments should describe relevant considerations that may impact the feasibility or implementation of the initiative or the impact the initiative may have on prescription drug labeling issues. We also encourage commenters to include recommendations on how such prescription drug labeling issues could be addressed.

FDA will consider all suggestions, recommendations, and comments; however, the Agency will not respond directly to the person or organization making the suggestion, recommendation, or comment.

IV. Comments

Interested persons may submit either electronic comments information regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments or information. Identify comments or information with the docket number found in brackets in the heading of this document. Received comments or information may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

Dated: January 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–02528 Filed 2–5–13; 8:45 am]

BILLING CODE 4160–01–P

[8] See §§ 314.150(a) and (b). An NDA holder that has discontinued marketing a drug product, but has not requested withdrawal of the NDA, must still comply with applicable statutory and regulatory requirements. Such requirements include, for example, submission of an annual report (including a brief summary of significant new information from the previous year that might affect the safety, effectiveness, or labeling of the drug product, and a description of actions the applicant has taken or intends to take as a result of this new information) and, if appropriate, proposed revisions to product labeling.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 200 and 203

[Docket No. FR–5457–P–01]

RIN 2502–AJ03

Streamlining Inspection and Warranty Requirements for Federal Housing Administration (FHA) Single-Family Mortgage Insurance: Removal of the FHA Inspector Roster and of the Ten-Year Protection Plan Requirements for High Loan-to-Value Ratio Mortgages

AGENCY: Office of the Assistant Secretary of Housing—Federal Housing Commissioner, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would streamline the inspection and home warranty requirements for FHA single-family mortgage insurance. First, HUD proposes to remove the regulations for the FHA Inspector Roster (Roster). The Roster is a list of inspectors approved by FHA as eligible to determine if the construction quality of a one- to four-unit property is acceptable as security for an FHA-insured loan. HUD's regulations currently require the use of an inspector from the Roster as a condition for FHA mortgage insurance where the local jurisdiction does not perform necessary inspections. HUD's proposal to remove the Roster regulations is based on the recognition of the sufficiency and quality of inspections carried out by certified inspectors and other qualified individuals. Second, this proposed rule would also remove the regulations

requiring 10-year protection plans in order to qualify for high loan-to-value (LTV), FHA-insured mortgages as a condition of closing for newly constructed single-family homes. The Housing and Economic Recovery Act of 2008 (HERA) removed the statutory requirement for a warranty plan and other special requirements for high LTV mortgages. HUD, however, is retaining the requirement that the Warranty of Completion of Construction (form HUD–92544) be executed by the builder and the buyer of a new construction home, as a condition for FHA mortgage insurance.

DATES: *Comment due date:* April 8, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0001.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Karin Hill, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 9278, Washington, DC 20410–8000; telephone number 202–708–2121 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the Federal Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Through FHA, HUD insures mortgages made by qualified lenders to people purchasing or refinancing a primary residence. The National Housing Act (12 U.S.C. 1709 *et seq.*) authorizes HUD to provide mortgage insurance so that qualified borrowers may use the insured mortgage to finance the purchase of new or existing one-to-four unit (single-family) housing. FHA's single family mortgage insurance is an important tool through which the Federal Government expands homeownership opportunities for first-time homebuyers and other borrowers who would not otherwise qualify for conventional mortgages on affordable terms, as well as for those who live in underserved areas where mortgages may be harder to get.

Under its statutory authority, HUD has issued various regulations that govern the inspection and warranty requirements of these FHA-insured mortgages. Since the promulgation of these regulations, the quality of housing and building technology has improved significantly. In addition, local jurisdictions have adopted more uniform building codes, while more vigorously enforcing their building codes. As a result, HUD recognizes that some of its former requirements for mortgage insurance are no longer necessary to protect lenders against the risk of default. With this rule, HUD proposes to remove those requirements it no longer believes to be necessary, thereby reducing some of the administrative burden on both homeowners and HUD, while also producing dollar savings for homeowners who obtain FHA-insured mortgages.

First, HUD proposes to eliminate its national Inspector Roster (Roster). The Roster is a list of inspectors, approved by HUD, to perform inspections in the limited circumstances when either: (1) A local jurisdiction did not already perform its own inspections for new construction, and issue building permits and certificates of occupancy; or (2) when the inspection of a repair or renovation was not performed by a licensed professional as specified by regulation. See 24 CFR 200.170(b). HUD originally created the Roster to standardize the inspection process for properties with FHA-insured mortgages. Before the Roster, cities and states developed their own building codes, which had little uniformity or consistency with each other. Now, however, the International Residential Code (IRC) is in use or adopted in 49 states, the District of Columbia, and the U.S. Virgin Islands. The International Code Council (ICC), which developed the IRC, also certifies Residential Combination Inspectors (RCIs). To be certified by the ICC, RCIs must pass a rigorous set of examinations, which includes testing their knowledge of the IRC.[1] As a result, there is no longer a need for HUD to maintain and administer its own standardization process for inspectors.

Second, HUD proposes to eliminate its requirement that borrowers purchase a 10-year protection plan for all high loan-to-value (LTV) mortgages in order to qualify for FHA mortgage insurance. In 1979, when Congress authorized HUD to insure mortgages with a high LTV ratio (in excess of 90 percent of the appraised property value), Congress also required that, to qualify for FHA insurance for such mortgages, borrowers would have to purchase a consumer protection plan or warranty plan acceptable to HUD. (Pub. L. 96–153, 93 Stat. 1101, approved December 21, 1979.) But in 2008, Congress eliminated the requirement of purchasing a consumer protection plan or warranty plan. (Pub. L. 110–289, 122 Stat. 2654, approved July 30, 2008). While HUD may still keep the requirements in place, HUD is no longer statutorily mandated to do so. Upon evaluation, HUD believes that the significant improvements in building technology and the quality of housing, as well as

[1] See *http://www.iccsafe.org/Accreditation/Documents/ComboCertificate.pdf.*

the adoption of uniform building codes and local jurisdictions' more stringent enforcement of building codes, mitigate HUD's previous concerns about needing to protect property owners from defects in workmanship and materials.

HUD expects the elimination of these two requirements to have an anticipated total savings of $29,569,957. By eliminating the Roster, HUD expects to save approximately $42,770 in administrative costs. In addition, lenders will have a greater number of inspectors to choose from, thereby increasing competition among qualified inspectors and potentially driving down the fees that inspectors charge lenders. Inspectors remain subject to other certification requirements, therefore minimizing any potential risk of unnoticed structural defects in properties secured by FHA-insured mortgages. Because this risk is very small, and because the universe of loans subject to the inspector roster requirement is also very small, HUD believes the costs of removing this requirement to be minimal.

By eliminating the 10-year warranty requirement, HUD anticipates saving $10,601 in administrative costs. Homeowners are expected save approximately $29.4 million from no longer being required to purchase a 10-year warranty plan in order to secure an FHA-insured mortgage. Providers of warranty plans are also expected to save $132,066 from the reduced paperwork burden of submitting required protection plans to HUD for approval. For those homeowners who still choose to purchase a warranty plan, they can choose from the entire market of warranty providers and not just those approved by HUD. Allowing homeowners to choose any provider they wish should increase competition and, possibly, drive down the prices of the protection plans. The costs of eliminating the warranty requirement are expected to be minimal. The increased quality of construction materials and the standardization of building codes have greatly mitigated concerns of defective construction that might result from eliminating the warranty requirement. Moreover, the number of potential homes affected by the elimination of the warranty requirement is very limited.

Summary of savings resulting from proposed regulatory changes:

FHA Inspection Roster	
Administrative Costs Savings:	
Revised Administrative Costs Savings	$42,770
Elimination of the review of applications	11,250
Elimination of the fielding with inspectors and data input into FHA Connection	11,520
Elimination of the maintenance of the Roster database	5,000
Elimination of the application HUD–925631 (Appication for Fee or Roster Personnel Designation) and associated burden hours	15,000

10-Year Warranty Plan	
Elimination of the warranty plan (Saving to Homeowners)	29,352,615
Administrative Costs Savings:	
Revised Administrative Cost Savings	142,667
Lender's (Lender's Review)	132,066
HUD	10,601
—HUD Review	6,601
—Elimination of the 10-year warranty webpage	320
—Elimination of the review of Plan Renewals	1,920
—Elimination of the review of single state renewals	1,280
—Elimination of burden hours on Warranty Providers for Plan Submittal	480
Estimated Total Financial Savings:	
Revised Estimated Total Financial Savings	29,538,052

II. Background

FHA Inspection Requirements and the Inspector Roster

Compliance inspectors, both from the private sector as well as HUD staff, have always played a vital role in FHA's mission to provide affordable homeownership by providing a means of assessing the durability and structural soundness of a home (whether newly constructed or under repair or renovation), as well as protecting the health and safety of the occupants. This role was particularly crucial in the 1930s and the following decades due to the lack of generally accepted building codes and code enforcement. Beginning in the early 1900s, model codes were developed by three separate regional model code groups. In addition, by the first part of the 20th century, all major cities had developed and adopted their own individual building codes with little uniformity or consistency among the various codes.

In 1990, the three major model code groups combined efforts and formed the ICC to develop uniform codes with no regional limitations. Since the promulgation of the initial ICC codes, most state and local governments that have adopted building codes to regulate and standardize the construction of residential and commercial buildings have chosen the model codes developed by the ICC. While there is no official national building code, since the publication of the most recent version of the ICC residential building code in 2009, the IRC is in use or adopted in 49 states, the District of Columbia, and the U.S. Virgin Islands. (See *http://www.iccsafe.org/gr/Pages/adoptions.aspx.*) The number of adoptions continues to increase. In addition to adopting the ICC codes, jurisdictions have developed protocols and standards for inspections to ensure compliance with the adopted code.

Because of the historic lack of uniformity among building codes, FHA utilized various methods to standardize the inspection process for properties with FHA-insured mortgages. Before 1996, FHA's 81 field offices each maintained a panel of fee inspectors who were assigned on a rotating basis to perform inspections. From 1996 to 2004, mortgagees selected inspectors from a panel of inspectors listed on the Internet. This ''Internet panel'' was a compilation of inspectors from the local panels established by FHA's field offices. In 2002, FHA issued a proposed rule to establish the Roster to take the place of the Internet panel of inspectors.

The final rule, published on March 10, 2004 (69 FR 11494) and codified at 24 CFR 200.170–172, implementing the Roster that is in place today provides eligibility standards, procedures, and requirements for placement on the Roster. In addition to demonstrating professional experience and familiarity with HUD requirements, an applicant for the Roster is required to provide verification of passing HUD's comprehensive examination for Roster inspectors and possession of an inspector's license or certification if the state or local jurisdiction where the inspector operates requires such licensing or certification. The regulations also provide procedures for removing an inspector from the Roster for cause, generally for actions detrimental to HUD or its programs.

The regulations also set forth the circumstances under which FHA-approved mortgagees are required to use a Roster inspector. For new construction, a Roster inspector is needed only where the local jurisdiction in which the property is located does not perform inspections and does not issue building permits prior to construction and certificates of occupancy or equivalent documents upon satisfactory completion of construction. See 24 CFR 200.170(b)(1). For repairs or renovations to existing construction, a Roster inspector is needed only where structural repairs have been made requiring an inspection and this inspection is not performed by one of the licensed professionals as specified by regulation. See 24 CFR 200.170(b)(2). The licensed professional may be a licensed, bonded, and registered engineer; a licensed home inspector; or other person specifically registered or licensed to conduct such inspections, such as a building inspector in a jurisdiction that has adopted a building code and that requires the issuance of building permits and subsequent inspections for repairs and renovations of existing construction, structural or otherwise.

Insured 10-Year Protection Plan for High LTV Mortgages

Section 310 of the Housing and Community Development Amendments of 1979 (Pub. L. 96–153, approved December 21, 1979) (1979 Amendments), amended section 203(b)(2) of the National Housing Act (12 U.S.C. 1709(b)(2)) to permit FHA to insure a mortgage with a high LTV ratio (in excess of 90 percent of the appraised property value) for single-family homes less than one year old if the dwelling was approved for mortgage insurance prior to construction or if ''the dwelling is covered by a consumer protection plan or warranty plan acceptable to the Secretary and satisfies all requirements which would have been applicable if such dwelling had been approved for mortgage insurance prior to the beginning of construction.''

Following issuance of a notice of solicitation of public comments (49 FR 45075, November 14, 1984) and a proposed rule (52 FR 21961, June 10, 1987), HUD published a final rule on October 5, 1990 (55 FR 41016), that set forth the requirements for a consumer protection plan ''acceptable to the Secretary,'' in accordance with the 1979 Amendments. This final rule is codified at 24 CFR 203.18(a)(3) and 203.200–209. Section 203.18(a)(3) requires high LTV mortgages to be accompanied by a 10-year consumer protection plan in order to be eligible for FHA mortgage insurance. Sections 203.200 through 203.209 set forth the criteria that such plans must meet in order to be acceptable to HUD, including certain underwriting standards and baseline warranty coverage that insures against structural defects. HUD currently maintains a database with 17 approved 10-year warranty plan providers, which is available on the HUD Web site.[2] Plan issuers apply to have their warranty plans accepted by HUD by submitting the plans to HUD for review. HUD then examines the submitted plans for compliance with the regulations. In order to maintain acceptance by HUD, the plans must be resubmitted for review every 2 years or the acceptance will be automatically terminated.

The HERA (Pub. L. 110–289, approved July 30, 2008) eliminated the language in section 203(b)(2) that imposed special requirements on high LTV mortgages, including the requirement for a consumer protection plan or warranty plan deemed acceptable by HUD. Removal of such language does not prohibit HUD from retaining these requirements, but HUD is no longer statutorily mandated to maintain these requirements for high LTV mortgages.

III. This Proposed Rule

Removal of FHA Inspection Requirements and the Inspector Roster

Along with the increasing prevalence of uniform residential building codes promulgated by ICC, there is an increasing number of RCIs who are certified by the ICC. RCIs certified by the ICC must pass a set of rigorous examinations and must be familiar with the IRC; the most widely adopted residential code in the country. Because of this and the fact that FHA accepts a local jurisdiction's building permits and certificates of occupancy in lieu of an inspection by a Roster inspector, FHA has determined that it is no longer necessary to maintain an Inspector Roster. For new and proposed construction, as well as for repairs and renovations of existing properties, in areas where local jurisdictions provide building code enforcement and the requisite documentation (issuance of building permits and certificates of occupancy or satisfactory inspection notices for work completed, or their equivalents), FHA will continue to accept such documentation as satisfactory evidence of the completion of work. For the diminishing number of jurisdictions that do not provide building code enforcement and requisite documentation, FHA proposes to accept inspections by an RCI certified by the ICC and who is also licensed or certified as a home inspector in accordance with the applicable State and local requirements governing the licensing or certification of such inspectors in the respective jurisdiction.

The ICC is a membership association dedicated to building safety and fire prevention and develops the great majority of building codes and standards used to construct residential and commercial buildings in the United States. An RCI is certified by the ICC after successful passage of the following standardized examinations, developed and administered by the ICC: Residential Building Inspector, Residential Electrical Inspector, Residential Mechanical Inspector, and Residential Plumbing Inspector. An ICC certification is valid for 3 years and renewal is achieved by participating in continuing education and professional development activities.

This rule proposes to amend 24 CFR 200.145, entitled ''Property and mortgage assessment,'' to include the fact that property inspections are still required despite the removal of the Roster regulations. The removal of the Roster regulations does not mean an absence of any inspection requirement for a property to be eligible for an FHA-insured mortgage. This rule will continue to permit inspections performed by local jurisdictions as satisfactory evidence of work completed, as discussed above. Where such inspections are not performed by the local jurisdiction (e.g., where jurisdictions do not provide for building code enforcement or do not provide documentation such as building permits and certificates of occupancy), this rule

[2] The list of approved 10-year protection plans may be downloaded from *http://www.hud.gov/offices/hsg/sfh/ins/hoctenyr.pdf.*

would require that the inspections be performed by an RCI who is also licensed or certified as a home inspector in jurisdictions that license or certify such inspectors. The number of required inspections would be unchanged from current regulatory requirements—three inspections in the case of new construction (see § 200.170(b)(1)) and a single inspection for existing construction (see § 200.170(b)(2)).

In those rare instances involving property located in areas where there is an absence of such RCIs, the lender shall obtain an inspection performed by a third party who is a registered architect, a professional engineer, or a tradesman or contractor and has met the licensing and bonding requirements of the State in which the property is located. Registered architects and professional engineers generally must have a minimum of 10 years of documented residential construction experience as related to new construction or repairs of a structural nature, ranging from building techniques to the installation of mechanical, electrical, and plumbing systems.[3] In cases where inspections are performed by RCIs or other qualified third parties in areas where there is an absence of RCIs, the inspection must ensure that construction was in accordance with any applicable building codes in jurisdictions that have building codes in place but either do not provide for building code enforcement or do not provide documentation such as building permits and certificates of occupancy.

Specific requests for comment. HUD has been unable to determine the number of jurisdictions for which there may be an absence of RCIs, and specifically requests information that would help HUD determine the number of jurisdictions or geographical areas in which RCIs are not available to perform inspections. Additionally, HUD is considering and seeks comment on whether, for jurisdictions for which RCIs are not available, whether HUD should require the lender, in selecting a non-RCI, albeit an individual licensed and bonded under State law, to select a registered architect, engineer, tradesman, or contractor with a minimum of 5 years experience.

[3] Each State establishes the licensing requirements for professional engineers and architects, which generally include education requirements and require passing certain examinations. As provided, in the following Web site, for example, becoming a licensed professional engineer generally requires at least 12 years of education and experience. See *http://www.heimer.com/pe/index.html.*

By continuing to accept inspections performed by local jurisdictions rather than requiring an inspection by an FHA Roster inspector, FHA is recognizing that the local jurisdiction is in a better position to determine how best to conduct inspections to ensure compliance with local building codes. By continuing its practice of deferring to the local jurisdiction, FHA would also be mirroring the broader residential mortgage lending industry, which has no national roster of inspectors and relies upon local jurisdictions to ensure that new construction or renovation or repairs to existing construction is both durable and safe. By accepting inspections performed by RCIs, HUD is conforming its standards to rigorous and well-established nationwide criteria for home inspections.

The number of properties insured by FHA that would require an inspection by an RCI (or other qualified individual where an RCI is unavailable) is statistically insignificant. Of the 1,946,639 loans endorsed by FHA in Fiscal Year (FY) 2009, only 2,975 (0.15 percent) of these loans required the use of a Roster inspector. Of the 1,746,367 loans endorsed by FHA in FY 2010, only 2,155 (0.1 percent) of these loans required the use of a Roster inspector. For FY 2011, only 685 out of 1,182,512 (0.06 percent) endorsed loans required the use of a Roster inspector. This statistical trend, along with the high standards required to become an RCI (or the professional qualifications and length of experience that would be required for other qualified individuals in the absence of an RCI), indicate that the elimination of the Inspector Roster will have an insignificant impact on the risk to FHA's Insurance Fund. In other words, because so few homes even require an inspection by a Roster inspector anymore, and RCIs have such high qualifications, it is highly unlikely that eliminating the Inspector Roster poses any increased risk of foreclosure because of inadequate inspections.

Removal of Requirement for Insured 10-Year Protection Plan for High-LTV Mortgages

The new inspection requirements proposed by this rule will apply to all single-family dwellings insured by FHA, for both new and existing construction, including high LTV FHA-insured mortgages. In this regard, HUD proposes to remove the regulations governing 10-year protection plans for high LTV mortgages, found at 24 CFR 203.18(a)(3) and 200–209. As discussed above in the Background section of this preamble, HERA eliminated any special requirements for high LTV mortgages, therefore HUD proposes to amend its regulations to follow suit. In proposing to remove in regulation the requirement for a 10-year protection plan, it is HUD's position that in the more than 20 years since the promulgation of the 10-year protection plan regulations, the necessity of requiring consumer protection plans appears to have lessened. The quality of housing and building technology has improved significantly, as has the proliferation of more uniform building codes and building code enforcement.

Requiring protection plans increases, in most cases, the cost of buying a home, as well as the regulatory burden on lenders and homebuyers. Builders will frequently factor in the cost of a 10-year protection plan and this increase in cost adds to the cost of the home.

In addition, although HUD is no longer mandated by statute to require a consumer protection plan or warranty plan, HUD is retaining the requirement that the Warranty of Completion of Construction (form HUD–92544) be executed by the builder and the buyer of a newly constructed home, as a condition for FHA mortgage insurance. This warranty provides assurance to FHA that the home was built according to plan, and protects the buyer against defects in equipment, material, or workmanship supplied or performed by the builder, subcontractor, or supplier. The warrantor agrees to fix and pay for the defect and restore any component of the home damaged in fulfilling the terms and conditions of the warranty. The one-year warranty commences on the date that title is conveyed to the buyer, the date that construction is complete, or upon occupancy, whichever date occurs first.

The regulations regarding 10-year protection plans were promulgated more than 20 years ago, and because of the increase in the quality of construction and the stringent requirements for building inspections proposed by this rule, HUD has determined that 10-year protection plans are no longer necessary to safeguard FHA's Insurance Fund. Reliance on inspections performed by local jurisdictions, RCIs, or other qualified individuals, as proposed by this rule, adequately protects the Insurance Fund and streamlines FHA's processing requirements. In fact, in HUD's final 1990 rule that followed the 1987 proposed rule and established the 10-year protection plan regulations, HUD, at the final rule stage, eliminated proposed criteria for acceptability of a plan on the basis that the criteria removed were satisfactorily addressed by state insurers and HUD did not need

to impose these requirements, adding to the burden of entities seeking HUD's approval of warranty plans.[4] Therefore, from the outset of establishing the warranty plan regulations, it was never HUD's intention to duplicate requirements that were satisfactorily being addressed at the State or local level. HUD, however, is retaining the requirement that the Warranty of Completion of Construction (form HUD–92544) be executed by the builder and the buyer of the home, as a condition for FHA mortgage insurance. The warranty of completion, as the title indicates, addresses homes for which construction has not been completed. Before committing to insure a loan on a home that has not yet been completed, FHA requires a signed warranty of completion. The 10-year warranty plan, as has been discussed in this preamble, is designed to protect against construction defects. Again, however, it is HUD's position that the quality of construction and more stringent building code requirements and inspections makes the 10-year warranty plan no longer necessary.

Further, removal of these regulations is consistent with the President's Executive Order 13563, entitled ''Improving Regulation and Regulatory Review,'' signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This Executive Order requires executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' For the reasons discussed in this preamble, HUD has determined that the requirement of a 10-year protection plan for high LTV mortgages is outmoded and may be unnecessarily costly to homebuyers and, therefore, proposes to remove the regulations.

Conforming Change

This rule would also amend § 203.50 to reflect the statutory change made by HERA and the removal of §§ 203.18(a)(3) and 200–209 of the regulations. Section 203.50(f) (''Eligibility of rehabilitation loans'') cross-references § 203.18(a)(3), and because § 203.18(a)(3) is being removed, this rule will amend § 203.50(f) accordingly.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Under Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and, therefore, subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulation and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. This rule was determined to be a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866 (although not an economically significant regulatory action, as provided under section 3(f)(1) of the Executive Order).

As already discussed in this preamble, this rule would remove conditions on closing an FHA-insured mortgage that HUD believes are no longer necessary and that add to the closing process unnecessary costs for the buyer. As discussed, HUD's proposal to remove the Inspector Roster is based on the recognition of the sufficiency and quality of inspections carried out by certified inspectors and other qualified individuals. In proposing to remove the requirement for a 10-year protection plan, HUD submits that in the more than 20 years since the promulgation of the 10-year protection plan regulations, the necessity of requiring consumer protection plans has lessened. The quality of housing and building technology has improved significantly, as has the proliferation of more uniform building codes and building code enforcement.

HUD expects both the elimination of the national Inspector Roster and the elimination of the 10-year warranty plan to have economic benefits and costs. However, neither the economic costs nor the benefits of the elimination of the two requirements are greater than the $100 million threshold that determines economic significance under Executive Orders 12866 and 13563. By eliminating the national Inspector Roster, HUD anticipates benefits of approximately $27,770 in savings. By eliminating the 10-year warranty requirement, HUD anticipates benefits in the form of approximately $29.5 million in savings.

Benefits and Costs of Eliminating the Inspector Roster

By eliminating the Roster, HUD believes that this rule would expand the number of inspectors from which lenders may choose for the inspection of a home where the mortgage is to be insured by FHA. The Roster has a total of 3,029 inspectors (in FY 2011, HUD added 90 inspectors and 29 have been added in FY 2012). HUD is also in the process of removing ineligible inspectors from the Roster and anticipates a significant reduction in inspectors upon completion of this ''sweep.'' The ICC is an international organization, with 49 states, the District of Columbia, and the U.S. Virgin Islands having adopted the IRC published by ICC. By adopting the IRC, the jurisdictions have all agreed that, to perform the inspection of such codes, the inspectors must be certified by the ICC as RCIs. It is not known how many inspectors currently listed on the Roster have ICC designation, or how many Roster inspectors without ICC designation would earn the designation in order to perform FHA work. Although those Roster inspectors who already have ICC designation would lose the marketing benefits associated with being listed on the Roster, they would continue to be eligible to perform FHA inspections. HUD believes that the overall effect of removing Roster inspectors will be to increase the number of competent inspectors, since inspectors currently on the Roster would no longer have an advantage of the exclusive market power of inspecting FHA-insured homes, conveyed by the current Roster requirements. A possible benefit of the increased choice of inspectors for the lender is that the cost, which is currently averaged to be approximately $1,000, may be driven down by the increased competition, and those

[4] In the preamble to the October 5, 1990, final rule, HUD stated as follows: ''The Department has reconsidered its position [on certain plan acceptability criteria] in light of these and similar comments and has determined to continue the existing system of accepting Plans that have State approval. This means that Plans will not, as a separate matter, have to satisfy the independent criteria formerly proposed in the sections referenced above. State approval serves the purpose of those now abandoned sections—ensuring that Plans have adequate financial and insurance backing. Removal of these sections also has the incidental benefit of eliminating a potential administrative burden on both HUD and Plan issuers. This action means that Plan issuers will not have to furnish the information that would have been required under these now-removed sections and, consequently, HUD will not have to evaluate each submission to ensure compliance with the regulatory criteria. HUD, along with homeowners, is still assured of the financial soundness of a Plan, since Plans backed by insurance companies must demonstrate their acceptance in each State in which they are doing business.'' (See 55 FR at 41017)

savings may be passed on to the homeowners.

In addition, HUD anticipates savings of approximately $42,770 in administrative costs from ceasing to maintain the Roster. To successfully administer the program, HUD must, among other administrative duties, bear the costs and workload associated with: (1) The review and verification of applicant qualifications for placement on the Roster; (2) the maintenance of records pertaining to application, placement, and removal from the Roster; (3) the monitoring of inspector performance; and (4) administrative proceedings to remove poor performing inspectors from the Roster. These costs will no longer accrue once this rule becomes effective.

As a matter of costs, the elimination of the Roster would affect a very limited number of loans. FHA data shows that the number of FHA-insured properties that would require an inspection by an RCI or other qualified individual where an RCI is unavailable is statistically insignificant. These are the properties that would normally go to inspectors from the Roster. Of the 1,946,639 loans endorsed by FHA in FY 2009, only 2,975 (0.15 percent) of these loans required the use of a Roster inspector. Of the 1,746,367 loans endorsed by FHA in FY 2010, only 2,155 (0.1 percent) of these loans required the use of a Roster inspector. For FY 2011, only 685 out of 1,182,512 (0.06 percent) endorsed loans required the use of a Roster inspector.

Moreover, the increased risk of inadequate inspections because of the elimination of the Roster is *de minimis,* if any. To become an RCI, applicants must undergo a rigorous examination and certification process that is more robust than the Inspector Roster qualification process. In the limited circumstances where an RCI is unavailable in a particular jurisdiction, the professional qualifications and length of experience that would be required for other qualified individuals are sufficiently high thresholds to mitigate the concern of inadequate inspections.

Given that the costs of eliminating the Inspector Roster are minimal because so few loans would be affected and that the concern of inadequate inspections is mitigated by the now available alternatives to Roster inspectors, as compared to the benefits of increased consumer choice, administrative savings, and burden reduction, HUD believes the benefits of this rule outweigh the minimal costs.

Benefits and Costs of Eliminating the 10-Year Warranty Requirement

By eliminating the 10-year warranty requirement, homeowners will no longer be required to pay warranty premiums. There currently are 16 FHA-approved warranty issuers. In 2010 and 2011, an average of 57,415 warranties were issued, with an average warranty rate ranging from $2.75 to $3.75 per $1,000 of coverage.[5] Assuming an average coverage of $170,412 (2010 average) and an average of $3.00 per $1,000 of coverage,[6] the total savings for homeowners because of the elimination of the warranty requirement is projected to approximate $29.4 million.

In addition, where homeowners with FHA-insured mortgages choose to purchase a protection plan, the FHA-approved warranty issuers would have to compete with other warranty issuers for such business. The current regulations limit the choices available to homebuyers to those warranty plan providers approved by HUD as meeting the regulatory requirements. Homebuyers would reap the benefits of heightened market competition, as warranty providers vie for their business through competitive pricing and expanded warranty coverage.

As noted earlier in this preamble, requiring protection plans increases, in most cases, the cost of buying a home. Builders frequently will factor in the cost of a 10-year protection plan and this increase in cost adds to the cost of the home. The changes proposed by this rule would eliminate, for lenders and homeowners, the costs associated with this regulatory burden.

In addition, the elimination of the warranty requirement also eliminates the associated paperwork burden formerly associated with the requirement. Assuming again the 2010–2011 average figure of 57,415 warranties, with 0.10 burden hours for each application, the elimination of the warranty requirement saves the public an additional $132,066 in burden hours. And finally, HUD has to review warranty plans submitted for approval and renewal to ensure compliance with the regulatory requirements of §§ 203.200–203.209, while also maintaining the online list of qualified warranty providers. The cost to HUD of providing this administrative service is approximately $10,601. In sum, the elimination of the warranty requirement represents a total cost savings to the public of $29,352,615 in warranty cost + $132,066 in paperwork burden + $10,601 in administrative costs to HUD. The cost of eliminating the warranty requirement is that consumers may be less protected from construction defects. However, as discussed earlier, the increased quality of construction materials, and the standardization of building codes and building code enforcement, protect consumers much better now than when the warranty requirement regulation was first promulgated. Assuming an average coverage of $170,412 and computed total cost savings of $29,522,572, 174 of the homes impacted by the elimination of this requirement would have to be foreclosed upon, due to the financial impact associated with construction problems, for the cost savings to be outweighed by the costs of the elimination of the warranty requirement. HUD believes that this is very unlikely. Thus, HUD believes that the benefit in cost savings exceeds the potential cost of eliminating the 10-year warranty requirement.

The docket file is available for public inspection in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the docket file by calling the Regulation Division at 202–402–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

Paperwork Reduction Act

As noted, although HUD proposes to remove the regulations requiring 10-year protection plans for high LTV FHA-insured mortgages, it is retaining the requirement that the Warranty of Completion of Construction (form HUD–92544) be executed by the builder and the buyer of the home, as a condition for FHA mortgage insurance. The information collections contained in form HUD–92544 have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) and assigned OMB control number 2502–0598. The annual reporting burden of this information

[5] This information derives from HUD's survey of its current warranty providers. A search on the Internet for home warranty insurers and their rates revealed that rates range from $1.50 to $7.50 per thousand, annual premium, depending upon the value/amount of the property. See, for example, *http://www.firstweber.com/consumer-notices/.*

[6] Another source on home warranty pricing advises that the average cost is about $3 per thousand of the selling price of the home. See *http://www.tcaor.com/Decoding_the_RE_Market/Home_Warranties.pdf.* This rate is closer to that being charged by the home warranty providers currently participating in FHA's program.

collection is estimated at 478,758 hours and no burden dollars, and this proposed rulemaking would not change the estimated burden hours for continued use of form HUD–92544.

The information collection requirements contained in proposed § 200.145(c), which would codify existing requirements pertaining to compliance inspection reports (form HUD–92051) and the mortgagee's assurance of completion (form HUD–92300), have been approved by OMB under the PRA and assigned OMB Control Number 2502–0189. The annual reporting burden of this information collection is estimated at 1,984 hours and no burden dollars, and this proposed rulemaking would not change the estimated burden hours for continued use of these forms. HUD would still expect the same number of inspections, just provided by a different set of respondents (i.e., RCIs and qualified individuals, as opposed to Roster inspectors).

The chart below represents the savings in paperwork burdens proposed in this rule. By eliminating the Inspector Roster, inspectors will no longer submit applications for HUD's review and approval. By eliminating the warranty requirement, warranty providers will no longer need to submit applications for HUD's review and approval.

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hour per response	Annual burden hours	Hourly cost	Annual cost
Inspector Applications/ HUD-92563I (and copy of state certification)	1,000	1	1,000	.50	500	$30	$15,000
Warranty providers § 203.202	16	*1	8	2.00	16	30	480

* Every 2 years.

In accordance with the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) 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. As noted above in this preamble, this proposed rule is a deregulatory action taken by HUD that will alleviate the economic costs borne by participants in the FHA single family mortgage insurance programs. As an initial matter, HUD notes that the RFA, under its own terms, applies to entities and not to individuals. The procedures and requirements for placement on the Roster apply to individual inspectors, not to entities. Accordingly, the RFA does not apply to the Roster component of this proposed rule. In addition to removing the Roster regulations, HUD also proposes to remove the regulations regarding the 10-year protection plans required in order to qualify for high LTV FHA-insured mortgages as a condition of closing for newly constructed single-family homes. As discussed in this preamble, removal of the requirement for a 10-year protection plan would ease burdens on lenders and homebuilders and does not preclude borrowers from purchasing such plans. HUD is removing these regulations because it has deemed they are no longer necessary. The proposed regulatory changes recognize the sufficiency and quality of inspections carried out by local jurisdictions as a result of the building permit and certification of occupancy processes. Therefore, the undersigned certifies that this rule will not have a significant impact on a substantial number of small entities.

Notwithstanding HUD's view that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule.

Environmental Impact

This proposed rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. In addition, part of this rule changes a statutorily required and/or discretionary establishment and review of loan limits. Accordingly, under 24 CFR 50.19(c)(1) and (c)(6), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on State and local governments and is not required by statute, or the rule preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the principal FHA single-family mortgage insurance program is 14.117.

List of Subjects

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing standards, Lead poisoning, Loan programs-housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social Security, Unemployment compensation, Wages.

24 CFR Part 203

Hawaiian natives, Home improvement, Indians—lands, Loan programs—housing and community development, Mortgage insurance, Reporting and recordkeeping requirements, Solar energy.

Accordingly, for the reasons discussed in the preamble, HUD proposes to amend 24 CFR parts 200 and 203 to read as follows:

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 1. The authority citation for part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715–z–21; 42 U.S.C. 3535(d).

■ 2. In § 200.145, add paragraph (c) to read as follows:

§ 200.145 Property and mortgage assessment.

* * * * *

(c) For all new construction as well as structural repairs and/or renovations of existing properties, to the extent that an inspection is required to determine if construction quality of a one- to four-unit property is acceptable as security for an FHA-insured loan, the following requirements apply:

(1)(i) In areas where local jurisdictions provide building code enforcement and the requisite documentation, the lender shall provide a copy of:

(A) The building permit, or its equivalent, and a copy of the certificate of occupancy, or its equivalent; or

(B) A satisfactory inspection notice for work completed, or its equivalent.

(ii) The documentation provided under paragraph (c)(1)(i) of this section shall be considered satisfactory evidence of completion of the work.

(2) In jurisdictions that do not provide building code enforcement and requisite documentation, three inspections are required for new construction. For existing construction, only one inspection and certification of work completed for repairs and renovations is required. For both new and existing construction, the lender shall, in order to ensure compliance with FHA requirements:

(i) Select a Residential Combination Inspector (or its successor designation) certified by the International Code Council (or its successor organization) who is licensed or certified as a home inspector in accordance with the applicable State and local requirements governing the licensing or certification of those jurisdictions that license or certify such inspectors in the respective jurisdiction. The lender shall provide a certification from such inspector that the new construction and/or structural repair or renovation work is completed satisfactorily and in compliance with any applicable building code.

(ii) In the absence of such Residential Combination Inspector, the lender shall obtain an inspection performed by a third party, who is a registered architect, a professional engineer, or a tradesman or contractor, and who has met the licensing and bonding requirements of the State in which the property is located. The lender shall provide a certification from such inspector that the inspector is licensed and bonded under applicable State law, and that the new construction and/or structural repair or renovation work is completed satisfactorily and in compliance with any applicable building code.

■ 3. Remove the undesignated center heading ''FHA Inspector Roster'' and §§ 200.170–172.

PART 203—SINGLE FAMILY MORTGAGE INSURANCE

■ 4. The authority citation for part 203 continues to read as follows:

Authority: 12 U.S.C. 1709, 1710, 1715b, 1715z–16, and 1715u; 42 U.S.C. 3535(d).

§ 203.18 [Amended]

■ 5. In § 203.18, remove paragraph (a)(3) and redesignate paragraph (a)(4) as paragraph (a)(3).

■ 6. In § 203.50, revise paragraph (f)(1) to read as follows:

§ 203.50 Eligibility of rehabilitation loans.

* * * * *

(f) * * *

(1)(i) The limits prescribed in § 203.18(a)(1) (in the case of a dwelling to be occupied as a principal residence, as defined in § 203.18(f)(1));

(ii) The limits prescribed in § 203.18(a)(1) and (3) (in the case of a dwelling to be occupied as a secondary residence, as defined in § 203.18(f)(2));

(iii) 85 percent of the limits prescribed in § 203.18(c), or such higher limit, not to exceed the limits set forth in § 203.18(a)(1), as Commissioner may prescribe (in the case of an eligible nonoccupant mortgagor as defined in § 203.18(f)(3));

(iv) The limits prescribed in § 203.18a, based upon the sum of the estimated cost of rehabilitation and the Commissioner's estimate of the value of the property before rehabilitation; or

* * * * *

§§ 203.200 through 203.209 [Removed]

■ 7. Remove the undesignated center heading ''Insured Ten-Year Protection Plans (Plan)'' and §§ 203.200 through 203.209.

Dated: January 8, 2013.

Carol J. Galante

Assistant Secretary for Housing– Federal Housing Commissioner.

[FR Doc. 2013–02668 Filed 2–5–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 54

[REG–120391]

RIN 1545–BJ60

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2590

RIN 1210–AB44

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 147, 148, and 156

[CMS–9968–P]

RIN 0938–AR42

Coverage of Certain Preventive Services Under the Affordable Care Act

AGENCY: Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services.

ACTION: Proposed rules.

SUMMARY: This document proposes amendments to rules regarding coverage for certain preventive services under section 2713 of the Public Health Service Act, as added by the Patient Protection and Affordable Care Act, as amended, and incorporated into the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code. Section 2713 of the Public Health Service Act requires coverage without cost sharing of certain preventive health services, including certain contraceptive services, in non-exempt, non-grandfathered group health plans and health insurance coverage. The proposed rules would amend the authorization to exempt group health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) with respect to the requirement to cover

contraceptive services. The proposed rules would also establish accommodations for group health plans established or maintained by eligible organizations (and group health insurance coverage offered in connection with such plans), including student health insurance coverage arranged by eligible organizations that are religious institutions of higher education. This document also proposes related amendments to regulations concerning excepted benefits and Affordable Insurance Exchanges.

DATES: Comments are due on or before April 8, 2013.

ADDRESSES: In commenting, please refer to file code CMS–9968–P. Because of staff and resource limitations, the Departments cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By Regular Mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9968–P, P.O. Box 8013, Baltimore, MD 21244–1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By Express or Overnight Mail.* You may send written comments to the following address only:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–9968–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By Hand or Courier.* You may deliver (by hand or courier) your written comments to the following addresses only:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.

Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without federal government identification, commenters are encouraged to leave their comments in the Centers for Medicare & Medicaid Services drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, call (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Do not mail comments to the addresses indicated as appropriate for hand or courier delivery because they may be delayed and received after the close of the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Jacob Ackerman, Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS), at (410) 786–1565. Amy Turner or Beth Baum, Employee Benefits Security Administration (EBSA), Department of Labor, at (202) 693–8335.

Karen Levin, Internal Revenue Service (IRS), Department of the Treasury, at (202) 927–9639.

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning employment-based health coverage laws may call the EBSA Toll-Free Hotline at 1–866–444–EBSA (3272) or visit the Department of Labor's Web site (*www.dol.gov/ebsa*). In addition, information from HHS on private health insurance coverage can be found on CMS's Web site (*www.cciio.cms.gov*), and information on health care reform can be found at *www.HealthCare.gov.*

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. The Departments post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately three weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4:00 p.m. To schedule an appointment to view public comments, call (800) 743–3951.

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148) was enacted on March 23, 2010, and amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) on March 30, 2010. These statutes are referred to collectively as the Affordable Care Act. The Affordable Care Act reorganizes, amends, and adds to the provisions of part A of title XXVII of the Public Health Service Act (PHS Act) relating to group health plans and health insurance issuers in the group and individual markets. The Affordable Care Act adds section 715(a)(1) to the Employee Retirement Income Security Act of 1974 (ERISA) and section 9815(a)(1) to the Internal Revenue Code (Code) to incorporate the provisions of part A of title XXVII of the PHS Act into ERISA and the Code, and to make them applicable to group health plans. The PHS Act sections incorporated by these references are sections 2701 through 2728.

Section 2713 of the PHS Act, as added by the Affordable Care Act and incorporated into ERISA and the Code, requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide benefits for certain preventive health services without the imposition of cost sharing. These preventive health services include, with respect to women, preventive care and screenings as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA).

The Departments of Health and Human Services (HHS), Labor, and the Treasury (collectively, the Departments) published interim final rules with a request for comments implementing section 2713 of the PHS Act in the July 19, 2010 **Federal Register** (75 FR 41726) (2010 interim final rules). Among other things, the 2010 interim final rules provide that a plan or issuer must provide coverage, without cost sharing, for certain newly recommended preventive health services starting with the first plan year (or, in the individual market, policy year) that begins on or after the date that is one year after the date on which the recommendation or guideline is issued.[1]

On August 1, 2011, HRSA adopted and released guidelines for women's preventive services based on

[1] 26 CFR 54.9815–2713T(b)(1); 29 CFR 2590.715–2713(b)(1); 45 CFR 147.130(b)(1).

recommendations of the independent Institute of Medicine, which had undertaken a review of the scientific and medical evidence on women's preventive services (Women's Preventive Services: Required Health Plan Coverage Guidelines, or HRSA Guidelines).[2] As relevant here, the HRSA Guidelines include all Food and Drug Administration (FDA)-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a health care provider (collectively, contraceptive services).[3] Accordingly, under section 2713 of the PHS Act and the 2010 interim final rules, non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage are required to provide coverage without cost sharing of women's preventive health services, including contraceptive services, consistent with the HRSA Guidelines in plan years (or, in the individual market, policy years) beginning on or after August 1, 2012, except as discussed later in this section.

Contemporaneous with the issuance of the HRSA Guidelines, the Departments amended the 2010 interim final rules (76 FR 46621) (2011 amended interim final rules). The amendment provided HRSA with the authority to exempt group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) from the requirement to cover contraceptive services pursuant to the HRSA Guidelines.[4] The 2011 amended interim final rules specified that, for purposes of this exemption, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. HRSA exercised this authority in the HRSA Guidelines such that group health plans established or maintained by these religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services.

On February 10, 2012, the Departments issued final rules that adopted the definition of religious employer in the 2011 amended interim final rules for purposes of the exemption from the requirement to cover contraceptive services (2012 final rules).[5] Contemporaneous with the issuance of the 2012 final rules, HHS, with the agreement of the Departments of Labor and the Treasury, issued guidance establishing a temporary enforcement safe harbor for group health plans established or maintained by certain nonprofit organizations that have religious objections to contraceptive coverage (and any group health insurance coverage provided in connection with such plans).[6]

The guidance provides that, under the temporary enforcement safe harbor, the Departments will not take any enforcement action against an employer, group health plan, or health insurance issuer for failing to cover some or all recommended contraceptive services in a non-grandfathered group health plan (or any group health insurance coverage provided in connection with such a plan) where the plan is established or maintained by an organization meeting all of the following criteria:

- The organization is organized and operates as a nonprofit entity.
- From February 10, 2012, onward, the group health plan established or maintained by the organization has consistently not covered all or the same subset of recommended contraceptive services, consistent with any applicable state law, because of the religious beliefs of the organization.
- The group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third party administrator) provides to participants a notice indicating that some or all contraceptive services will not be covered under the plan for the first plan year beginning on or after August 1, 2012, as set forth in the guidance.
- The organization self-certifies that it satisfies the foregoing three criteria and documents its self-certification, as set forth in the guidance.

The temporary enforcement safe harbor is also available for insured student health insurance coverage arranged by nonprofit institutions of higher education with religious objections to contraceptive coverage that similarly meet the four criteria.[7]

The temporary enforcement safe harbor is in effect until the first plan year that begins on or after August 1, 2013. The Departments committed to rulemaking during this 1-year safe harbor period to provide women with contraceptive coverage without cost sharing as required by section 2713 of the PHS Act, while protecting certain additional organizations from having to contract, arrange, pay, or refer for any contraceptive coverage to which they object on religious grounds.

The first step toward realizing these policy goals was an advance notice of proposed rulemaking (ANPRM) published on March 21, 2012 (77 FR 16501). The ANPRM presented potential approaches and solicited comments on alternative ways to fulfill the requirements of section 2713 of the PHS Act when health coverage is established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education,[8] with religious objections to contraceptive coverage. The 90-day comment period on the ANPRM closed on June 19, 2012.

These proposed rules mark the next step in the process. The proposed rules would make two principal changes to the preventive services coverage rules to provide women contraceptive coverage without cost sharing, while taking into account religious objections to contraceptive services of eligible organizations, including eligible

[2] The HRSA Guidelines are available at: *http://www.hrsa.gov/womensguidelines.*

[3] This excludes services relating to a man's reproductive capacity, such as vasectomies and condoms.

[4] The 2011 amended interim final rules were issued and effective on August 1, 2011, and published on August 3, 2011.

[5] The 2012 final rules were published on February 15, 2012 (77 FR 8725).

[6] Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans, and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code, issued on February 10, 2012, and reissued on August 15, 2012. Available at: *http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf.* The guidance, as reissued on August 15, 2012, clarifies, among other things, that group health plans that took some action before February 10, 2012, to try, without success, to exclude or limit contraceptive coverage are not precluded from eligibility for the safe harbor.

[7] *See* final rule on student health insurance coverage published by HHS on March 21, 2012 (77 FR 16456 and 16457).

[8] In these proposed rules, any proposed accommodation specific to a religious institution of higher education is intended to accommodate the religious institution of higher education only with respect to its arrangement of student health insurance coverage. With respect to the establishment or maintenance of a group health plan by a religious institution of higher education, the religious institution of higher education is intended to be accommodated the same way as any other religious organization that has established or maintained a group health plan.

organizations that are religious institutions of higher education, that establish or maintain or arrange health coverage. First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage. The proposed rules also propose related amendments to other rules, consistent with the proposed accommodations. The Departments intend to finalize all such proposed amendments before the end of the temporary enforcement safe harbor.

Comments are welcome on any aspect of the proposed rules, including on how best to provide women with contraceptive coverage without cost sharing as required by section 2713 of the PHS Act, while protecting eligible organizations from having to contract, arrange, pay, or refer for any contraceptive coverage to which they object on religious grounds.

II. Overview of the Public Comments on the Advance Notice of Proposed Rulemaking

The Departments received approximately 200,000 comments in response to the ANPRM. Commenters represented a wide variety of stakeholders, including religious groups; religiously affiliated educational institutions, health care organizations, charities, and associations; civil rights organizations; consumer groups; group health plan sponsors and administrators; third party administrators and other plan service providers; health insurance issuers; law and public policy organizations; states; secular organizations; private citizens; and women's rights and reproductive health advocacy organizations.

Comments addressed both the religious employer exemption and the suggested accommodations, among other issues. Although the Departments do not separately address each comment received, the significant issues raised in the comments are summarized in this section. The Departments considered these comments in developing the policies in these proposed rules.

A. Comments on the Religious Employer Exemption

Some commenters asserted that the definition of religious employer as formulated in the 2012 final rules is too narrow. Some of these commenters expressed concern that the group health plans of a number of religious employers, including houses of worship, do not qualify for the exemption because the employers' purposes extend beyond the inculcation of religious values or because the employers serve or hire people of different religious faiths. Commenters noted that employers may not know the religious beliefs of those they serve or hire, and that employment discrimination laws may prohibit them from inquiring about the religious beliefs of their employees. Other commenters expressed concern that the definition of religious employer is not broad enough to allow them to continue their current exclusion of contraceptive services from coverage under their group health plans and warned that, if the definition of religious employer is not broadened, they could cease to offer health coverage to their employees in order to avoid having to offer coverage to which they object on religious grounds.

Commenters also asserted that federal laws, including the Affordable Care Act, provide for conscience clauses and religious exemptions broader than the religious employer exemption provided for in the 2012 final rules. Other commenters asserted that the narrow scope of the exemption raises concerns under the First Amendment and the Religious Freedom Restoration Act (RFRA). Some commenters asserted that the criteria for the religious employer exemption could result in excessive government entanglement in religion. Several commenters expressed concern that the definition of religious employer sets a precedent for use in other areas of federal and state law. These commenters urged that the definition of religious employer be broadened such that more group health plans may qualify for the exemption.

Other commenters, however, disputed claims that the contraceptive coverage requirement infringes on rights protected by the First Amendment or RFRA, noting that the requirement is neutral and generally applicable. They also explained that the requirement does not substantially burden religious exercise and, in any event, serves compelling governmental interests and is the least restrictive means to achieve those interests.

Some commenters supported the inclusion of contraceptive services in the HRSA Guidelines and urged that the Departments not broaden the religious employer exemption. These commenters asserted that the definition of religious employer is appropriately targeted at houses of worship and argued that making contraceptive coverage available to as many women as possible would enhance access to important preventive health care services and would significantly reduce long-term health care costs and consequences associated with unplanned pregnancies. These commenters asserted that expanding the exemption would undermine the benefits of the law. Some commenters believed that the exemption should be eliminated entirely due to the importance of extending these benefits to as many women as possible.

Several commenters requested clarification as to whether, if employees of multiple employers are covered under a single group health plan, each employer must independently meet the definition of religious employer for the plan to qualify for the exemption.

B. Comments on the Suggested Accommodations for Health Coverage Established or Maintained by Religious Organizations or Arranged by Religious Institutions of Higher Education

Several commenters asserted that the suggested accommodations described in the ANPRM would fail to adequately accommodate religious objections to contraceptive coverage. These commenters emphasized that, in their view, religious organizations would continue to be involved, whether directly or indirectly, in providing coverage for services that they find religiously objectionable. For example, with respect to insured group health plans, these commenters disputed the claim that contraceptive coverage is at least cost neutral and argued that plan sponsors would end up funding the coverage in the form of higher premiums or fees. These commenters generally argued that, in order to provide adequate relief, the Departments would need to rescind the contraceptive coverage requirement in its entirety, provide an exemption for the group health plan of any organization with a religious or moral objection to contraceptive coverage, or provide government funding for provision of contraceptive services.

Other commenters recommended that the Departments expand the suggested accommodations to encompass the group health plans of a broader class of religiously affiliated organizations. Several commenters stated that the rules

should accommodate all organizations with a religious or moral objection to contraceptive coverage, whether the organization is religious or secular, or nonprofit or for-profit, among other potential distinctions. These commenters also argued that an accommodation should be available without regard to whether an organization has covered contraceptive services in its group health plan in the past.

Some commenters recommended using criteria in other federal laws, such as the National Labor Relations Act, for determining whether the group health plan of an organization qualifies for an accommodation. Some commenters suggested accommodating the group health plans of religiously affiliated organizations recognized as tax-exempt under an IRS group ruling.

In contrast, other commenters urged that any accommodation apply only to health coverage established or maintained by a limited class of religiously affiliated organizations or arranged by a limited class of religiously affiliated institutions of higher education. For example, several commenters suggested limiting any accommodation to only health coverage established or maintained by nonprofit organizations owned or controlled by a church, association of churches, or religious order, or arranged by nonprofit institutions of higher education owned or controlled by a religious organization as defined for purposes of Title IX of the Education Amendments of 1972. These commenters also generally argued that health coverage established or maintained by for-profit organizations or arranged by for-profit institutions of higher education, or health coverage established or maintained by organizations, or arranged by institutions of higher education, that object to only some types of contraceptive services, should not qualify for an accommodation.

A number of commenters supported a self-certification process, similar to that used for the temporary enforcement safe harbor, for religious organizations seeking to avail themselves of an accommodation. Some commenters urged that the Departments adopt appropriate oversight and enforcement mechanisms to monitor compliance with the criteria for any accommodation and recommended self-certification as a tool to promote transparency and support compliance and enforcement. Other commenters suggested that the Departments consider any such self-certification to be conclusive to avoid inquiry into a religious organization's character, mission, or practices.

Comments were quite varied regarding the ANPRM's suggested approaches with respect to the provision of contraceptive coverage to participants and beneficiaries enrolled in self-insured group health plans established or maintained by religious organizations with religious objections to such coverage. Many commenters supported the general approach suggested in the ANPRM of ensuring that participants and beneficiaries enrolled in such self-insured plans receive contraceptive coverage without cost sharing. These commenters stated that any accommodation should not create delays in or barriers to contraceptive benefits, and that these benefits should be provided without participants and beneficiaries having to specifically elect such benefits.

Concerns were raised by some commenters about an objecting organization's ability to not administer, facilitate, or otherwise involve itself in the provision of contraceptive coverage to such participants and beneficiaries. Many commenters were concerned about how third party administrators would be able to fund these benefits. They noted that drug rebates, one suggested source of funds, often belong to another entity (such as the plan sponsor and/or the plan participants and beneficiaries), not the third party administrator, and stated that, in their view, costs incurred by third party administrators would ultimately be passed on to plan sponsors and/or plan participants and beneficiaries unless a separate source of funding could be found, such as some form of public funding or stand-alone contraceptive coverage with no premium or cost sharing. Others raised questions about the responsibility for communications regarding contraceptive coverage. Some third party administrators were concerned about becoming surrogate insurers, which might subject them to the application of state insurance laws. At the same time, other commenters believed that, with funding, notice, and adequate claims information, contraceptive coverage could be administered effectively by third party administrators.

III. Provisions of the Proposed Rules

A. Overview

The Departments aim to secure the protections under section 2713 of the PHS Act that are designed to enhance coverage of important preventive services for women without cost sharing while accommodating the religious objections to contraceptive coverage of eligible organizations.

The Departments propose two key changes to the preventive services coverage rules codified in 26 CFR 54.9815–2713T, 29 CFR 2590.715–2713, and 45 CFR 147.130 to meet these goals. First, the proposed rules would amend the criteria for the religious employer exemption to ensure that an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths. Second, the proposed rules would establish accommodations for health coverage established or maintained by eligible organizations, or arranged by eligible organizations that are religious institutions of higher education, with religious objections to contraceptive coverage.

Amendments to rules concerning excepted benefits and Affordable Insurance Exchanges (Exchanges) are also proposed in connection with the proposed accommodations.

B. Explanation of Terms

In these proposed rules, all references to ''contraceptive coverage'' are references to coverage of the contraceptive services that are required to be covered without cost sharing in accordance with the HRSA Guidelines (that is, all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity, as prescribed by a health care provider).

All references to ''accommodation'' are references to an arrangement under which contraceptive coverage is provided without cost sharing to plan participants and beneficiaries (or, in the case of student health insurance coverage, student enrollees and their covered dependents) independent of health coverage established or maintained or arranged by an objecting religious organization, including an objecting religious institution of higher education.

Finally, all references to ''religious organization'' and ''religious institution of higher education'' are references to the class of organizations and institutions of higher education that establish or maintain or arrange health coverage that qualifies for an accommodation. These organizations are collectively referred to as ''eligible organizations'' in these proposed rules.

C. Religious Employer Exemption and Accommodations for Health Coverage Established or Maintained or Arranged by Eligible Organizations

For purposes of organization and clarity, proposed 45 CFR 147.130(a)[9] would provide that the requirement to provide coverage for recommended preventive services without cost sharing is subject to a new 45 CFR 147.131, which would establish standards and processes related to both the religious employer exemption and the accommodations for health coverage established or maintained or arranged by eligible organizations, as discussed in more detail later in this section.

Accordingly, the proposed rules would move to new 45 CFR 147.131[10] the language currently in 45 CFR 147.130(a)(1)(iv)(A) and (B) (incorporated by reference in the rules of the Departments of Labor and the Treasury) that authorizes HRSA to exempt group health plans of religious employers (and group health insurance coverage provided in connection with such plans) from the contraceptive coverage requirement and that defines religious employer for this purpose, and would amend the authorization and definition as discussed later in this section.

1. Religious Employer Exemption

Currently, under the 2012 final rules, a religious employer is one that: (1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) of the Code. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. The Departments explained in the 2011 amended interim final rules that this definition was intended to focus the religious employer exemption on ''the unique relationship between a house of worship and its employees in ministerial positions.''[11]

Some commenters brought to the Departments' attention that the group health plans of certain religious entities that meet the fourth prong of the definition of religious employer (providing that a religious employer is a nonprofit organization described in section 6033(a)(1) and (a)(3)(A)(i) or (iii) of the Code) may not qualify for the exemption because those entities provide benevolent services to their communities. For example, if a church maintains a soup kitchen that provides free meals to low-income individuals irrespective of their religious faiths, it could fail to satisfy the third prong of the definition of religious employer (providing that a religious employer primarily serves persons who share its religious tenets). The same question could arise if a church runs a parochial school that employs people of different religious faiths.

The Departments agree that the exemption should not exclude group health plans of religious entities that would qualify for the exemption but for the fact that, for example, they provide charitable social services to persons of different religious faiths or employ persons of different religious faiths when running a parochial school. Indeed, this was never the Departments' intention in connection with the 2011 amended interim final rules or the 2012 final rules. Accordingly, in 45 CFR 147.131(a) (and the related rules of the Departments of Labor and the Treasury), the Departments propose to amend the definition of religious employer that was adopted in the 2012 final rules by eliminating the first three prongs of the definition and clarifying the application of the fourth. Under this proposal, an employer that is organized and operates as a nonprofit entity and referred to in section 6033(a)(3)(A)(i) or (iii) of the Code would be considered a religious employer for purposes of the religious employer exemption. For this purpose, an organization that is organized and operates as a nonprofit entity is not limited to any particular form of entity under state law, but may include organizations such as trusts and unincorporated associations, as well as nonprofit, not-for-profit, non-stock, public benefit, and similar types of corporations. However, for this purpose, an organization is not considered to be organized and operated as a nonprofit entity if its assets or income accrue to the benefit of private individuals or shareholders. Under this standard, it is not necessary to determine the federal tax-exempt status of the nonprofit entity in determining whether the religious employer exemption applies. The Departments note that eliminating the first three prongs would avoid any inquiry into an employer's purposes, as well as any inquiry into the religious beliefs of its employees and the religious beliefs of those it serves.

The Departments believe that this proposal would not expand the universe of employer plans that would qualify for the exemption beyond that which was intended in the 2012 final rules. As previously noted, when the Departments first defined religious employer, the primary goal was to exempt the group health plans of houses of worship. Section 6033(a)(3)(A)(i) and (iii) of the Code refers to churches, their integrated auxiliaries, and conventions or associations of churches, as well as to the exclusively religious activities of any religious order. By restricting the exemption primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders, the fourth prong of the current definition of religious employer would alone suffice to meet the goal. By eliminating the first three prongs of the current definition, there no longer would be any question as to whether group health plans of houses of worship that provide educational, charitable, or social services to their communities qualify for the exemption.

The Departments welcome comments on this proposal, including whether it would unduly expand the universe of employer plans that would qualify for the exemption and whether additional or different language is needed to clarify the scope of the exemption.

2. Accommodations for Health Coverage Established or Maintained or Arranged by Eligible Organizations

In proposed 45 CFR 147.131(b) through (e) (and the related rules of the Departments of Labor and the Treasury) and as discussed later in this section, the Departments propose policies relating to the accommodation of certain group health plans and group health insurance coverage with respect to the contraceptive coverage requirement. The Departments propose a comparable accommodation with respect to student health insurance coverage arranged by eligible organizations that are religious institutions of higher education. The Departments believe these proposed accommodations, as opposed to the exemption that is provided to religious employers, are warranted given that participants and beneficiaries in group health plans established or maintained by eligible organizations, as well as student enrollees and their covered dependents in student health insurance coverage arranged by eligible organizations, may be less likely than participants and beneficiaries in group health plans established or maintained

[9] For simplicity, this preamble refers only to provisions of 45 CFR 147.130. Parallel provisions to 45 CFR 147.130 are contained in 26 CFR 54.9815–2713T and 29 CFR 2590.715–2713.

[10] For simplicity, this preamble refers only to provisions of 45 CFR 147.131. Parallel provisions to 45 CFR 147.131 are contained in 26 CFR 54.9815–2713A and 29 CFR 2590.715–2713A.

[11] 76 FR 46623.

by religious employers to share such religious objections of the eligible organizations. The proposed accommodations would provide such plan participants and beneficiaries contraceptive coverage without cost sharing while insulating their employers or institutions of higher education from contracting, arranging, paying, or referring for such coverage.

a. Definition of Eligible Organization

These proposed rules would provide that group health plans established or maintained by eligible organizations with religious objections to contraceptive coverage (and group health insurance coverage provided in connection with such plans), and student health insurance coverage arranged by eligible organizations that are religious institutions of higher education with such objections, comply with the requirement to provide coverage for contraceptive services under section 2713 of the PHS Act if the conditions of the accommodation are satisfied.

For purposes of these proposed rules only, the Departments propose to define an eligible organization as an organization that meets all of the following criteria:

- The organization opposes providing coverage for some or all of the contraceptive services required to be covered under section 2713 of the PHS Act on account of religious objections.
- The organization is organized and operates as a nonprofit entity.
- The organization holds itself out as a religious organization.
- The organization self-certifies that it satisfies the first three criteria, as described later in this section.

This proposed definition of eligible organization is intended to allow health coverage established or maintained or arranged by nonprofit religious organizations, including nonprofit religious institutional health care providers, educational institutions, and charities, with religious objections to contraceptive coverage to qualify for an accommodation. For this purpose, an organization that is organized and operated as a nonprofit entity is not limited to any particular form of entity under state law, but may include organizations such as trusts and unincorporated associations, as well as nonprofit, not-for-profit, non-stock, public benefit, and similar types of corporations. However, for this purpose an organization is not considered to be organized and operated as a nonprofit entity if its assets or income accrue to the benefit of private individuals or shareholders.

The Departments believe that the proposed definition of eligible organization would strike an appropriate balance because it would limit any accommodation to nonprofit organizations that hold themselves out as religious. The Departments solicit comments on whether the proposed definition of eligible organization would allow an appropriate universe of nonprofit religious organizations and institutions of higher education establishing or maintaining or arranging health coverage to qualify for an accommodation, including comments on whether it would be too broad or too narrow.

The Departments do not propose that the definition of eligible organization extend to for-profit secular employers. Religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964, are available to nonprofit religious organizations but not to for-profit secular organizations. Accordingly, the Departments believe it would be appropriate to define eligible organization to include nonprofit religious organizations, but not to include for-profit secular organizations.

b. Self-Certification

Each organization seeking accommodation under the proposed rules would be required to self-certify that it meets the definition of eligible organization, following a self-certification process similar to that under the temporary enforcement safe harbor. The self-certification would also specify the contraceptive services for which the organization will not establish, maintain, administer, or fund coverage. The organization would not be required to submit the self-certification to any of the Departments. The organization would maintain the self-certification (executed by an authorized representative of the organization) in its records for each plan year to which the accommodation applies and make the self-certification available for examination upon request so that regulators, issuers, third party administrators, and plan participants and beneficiaries may verify that an organization has qualified for an accommodation, while avoiding any inquiry into the organization's character, mission, or practices. The Departments intend to specify in guidance the form to be used for the self-certification.

c. Separate Contraceptive Coverage Without Cost Sharing for Plan Participants and Beneficiaries

These proposed rules aim to provide women with contraceptive coverage without cost sharing and to protect eligible organizations from having to contract, arrange, pay, or refer for contraceptive coverage to which they object on religious grounds.

1. Insured Plans

To achieve these goals, under HHS's authority in section 2792 of the PHS Act to promulgate rules ''necessary or appropriate'' to carry out the provisions of title XXVII of the PHS Act, and the parallel authorities of the Department of Labor in section 734 of ERISA and the Department of the Treasury in section 9833 of the Code, these proposed rules would provide that, in the case of an insured group health plan established or maintained by an eligible organization, the health insurance issuer providing group coverage in connection with the plan would assume sole responsibility, independent of the eligible organization and its plan, for providing contraceptive coverage without cost sharing, premium, fee, or other charge to plan participants and beneficiaries.

The eligible organization would provide the issuer with a copy of its self-certification. If the plan uses a separate issuer for certain coverage, such as prescription drug coverage, the eligible organization may also need to provide a copy of its self-certification to the separate issuer. Nothing more would be required of the eligible organization to qualify for the accommodation.

The proposed rules would direct the issuer receiving the copy of the self-certification to ensure that the coverage for those contraceptive services identified in the self-certification is not included in the group policy, certificate, or contract of insurance; that such coverage is not reflected in the group health insurance premium; and that no fee or other charge in connection with such coverage is imposed on the eligible organization or its plan.

The proposed rules would further direct the issuer receiving the copy of the self-certification to provide contraceptive coverage under individual policies, certificates, or contracts of insurance (hereinafter referred to as individual health insurance policies) for plan participants and beneficiaries without cost sharing, premium, fee, or other charge. The coverage would not be offered by or through a group health plan. (As discussed later in this section, the Departments propose that this type

of individual health insurance policy be a new category of excepted benefits.)

The issuer would automatically enroll plan participants and beneficiaries in a separate individual health insurance policy that covers recommended contraceptive services. The Departments envision that the issuer would ensure that contraceptive coverage for plan participants and beneficiaries is effective at the beginning of the plan year of their group health plan, to the extent possible, to prevent a delay or gap in contraceptive coverage. The eligible organization would have no role in contracting, arranging, paying, or referring for this separate contraceptive coverage. Such coverage would be offered at no charge to plan participants and beneficiaries, that is, the issuer would provide benefits for such contraceptive services without the imposition of any cost sharing requirement (such as a copayment, coinsurance, or a deductible), premium, fee, or other charge, consistent with section 2713 of the PHS Act. The requirements of section 2713 of the PHS Act, its implementing regulations, and other applicable federal and state law (as well as their enforcement mechanisms) would continue to apply with respect to such coverage. For example, an issuer providing such coverage could use reasonable medical management techniques consistent with 45 CFR 147.130(a)(4).

The Departments believe that, in the case of insured group health plans, this proposed arrangement would alleviate the need for the eligible organization to contract, arrange, pay, or refer for contraceptive coverage while providing contraceptive coverage to plan participants and beneficiaries at no additional cost. Actuaries, economists, and insurers estimate that providing contraceptive coverage is at least cost neutral, and may result in cost-savings when taking into account all costs and benefits for the insurer.[12] In this instance, contraceptive coverage without cost sharing would be provided to plan participants and beneficiaries through individual health insurance policies, separate from the group policy through which all other coverage would be provided to plan participants and beneficiaries. The Departments believe that issuers generally would find that providing such contraceptive coverage is cost neutral because they would be they would be insuring the same set of individuals under both policies and would experience lower costs from improvements in women's health and fewer childbirths.

The Departments note that a health insurance issuer providing coverage in connection with a plan established or maintained by an eligible organization would be held harmless under the accommodation if a representation by the organization to the issuer that the organization is an eligible organization on which the issuer relied in good faith were determined later to be incorrect. Conversely, the eligible organization and its plan would be held harmless if the issuer were to fail to comply with the requirement that it provide separate contraceptive coverage for plan participants and beneficiaries at no charge.

The Departments request comments on this proposed arrangement.

2. Self-Insured Plans

The Departments are considering alternative approaches for providing participants and beneficiaries in self-insured group health plans established or maintained by eligible organizations with contraceptive coverage at no additional cost, while protecting the eligible organizations from having to contract, arrange, pay, or refer for such coverage. Under each of these approaches, a health insurance issuer that provides individual health insurance policies for contraceptive coverage for plan participants and beneficiaries at no additional cost would be able to offset the costs of providing such coverage by claiming an adjustment in Federally-facilitated Exchange (FFE) user fees that would reduce the amount of the such fees for the issuer (or an affiliated issuer), as discussed later in this section. The Departments envision that the issuer would ensure that contraceptive coverage for plan participants and beneficiaries is effective at the beginning of the plan year of their group health plans, to the extent possible, to prevent a delay or gap in contraceptive coverage. Under each of these approaches, HHS would assist in identifying issuers offering the separate individual health insurance policies for contraceptive coverage.

Under all approaches, if there is a third party administrator for the self-insured group health plan of the eligible organization, the eligible organization would provide the third party administrator with a copy of its self-certification. If the plan uses a separate third party administrator for certain coverage, such as prescription drug coverage, the eligible organization would also provide a copy of its self-certification to the separate third party administrator if the coverage administered by the separate third party administrator includes coverage of any contraceptive service listed in the self-certification.

Further, under all approaches, a third party administrator receiving a copy of the self-certification would automatically arrange separate individual health insurance policies for contraceptive coverage from an issuer providing such polices, as described above. The issuer providing the coverage (or an affiliated issuer) would receive an additional adjustment in the user fees that otherwise would be charged by an FFE in an amount that would offset a reasonable charge by the third party administrator for performing this service. In turn, the issuer would be required to pass the amount of this additional adjustment in FFE user fees on to the third party administrator as a condition of receiving any FFE user fee adjustment, and would be required to attest to HHS that it has in fact passed the amount of this additional adjustment on to the third party administrator. As a condition of payment of this amount by the issuer, the third party administrator would not be permitted to charge any amount to the eligible organization, its plan, or to plan participants or beneficiaries for performing the service. The Departments note that the issuer could either be affiliated with or be independent of the third party administrator.

The Departments solicit comment on which of the proposed approaches below would best provide participants and beneficiaries in self-insured group health plans established or maintained by eligible organizations with contraceptive coverage at no additional cost, while protecting eligible organizations from having to contract, arrange, pay, or refer for such coverage. The Departments also request comment on whether there are other approaches that should be considered that would achieve the same goals.

Under the first approach, a third party administrator receiving the copy of the self-certification would have an economic incentive to voluntarily arrange for the separate individual health insurance policies for contraceptive coverage for plan participants and beneficiaries because it would be compensated for a reasonable charge for automatically arranging for the contraceptive coverage through

[12] Bertko, John, F.S.A., M.A.A.A., Director of Special Initiatives and Pricing, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, Glied, Sherry, Ph.D., Assistant Secretary for Planning and Evaluation, Department of Health and Human Services (ASPE/HHS), *et al.,* ''The Cost of Covering Contraceptives Through Health Insurance,'' (February 9, 2012), available at: *http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml.*

payment by the issuer of the contraceptive coverage. Under this approach, in automatically arranging for the contraceptive coverage, the third party administrator would be acting, not as the third party administrator to the self-insured plan of the eligible organization, but rather in its independent capacity apart from its capacity as the agent of the plan. Under this approach, the self-insured plan of the eligible organization would be treated as complying with the requirement to provide contraceptive coverage based on the third party administrator's receipt of the copy of the self-certification.

Under the second approach, coverage under the plan of the eligible organization would comply with the requirement to provide contraceptive coverage without cost sharing only if the third party administrator administering coverage in connection with the plan automatically arranges for an issuer to assume sole responsibility for providing separate individual health insurance policies offering contraceptive coverage without cost sharing, premium, fee, or other charge to plan participants and beneficiaries, the eligible organization, or its plan. As discussed above, any reasonable administrative costs of the third party administrator in performing this service would be covered through payment by the issuer of the contraceptive coverage. If the third party administrator performs the services, coverage under the plan of the eligible organization would comply with 45 CFR 147.130. While the third party administrator would not be directly responsible for assuring compliance with section 2713 of the PHS Act, the Departments expect that third party administrators would seek to assist eligible organizations such that eligible organizations would be able to avail themselves of the proposed accommodation.

Under the third approach, the third party administrator receiving the copy of the self-certification would be directly responsible for automatically arranging for contraceptive coverage for plan participants and beneficiaries. Specifically, the self-certification would have the effect of designating the third party administrator [13] as the plan administrator under section 3(16) of ERISA solely for the purpose of fulfilling the requirement that the plan provide contraceptive coverage without cost sharing. The third party administrator would satisfy its responsibility to automatically arrange for contraceptive coverage for plan participants and beneficiaries by arranging for an issuer to assume sole responsibility for providing separate individual health insurance policies offering contraceptive coverage without cost sharing, premium, fee, or other charge to plan participants and beneficiaries, the eligible organization, or its plan. The Departments note that there would be no obligation on a third party administrator to enter into or continue a third party administration contract with an eligible organization if the third party administrator were to object to having to carry out this responsibility. Although this approach would place the legal responsibility for assuring compliance with section 2713 of the PHS Act solely on the third party administrator, it would have legal implications under ERISA's reporting, disclosure, claims processing, and fiduciary provisions for both the third party administrator and the eligible organization. The Departments seek comment specifically on potential issues arising under ERISA if the third party administrator were to become the designated plan administrator under section 3(16) of ERISA, and therefore a plan fiduciary, even for the limited purposes contemplated.

The Departments also seek comment on whether there is a need to provide an accommodation for self-insured plans of eligible organizations without third party administrators, and, if so, how best to ensure that participants and beneficiaries in such plans receive separate contraception coverage without cost sharing. No comments were submitted in response to the request in the ANPRM on the extent to which there are such plans without a third party administrator. The Departments continue to believe that there are very few, if any, self-insured plans of eligible organizations in this circumstance.

The Departments solicit comment on these alternative approaches.

3. Notice of Availability of Contraceptive Coverage and Coordination of Benefits

The proposed rules would direct a health insurance issuer providing separate individual health insurance policies for contraceptive coverage at no additional cost to participants and beneficiaries in plans of eligible organizations to provide a written notice to plan participants and beneficiaries regarding the availability of the separate contraceptive coverage. Issuers providing such contraceptive coverage would be responsible for providing the notice of availability of such coverage to participants and beneficiaries in both insured and self-insured group health plans of eligible organizations. The notice would be provided directly to plan participants and beneficiaries by the issuer, separate from but contemporaneous with (to the extent possible) any application materials distributed in connection with enrollment (or re-enrollment) in group coverage established, maintained, or arranged by the eligible organization in any plan year to which the accommodation is to apply. As such, this notice generally would be provided annually. To satisfy the proposed notice requirement, issuers could use the model language set forth in the proposed rules or substantially similar language. The Departments request comments on the proposed notice requirement, including ways to improve the proposed model language, the timing and delivery (including electronically) of the notice to plan participants and beneficiaries, and whether this notice requirement could be combined with other existing notice requirements to simplify administration for issuers.

The Departments also seek comment on whether there are efficient ways to limit the benefits provided under the separate individual health insurance policies for contraceptive coverage to match the contraceptive benefits identified in the self-certification or whether the separate individual health insurances policies for contraceptive coverage should simply cover the full set of recommended contraceptive services. One option would be to require coordination of benefits such that the contraceptive coverage is secondary to the coverage provided by the group health plan established or maintained by the eligible organization (and any group health insurance coverage provided in connection with the plan). The Departments solicit comment on this issue.

[13] To the extent the plan uses more than one third party administrator (for example, one pharmacy benefit manager (PBM) to handle claims administration for prescription drugs and another entity to handle claims for inpatient and outpatient medical/surgical benefits), each third party administrator would become the plan administrator upon receiving the copy of the self-certification with respect to the types of claims that it normally processes (that is, the PBM would continue to handle claims for prescription drugs and the other entity would continue to handle claims for inpatient and outpatient medical/surgical benefits), and each would do so in accordance with section 2713 of the PHS Act (even if plan terms might otherwise provide differently) as plan administration with an independent funding source.

d. Adjustments of Federally-Facilitated Exchange (FFE) User Fees

To fund contraceptive coverage for participants and beneficiaries in self-insured plans established or maintained by eligible organizations at no cost to plan participants or beneficiaries, HHS proposes that the existing proposed FFE user fee calculation, set forth in the December 7, 2012 proposed rule titled ''Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014'' (77 FR 73213), take into account that an issuer that offers a qualified health plan (QHP) through an FFE (or an affiliated issuer in a state without an FFE) provides such contraceptive coverage by reducing the amount of the user fee.

Consistent with Office of Management and Budget (OMB) Circular No. A25–R, the proposed revised FFE user fee calculation (which would result in an adjustment of the FFE user fee) would facilitate the proposed accommodation of self-insured plans established or maintained by eligible organizations by ensuring that plan participants and beneficiaries have separate individual health insurance policies for contraceptive coverage at no additional cost such that eligible organizations are not required to administer or fund such coverage. It would thereby support many of the goals of the Affordable Care Act, including improving the health of the population, reducing health care costs, providing access to health coverage, encouraging eligible organizations to continue to offer health coverage, and ensuring access to affordable QHPs via efficiently operated Exchanges. Moreover, as described in the 2012 final rules and the ANPRM, there are significant benefits associated with contraceptive coverage without cost sharing. Such contraceptive coverage significantly furthers the governmental interests in promoting public health and in promoting gender equality.

Under this proposal, the FFE user fee calculation would take into account contraceptive coverage that is provided by an issuer in a state without an FFE so long as the issuer is affiliated with an issuer that offers a QHP through an FFE.[14] The affiliated issuer would not be required to be a QHP issuer. An issuer that provides contraceptive coverage in a state without an FFE could offset the estimated cost of such coverage through an affiliated QHP issuer in a state with an FFE. This would encourage issuers to provide this type of coverage widely, to meet the goal of providing all plan participants and beneficiaries of self-insured plans established or maintained by eligible organizations with separate contraceptive coverage without cost sharing.

HHS proposes that, in order for the FFE user fee calculation to take into account that a QHP issuer (or an affiliated issuer) provides contraceptive coverage, the issuer providing coverage for contraceptive services for the plan participants and beneficiaries of a self-insured plan established or maintained by an eligible organization must provide coverage for all recommended contraceptive services identified in the self-certification of the eligible organization, and do so without cost sharing, premiums, fees, or other costs to the plan participants and beneficiaries. It also must pay the reasonable charge of third party administrators. The contraceptive coverage would be subject to all applicable federal and state laws, including state filing and rate review requirements. HHS seeks comment on ways to streamline the regulatory processes for, and minimize the costs of, obtaining approval of such coverage in all states.

HHS further proposes that, if an issuer provides contraceptive coverage to plan participants and beneficiaries of self-insured plans of eligible organizations at no additional cost, and it, or another issuer in the same issuer group, is required to pay an FFE user fee, an adjustment in the FFE user fee may be sought for the estimated cost of the contraceptive coverage. HHS would use the definition of issuer group proposed at 45 CFR 156.20 for this purpose. That section proposes that issuer group means all entities treated under section 52(a) or (b) of the Code as a member of the same controlled group of corporations as (or under common control with) a health insurance issuer, or issuers affiliated by the common use of a nationally licensed service mark. HHS seeks comment on whether this definition would provide the appropriate amount of flexibility in calculating the FFE user fee to correctly reflect the costs of issuers in states without an FFE, and on the advantages and disadvantages of permitting an adjustment in the FFE user fee with respect to unaffiliated issuers.

Under this proposal, the issuer providing the contraceptive coverage would provide certain information and documentation (jointly with the affiliated QHP issuer if applicable) to HHS. First, monthly data on the number of individuals for whom the contraceptive coverage is being provided would be submitted, along with an attestation that a copy of the self-certification of the eligible organization was provided by the third party administrator that arranged for the coverage for the plan participants and beneficiaries. Second, the issuer(s) would be required to provide an attestation that coverage for all recommended contraceptive services identified in the self-certification of the eligible organization is being provided, and being provided without cost sharing, premiums, fee, or other costs to the plan participants or beneficiaries. The issuer also would attest to HHS that it passed the portion of its adjustment attributable to reasonable charges by third party administrators on to those parties. Third, the issuer(s) would be required to identify the QHP(s) being offered through an FFE with respect to which the FFE user fee adjustment is to be made. In addition, if the issuer providing the contraceptive coverage is not the QHP issuer for which the adjustment in the FFE user fee is being sought, HHS proposes to require an attestation that the issuers are from the same issuer group. Finally, the issuer(s) would be required to submit to HHS an estimate of the cost of the contraceptive coverage, along with data or documentation supporting that estimate. HHS approval of the cost estimate would be required before a QHP issuer could receive an FFE user fee adjustment. HHS solicits comment on whether additional information or attestations should be required of issuers, for example, whether issuers should be required to attest that they provided the required notice of availability of contraceptive coverage to plan participants and beneficiaries.

HHS is considering two approaches to ensuring that the cost estimate reasonably reflects the cost of the contraceptive coverage. One approach would require the issuer(s) to submit to HHS the estimated per capita cost of the contraceptive coverage, as well as an actuarial memorandum prepared by a member of the American Academy of Actuaries in accordance with generally accepted actuarial principles and methodologies validating the estimate. HHS seeks comment on appropriate standards to guide such calculations. Under this approach, HHS expects that, in 2016 and beyond, the estimated cost of providing the contraceptive coverage would be based on the issuer's experience in previous years.

[14] For simplicity, the discussion that follows uses the shorthand ''contraceptive coverage'' to refer to contraceptive coverage for participants and beneficiaries in self-insured plans established or maintained by eligible organizations at no cost to plan participants or beneficiaries.

HHS also proposes that the estimate of the cost of the contraceptive coverage could include a reasonable charge for the issuer's administrative costs, including the costs of obtaining regulatory approval of the contraceptive coverage policy in the applicable state as well as a third party administrator's charge. HHS seeks comment on the magnitude of a reasonable administrative charge. HHS recognizes that the contraceptive coverage that issuers would provide under this proposed accommodation could see limited enrollment in a particular state. Given the potentially narrow markets available to the issuers of the contraceptive coverage, the per capita cost of administering this type of coverage may be higher than that for major medical coverage or other excepted benefits. On the other hand, given that a third party administrator would be connecting the plan participants and beneficiaries with the issuer, and there would therefore be reduced marketing costs, the administrative costs could be lessened. HHS seeks comment on the appropriate magnitude of these administrative costs generally, as well as ways of minimizing the administrative costs. In particular, HHS notes the issues associated with reimbursing for fixed costs, including the cost of obtaining regulatory approval for the policy in the applicable state. Fixed administrative costs could be amortized across the expected life of the policy, or could be reimbursed in the first year of operation. HHS seeks comment on the appropriate manner of compensating for such costs.

HHS also seeks comment on whether HHS should limit the number of issuers providing the contraceptive coverage in each state with respect to which an FFE user fee adjustment may be made. If HHS were to modify its proposal in this way, HHS would add that an issuer must be willing and have the ability to offer the contraceptive coverage to any participant or beneficiary in a self-insured plan of an eligible organization who resides in the state.

HHS notes that the estimate of the cost of the contraceptive coverage could include a reasonable margin. HHS seeks comment on the magnitude of a reasonable margin, and notes that the proposed HHS Notice of Benefit and Payment Parameters for 2014 proposes a presumed margin of 3 percent within allowable administrative costs for the risk corridors program.

The proposed inclusion of reasonable administrative costs and margin in the estimate of the cost of the contraceptive coverage is intended to ensure that issuers receive reasonable compensation for providing the contraceptive coverage, as they would expect to receive in their other commercial businesses. HHS would review the submission by the issuer(s) to ensure that the cost estimate reflects reasonable assumptions and was calculated in accordance with applicable standards and generally accepted actuarial principles and methodologies. HHS would multiply the estimated per capita cost of the contraceptive coverage by the number of individuals being provided the contraceptive coverage each month in order to determine the magnitude of the FFE user fee adjustment. The amount should also take into account the reasonable administrative charges of third party administrators.

Alternatively, HHS could provide a national per capita estimate for the cost of the contraceptive coverage, which would also include adjustments for reasonable administrative costs and margin. This estimate could then be multiplied by the monthly enrollment in the contraceptive coverage in order to determine the magnitude of the FFE user fee adjustment for each QHP issuer concerned. This latter approach would provide for a more standardized approach, but could result in FFE user fee adjustments that do not fund the entire cost of the contraceptive coverage for some issuers, or that overcompensate other issuers. The former approach, however, would place a greater administrative burden on issuers, and would require a more in-depth review by HHS. HHS seeks comment on these two approaches, as well as alternative approaches for determining the estimated cost of the contraceptive coverage.

In both approaches to establishing an estimated cost of providing the contraceptive coverage described above, HHS seeks comment on the appropriate manner of accounting for a third party administrator's administrative costs of arranging for the contraceptive coverage in the issuer's estimated cost of the contraceptive coverage. For example, a flat administrative fee approved by HHS could be included in that estimated cost—with that flat administrative fee including an appropriate margin for the third party administrator. However, such an approach risks providing over- or under-incentives to the third party administrator for arranging for the contraceptive coverage, if the flat administrative fee is too high or too low. Alternatively, the third party administrator's actual reasonable charge, or actual reasonable administrative costs, for arranging the contraceptive coverage could be included in the estimated cost of the contraceptive coverage. HHS seeks comment on these and other approaches to estimating the third party administrator's administrative costs, and how HHS may ensure that they reflect reasonable administrative costs.

HHS proposes that, if the information described previously is provided and the cost estimate is approved, the FFE user fee will be reduced for the issuer of the identified QHP(s) by the amount of the approved estimate of the cost of the contraceptive coverage (multiplied by enrollment in the coverage for the month). While a highly unlikely occurrence given the relatively small population under consideration, HHS proposes that, if the amount of the adjustment is greater than the amount of the obligation to pay the FFE user fee in a particular month, the issuer of the identified QHP(s) will be provided a credit for the FFE user fee charged in succeeding months in the amount of the excess, consistent with OMB Circular No. A25–R. HHS seeks comment on whether a QHP issuer's FFE user fee should be adjusted for any excess in succeeding months at all; whether, if a QHP issuer's FFE user fee is adjusted for any excess in succeeding months, any time limit should be placed on how much later the adjustment should take place; and alternative methods of compensating an issuer with greater contraceptive coverage costs than its (or its affiliated QHP issuer's) FFE user fees.

HHS also proposes that an issuer providing contraceptive coverage for which the FFE user fee has been adjusted (whether the adjustment was provided to the issuer or an affiliated QHP issuer) must maintain for 10 years and make available to HHS upon request: documentation demonstrating that the contraceptive coverage was provided to participants or beneficiaries in a self-insured plan of an eligible organization, as evidenced by the copy of the self-certification that was provided by the third party administrator that arranged for such coverage; documentation demonstrating that the contraceptive coverage was provided without the imposition of any cost sharing, premium, fee, or other charge; documentation or data supporting the estimate of the cost of the contraceptive coverage; and documentation or data on the actual cost of providing the contraceptive coverage. This record-keeping requirement is consistent with timeframes under the False Claims Act, 31 U.S.C. 3729–3733. HHS is considering mechanisms for ensuring program integrity with respect to the provision of the contraceptive coverage under this proposed accommodation.

These mechanisms may include requiring cooperation with audits and investigations, and requiring corrective action. HHS seeks comment on the oversight requirements that should be implemented with respect to the contraceptive coverage under this proposal.

Finally, HHS is proposing that a QHP issuer that is to receive an FFE user fee adjustment as described above prior to January 1, 2014, will be provided a credit in the amount of the adjustment beginning in January 2014. HHS seeks comment on issuers' ability to fund the contraceptive coverage under the proposal between the end of the temporary enforcement safe harbor and December 31, 2013, if HHS is not able to provide the FFE user fee adjustment until January 2014.

The Departments also seek comment on alternative ways to finance separate contraceptive coverage without cost sharing with respect to participants and beneficiaries in self-insured plans of eligible organizations.

e. Treatment of Multiple Employer Group Health Plans

The Departments recognize that, in some instances, several affiliated employers—only some of which are eligible organizations or religious employers—offer health coverage to their employees and their covered dependents through a single group health plan. The Departments considered allowing all employers in such instances to qualify for an accommodation or the religious employer exemption if any single employer met the definition of eligible organization or religious employer. Alternatively, the Departments considered precluding all employers in such instances from qualifying for an accommodation or the religious employer exemption if any single employer failed to meet the definition of eligible organization or religious employer.

The Departments propose to make the accommodation or the religious employer exemption available on an employer-by-employer basis. That is, each employer would have to independently meet the definition of eligible organization or religious employer in order to take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents. Conversely, an employer that did not meet the definition of eligible organization or religious employer could not take advantage of the accommodation or the religious employer exemption with respect to its employees and their covered dependents. This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan. The Departments seek comment on this approach, including comments on the extent to which an employer-by-employer approach would pose administrative challenges for plans and issuers, as well as comments on alternative approaches.

f. Student Health Insurance Coverage

Many institutions of higher education administer programs that provide students and their dependents with access to health coverage. Some institutions of higher education sponsor self-insured student health plans, but the vast majority of student health plans are insured, meaning that a health insurance issuer contracts with the institution of higher education to issue a blanket health insurance policy, from which students can buy coverage. Under final rules published by HHS on March 21, 2012, student health insurance coverage is a type of individual health insurance coverage offered to students and their covered dependents under a written agreement between an institution of higher education and an issuer.[15]

Some religiously affiliated colleges and universities object to signing a written agreement for student health insurance coverage that provides benefits for contraceptive services. Such colleges and universities sometimes include funding for student health plans in their student financial aid packages and object to funding student health plans that include coverage for contraceptive services.

The proposed rules would provide for an accommodation for student health insurance coverage arranged by a nonprofit religious institution of higher education with religious objections to contraceptive coverage comparable to the proposed accommodation for group health insurance coverage provided in connection with a group health plan established or maintained by a nonprofit religious organization with religious objections to contraceptive coverage. Accordingly, among other things, upon receiving a copy of the self-certification from an institution of higher education that meets the criteria for being an eligible organization, an issuer offering student health insurance coverage would provide contraceptive coverage, without cost sharing or additional premium, fee, or other charge, directly to student enrollees and their covered dependents, independent of the issuer's written agreement with the institution of higher education to offer the student health plan. The Departments solicit comments on this proposal.

g. Contraceptive-Only Excepted Benefits

In order to implement the proposed accommodations, it would be necessary and appropriate to establish a new contraceptive-only excepted benefits category. Sections 2722(c)(2) and 2763(b) of the PHS Act provide that the requirements of parts A and B of title XXVII of the PHS Act do not apply to any individual health insurance coverage in relation to its provision of excepted benefits described in section 2791(c)(2) of the PHS Act if the benefits are provided under a separate policy, certificate, or contract of insurance. Section 2791(c)(2) of the PHS Act provides that this category of excepted benefits includes limited scope dental or vision benefits, as well as benefits for long-term care, nursing home care, home health care, or community-based care, or any combination thereof. The law authorizes similar limited benefits to be specified in rule as excepted benefits. Additionally, section 2792 of the PHS Act authorizes HHS to promulgate such rules as may be necessary or appropriate to carry out the provisions of title XXVII of the PHS Act. Parallel provisions in section 734 of ERISA and section 9833 of the Code do the same with respect to the Departments of Labor and the Treasury.

Pursuant to the authority in section 2791(c)(2) of the PHS Act (and companion provisions in ERISA and the Code), the proposed rules would provide that benefits for contraceptive services only, when provided under a separate individual market health insurance policy, certificate, or contract of insurance constitute excepted benefits (subject to the conditions discussed later in this section). The Departments propose to establish this new category of excepted benefits to ensure that individual health insurance policies providing contraceptive coverage offered by an issuer pursuant to the proposed accommodations are not subject to certain generally applicable PHS Act and Affordable Care Act

[15] Because student health plans are not employment-based, they are not group health plans under federal law. Section 2791(a)(1) of the PHS Act defines ''group health plan'' as an employee welfare benefit plan as defined in section 3(1) of ERISA to the extent that the plan provides medical care to employees and their dependents directly or through insurance, reimbursement, or otherwise.

requirements, such as guaranteed availability (section 2702 of the PHS Act) given the unique nature of this coverage. Thus, for example, while issuers would offer this coverage to plan participants and beneficiaries in plans established or maintained by eligible organizations, issuers would not be required to make this coverage available to all other individuals in a state. These proposed amendments are reflected in proposed 45 CFR 148.220(b).

Notwithstanding this proposed excepted benefits status, the Departments believe that a core set of basic consumer protection requirements should apply to individual health insurance policies providing contraceptive-only coverage. This core set of consumer protection requirements would be drawn from the broader set of requirements applicable to individual health insurance coverage under the PHS Act. This core set would include the requirements regarding guaranteed renewability of coverage (section 2703 of the PHS Act), the prohibition against lifetime and annual dollar limits on benefits (section 2711 of the PHS Act), the prohibition against rescissions of coverage (section 2712 of the PHS Act), and internal appeals and external review rights (section 2719 of the PHS Act). Accordingly, pursuant to the authority in section 2792 of the PHS Act to promulgate rules that are ''necessary or appropriate'' to carry out section 2713 of the PHS Act (and companion provisions in ERISA and the Code), the proposed rules would require compliance with these provisions of federal law as a condition of excepted benefits status. The Departments welcome comments on which requirements of the PHS Act, ERISA, and the Code should or should not apply to individual health insurance policies that provide contraceptive-only coverage. We also seek comments on how to simplify the establishment of these products and how best to ensure their availability in all states, including alternatives to excepted benefits in any state without any such product.

D. No Effect on Other Law

The religious employer exemption and accommodations in these proposed rules are intended to have meaning solely with respect to the contraceptive coverage requirement under section 2713 of the PHS Act and the companion provisions of ERISA and the Code. Whether an employer or organization (including an institution of higher education) is designated as ''religious'' for these purposes is not intended as a judgment about the mission, sincerity, or commitment of the employer or organization (including an institution of higher education), or intended to differentiate among the religious merits, commitment, mission, or public or private standing of religious entities. The use of such designation is limited solely to defining the class of employers or organizations (including institutions of higher education) that would qualify for the religious employer exemption and accommodations under these proposed rules. The definition of religious employer or eligible organization in these proposed rules is not being proposed to apply with respect to, or relied upon for the interpretation of, any other provision of the PHS Act, ERISA, the Code, or any other provision of federal law, nor is it intended to set a precedent for any other purpose. For example, nothing in these proposed rules should be construed as affecting the interpretation of federal or state civil rights statutes, such as Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972.

Furthermore, nothing in these proposed rules would preclude employers or others from expressing their opposition, if any, to the use of contraceptives; require anyone to use contraceptives; or require health care providers to prescribe contraceptives if doing so is against their religious beliefs.

Finally, the provisions of these proposed rules would not prevent states from enacting stronger consumer protections than these minimum standards. Federal health insurance regulation generally establishes a federal floor to ensure that individuals in every state have certain basic protections. State health insurance laws requiring coverage for contraceptive services that provide more access to contraceptive coverage than the federal standards would therefore continue under the proposed rules. The Departments solicit comment on the interaction between state law and these proposed rules.

IV. Economic Impact and Paperwork Burden

A. Executive Orders 12866 and 13563—Department of Health and Human Services and Department of Labor

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

A regulatory impact analysis must be prepared for major rules with economically significant effects ($100 million or more in any one year), and an ''economically significant'' regulatory action is subject to review by the Office of Management and Budget (OMB). The Departments have concluded that these proposed rules are not likely to have economic impacts of $100 million or more in any one year, and therefore do not meet the definition of ''economically significant'' under Executive Order 12866.

1. Need for Regulatory Action

As stated earlier in this preamble, the Departments previously issued amended interim final rules authorizing an exemption for group health plans established or maintained by religious employers (and any group health insurance coverage provided in connection with such plans) from certain coverage requirements under section 2713 of the PHS Act (76 FR 46621, August 3, 2011). The amended interim final rules were finalized on February 15, 2012 (77 FR 8725). The Departments are proposing in these proposed rules to amend the definition of religious employer in the HHS rule at 45 CFR 147.130(a)(1)(iv)(B) (incorporated by reference in the rules of the Departments of Labor and the Treasury) by eliminating the first three prongs of the definition of religious employer that was established in the 2012 final rules and clarifying the fourth prong. Under this proposal, an employer that is an organization that is organized and operates as a nonprofit entity and

is referred to in section 6033(a)(3)(A)(i) or (iii) of the Code would be considered a religious employer and its group health plan would qualify for the exemption from the requirement to cover contraceptive services. In addition, the proposed rules would establish accommodations for health coverage established or maintained or arranged by eligible organizations, which have religious objections to contraceptive coverage, while providing women contraceptive coverage without cost sharing.

2. Anticipated Effects

The Departments expect that these proposed rules would not result in any additional significant burden on or costs to the affected entities.

B. Special Analyses—Department of the Treasury

For purposes of the Department of the Treasury, it has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this proposed rule. It is hereby certified that the collections of information contained in this notice of proposed rulemaking would not have a significant impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

The proposed rules would require each organization seeking accommodation under the proposed rules to self-certify that it meets the definition of eligible organization in the proposed rules. Each organization must self-certify that: (1) On account of religious objections, it opposes providing coverage for some or all of the contraceptive items or services that it would otherwise be required to provide; (2) it is organized and operates as a nonprofit entity; and (3) it holds itself out as a religious organization. The self-certification must be executed by an authorized representative of the organization. The organization must maintain the self-certification in its records for each plan year to which the accommodation is to apply and make it available for examination upon request. The proposed rules would also require each eligible organization that establishes or maintains an insured group health plan to provide a copy of its self-certification to the group health insurance issuer. If the group health plan of the eligible organization is self-insured, the proposed rules would direct the eligible organization to provide a copy of its self-certification to the third party administrator.

The Departments intend to specify in guidance the form to be used for the self-certification, similar to the form previously prescribed in guidance for the temporary enforcement safe harbor. The Departments are unable to estimate the number of eligible organizations that would seek an accommodation. The Departments seek comment on the likely number of eligible organizations seeking an accommodation. Of the eligible organizations, some would likely be small entities. It is estimated that each eligible organization would need only approximately 50 minutes of labor (30 minutes of clerical labor at a cost of $30.64 per hour, 10 minutes for a manager at a cost of $55.22 per hour, 5 minutes for legal counsel at a cost of $83.10 per hour, and 5 minutes for a senior executive at a cost of $112.43 per hour) each year to prepare and provide the information in the self-certification. This would not be a significant economic impact. For these reasons, this information collection requirement would not have a significant impact on a substantial number of small entities.

The proposed rules also would require health insurance issuers providing separate contraceptive coverage to provide written notice to plan participants and beneficiaries regarding the availability of the contraceptive coverage. The notice would be provided separate from but contemporaneous with (to the extent possible) any application materials distributed in connection with enrollment (or re-enrollment) in group coverage established, maintained, or arranged by the eligible organization in any plan year to which the accommodation is to apply. The proposed rules contain model language for issuers to use to satisfy the notice requirement. There are 446 issuers in the individual and group markets. It is believed that very few, if any, of them are small entities. Moreover, the cost for preparation and distribution of the notice would not be significant. It is estimated that each issuer would need approximately 1 hour of clerical labor (at $31.64 per hour) and 15 minutes of management review (at $55.22 per hour) to prepare the notices for a total cost of approximately $44. It is estimated that each notice would require $0.46 in postage and $0.05 in materials cost (paper and ink) and the total postage and materials cost for each notice sent via mail would be $0.51. For these reasons, these information collection requirements would not have a significant impact on a substantial number of small entities.

HHS is soliciting public comment on each of these issues for purposes of the following section as well.

Pursuant to section 7805(f) of the Code, this proposed rule has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

C. Paperwork Reduction Act—Department of Health and Human Services

Under the Paperwork Reduction Act of 1995, HHS is required to provide 60-day notice in the **Federal Register** and solicit public comment before an information collection requirement (ICR) is submitted to the Office of Management and Budget (OMB) for review and approval. These proposed rules contain proposed ICRs that are subject to review by OMB. A description of these provisions is given in the following paragraphs with an estimate of the annual burden. In order to fairly evaluate whether an ICR should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that HHS solicit public comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of HHS.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

HHS is soliciting public comment on each of these issues for the following sections of these proposed rules that contain proposed ICRs. Average labor costs (including fringe benefits) used to estimate the costs are calculated using data available from the Bureau of Labor Statistics.

1. Self-Certification (§§ 147.131(b)(4), 147.131(c)(1), 147.131(c)(2))

Each organization seeking accommodation under the proposed rules would be required to self-certify that it meets the definition of an eligible organization. The self-certification would be executed by an authorized representative of the organization and would also specify the contraceptive services for which the organization will not establish, maintain, administer, or fund coverage. The self-certification would not be submitted to any of the Departments. The form that would be

used by organizations for their self-certification would be specified. This form is available for inspection at *http://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.* The organization would maintain the self-certification in its records for each plan year to which the accommodation is to apply. The eligible organization would need to provide a copy of its self-certification to a health insurance issuer (for insured group health plans or student health insurance coverage) or to a third party administrator (for self-insured group health plans).

HHS does not have an estimate for how many organizations would seek an accommodation. HHS seeks comment on the likely number of organizations seeking an accommodation or the number of participants and beneficiaries in the plans of such organizations. Therefore, the burden for only one eligible organization, as opposed to all eligible organizations in total, is estimated. It is assumed that, for each eligible organization, clerical staff would gather and enter the necessary information, send the self-certification electronically to the issuer or third party administrator, and retain a copy for record-keeping, a manager and legal counsel would review it, and a senior executive would execute it. HHS estimates that an organization would need approximately 50 minutes (30 minutes of clerical labor at a cost of $30.64 per hour, 10 minutes for a manager at a cost of $55.22 per hour, 5 minutes for legal counsel at a cost of $83.10 per hour, and 5 minutes for a senior executive at a cost of $112.43 per hour) to execute the self-certification. Therefore, the total annual burden for preparing and providing the information in the self-certification would be approximately $41 for each eligible organization.

With respect to self-insured plans of eligible organizations, the third party administrator would provide a health insurance issuer a copy of the self-certification of the eligible organization. The third party administrator would be able to provide a copy of the self-certification to the issuer electronically at minimal cost.

2. Notice of Availability of Contraceptive Coverage (§ 147.131(d))

The proposed rules would direct a health insurance issuer providing separate individual contraceptive coverage at no additional cost to participants and beneficiaries in insured plans of eligible organizations (or to student enrollees and covered dependents in student health insurance coverage arranged by eligible organizations) and to participants and beneficiaries in self-insured plans of eligible organizations whose coverage is automatically arranged for them by a third party administrator to provide a written notice to such plan participants and beneficiaries (or to such student enrollees and covered dependents) regarding the separate contraceptive coverage. The notice would be separate from but contemporaneous with (to the extent possible) any application materials distributed in connection with enrollment (or re-enrollment) in group coverage of the eligible organization in any plan year to which the accommodation is to apply and would be provided annually. To satisfy the proposed notice requirement, issuers could use the model language set forth in the proposed rules or substantially similar language.

It is unknown how many issuers provide health insurance coverage in connection with insured plans of eligible organizations or how many third party administrators provide services to self-insured plans of eligible organizations or how many issuers would provide separate individual contraceptive coverage to plan participants and beneficiaries of self-insured plans of eligible organizations. Therefore, the burden for only one issuer, as opposed to all issuers in total, is estimated. It is estimated that each issuer would need approximately 1 hour of clerical labor (at $31.64 per hour) and 15 minutes of management review (at $55.22 per hour) to prepare the notices for a total cost of approximately $44. It is estimated that each notice would require $0.46 in postage and $0.05 in materials cost (paper and ink) and the total postage and materials cost for each notice sent via mail would be $0.51.

3. FFE User Fee Adjustments (§ 156.50(d))

In order for a QHP issuer to be eligible for the proposed FFE user fee adjustment, the proposed rules would provide that the issuer providing the contraceptive coverage would provide certain information and documentation (jointly with the affiliated QHP issuer for which the reduction in the FFE user fee is being sought, if the issuers are not the same) to HHS. First, monthly data on the number of individuals for whom the contraceptive coverage is being provided would be required, along with an attestation that a copy of the self-certification of the eligible organization was provided by the third party administrator that arranged for the coverage for the plan participants and beneficiaries. Second, the issuer would provide an attestation that coverage for all recommended contraceptive services identified in the self-certification of the eligible organization is being provided, and being provided without cost sharing, premiums, fee, or other costs to the plan participants or beneficiaries. The issuer also would attest to HHS that it passed the portion of its adjustment attributable to reasonable charges by third party administrators on to those parties. Third, the issuer(s) would identify the QHP(s) being offered through an FFE with respect to which the FFE user fee reduction is to be applied. In addition, where the issuer providing the contraceptive coverage is not the QHP issuer for which the reduction in the FFE user fee is being sought, an attestation that the issuers are from the same issuer group would be submitted. Finally, the issuer(s) would submit to HHS an estimate of the cost of the contraceptive coverage, along with data or documentation supporting that estimate. HHS approval of the cost estimate would be required before a QHP issuer could receive an FFE user fee adjustment.

Although the number of QHP issuers that would seek an FFE user fee adjustment is unknown at this point, HHS anticipates that a small number of issuer groups would provide such contraceptive coverage nationwide, and that, for purposes of efficiency, those issuer groups would consolidate their applications for FFE user fee adjustments with fewer than 9 issuers of QHPs on FFEs. Collections from fewer than 10 persons are exempt from the Paperwork Reduction Act under 44 U.S.C. 3502(3)(A)(i). Therefore, HHS does not plan to seek OMB approval for this proposed ICR. However, in the event that, by the time of the issuance of the final rules, HHS believes that the number of QHP issuers that would seek an FFE user fee adjustment would be greater than 9, HHS would seek OMB approval for this proposed ICR.

To obtain copies of the supporting statement and any related forms for the proposed ICRs referenced above, access CMS's web site at *http://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html* or email your request, including your address, phone number, OMB number, and CMS document identifier, to *paperwork@cms.hhs.gov,* or call the Reports Clearance Office at (410) 786–1326.

If you comment on these proposed ICRs, please do either of the following:

1. Submit your comments electronically as specified in the

ADDRESSES section of these proposed rules; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, 9968–P, FAX: (202) 395–5806, or email: *OIRA_submission@omb.eop.gov.*

D. Paperwork Reduction Act—Department of Labor and Department of the Treasury

As noted above, each organization seeking accommodation under the proposed rules would be required to self-certify that it meets the definition of an eligible organization. This proposed requirement, which is the same in all three sets of proposed rules, is set out in proposed 26 CFR 54.9815–2713A(b)(4) and proposed 29 CFR 2590.715–2713A(b)(4). The Departments are soliciting public comments for 60 days concerning this record-keeping requirement. The Departments will submit a copy of these proposed rules to OMB in accordance with 44 U.S.C. 3507(d) for review of the proposed ICRs. The Departments and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, by permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Attention: Desk Officer for the Employee Benefits Security Administration either by Fax to (202) 395–5806 or by email to *oira_submission@omb.eop.gov.* A copy of the proposed ICRs may be obtained by contacting the PRA addressee: G. Christopher Cosby, Office of Policy and Research, Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210; telephone: (202) 693–8410; Fax: (202) 219–4745 (please note that these numbers are not toll-free numbers); email: *ebsa.opr@dol.gov.* Proposed ICRs submitted to OMB also are available at *www.reginfo.gov* (*http://www.reginfo.gov/public/do/PRAMain*).

Consistent with the HHS analysis presented above, the Departments do not have an estimate for how many organizations would seek an accommodation. The Departments seek comment on the likely number of organizations seeking an accommodation and the number of participants and beneficiaries in the plans of such organizations. The Departments rely on the same estimates noted above: 50 minutes per organization to execute the self-certification (*i.e.,* approximately $41 for each eligible organization).

With respect to self-insured plans of eligible organizations, the third party administrator would provide a health insurance issuer a copy of the self-certification of the eligible organization. The third party administrator would be able to provide a copy of the self-certification to the issuer electronically at minimal cost.

The Departments note that persons are not required to respond to, and generally are not subject to any penalty for failing to comply with, an ICR unless the ICR has a valid OMB control number. The paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agencies: Employee Benefits Security Administration, Department of Labor; Internal Revenue Service, Department of the Treasury.

Title: Self-Certification; Preventive Services Coverage.

OMB Number: XXXX–XXXX; XXXX–XXXX.

Affected Public: Business or other for-profit; not-for-profit institutions.

Total Respondents: Unknown.

Total Responses: Unknown.

Frequency of Response: Once.

Estimated Total Annual Burden Hours: 50 minutes per respondent.

Estimated Total Annual Burden Cost: Unknown.

V. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), as well as Executive Order 12875, these proposed rules do not include any proposed federal mandate that may result in expenditures by state, local, or tribal governments, nor does it include any proposed federal mandates that may impose an annual burden of $100 million, adjusted for inflation, or more on the private sector.[16]

[16] In early 2013, that threshold level is approximately $139 million.

VI. Federalism—Department of Health and Human Services and Department of Labor

Executive Order 13132 outlines fundamental principles of federalism, and requires the adherence to specific criteria by federal agencies in the process of their formulation and implementation of policies that have ''substantial direct effects'' on states, the relationship between the federal government and states, or the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating rules that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the rules.

In the Departments' view, these proposed rules have federalism implications, but the federal implications are substantially mitigated because, with respect to health insurance issuers, 15 states have enacted specific laws, rules, or bulletins that meet or exceed the federal standards requiring coverage of specified preventive services without cost sharing. The remaining states which provide oversight for these federal law requirements are doing so using their general authority to enforce these federal standards. Therefore, the proposed rules are not likely to require substantial additional oversight of states by HHS.

In general, section 514 of ERISA provides that state laws are superseded to the extent that they relate to any covered employee benefit plan, and preserves state laws that regulate insurance, banking, or securities. ERISA also prohibits states from regulating a covered plan as an insurance or investment company or bank. HIPAA added a new preemption provision to ERISA (as well as to the PHS Act) narrowly preempting state requirements for group health insurance coverage. States may continue to apply state law requirements but not to the extent that such requirements prevent the application of the federal requirement that group health insurance coverage provided in connection with group health plans provide coverage for specified preventive services without cost sharing. HIPAA's Conference Report states that the conferees intended the narrowest preemption of state laws with regard to health insurance issuers (H.R. Conf. Rep. No. 104–736, 104th Cong. 2d Session 205, 1996). State insurance laws that are more stringent

than the federal requirement are unlikely to ''prevent the application of'' the preventive services coverage provision, and therefore are not preempted. Accordingly, states have significant latitude to impose requirements on health insurance issuers that are more restrictive than those in federal law.

Guidance conveying this interpretation was published in the **Federal Register** on April 8, 1997 (62 FR 16904), and December 30, 2004 (69 FR 78720), and these proposed rules would clarify and implement the statute's minimum standards and would not significantly reduce the discretion given the states by the statute.

The PHS Act provides that the states may enforce the provisions of title XXVII of the PHS Act as they pertain to issuers, but that the Secretary of HHS will enforce any provisions that a state does not have authority to enforce or that a state has failed to substantially enforce. When exercising its responsibility to enforce provisions of the PHS Act, HHS works cooperatively with the state for the purpose of addressing the state's concerns and avoiding conflicts with the exercise of state authority.[17] HHS has developed procedures to implement its enforcement responsibilities, and to afford states the maximum opportunity to enforce the PHS Act's requirements in the first instance. In compliance with Executive Order 13132's requirement that agencies examine closely any policies that may have federalism implications or limit the policymaking discretion of states, the Departments have engaged in numerous efforts to consult and work cooperatively with affected state and local officials.

In conclusion, throughout the process of developing these proposed rules, to the extent feasible within the specific preemption provisions of ERISA and the PHS Act, the Departments have attempted to balance states' interests in regulating health plans and health insurance issuers, and the rights of those individuals that Congress intended to protect in the PHS Act.

VII. Statutory Authority

The Department of the Treasury regulations are proposed to be adopted pursuant to the authority contained in sections 7805 and 9833 of the Code.

The Department of Labor regulations are proposed to be adopted pursuant to the authority contained in 29 U.S.C. 1002(16), 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

The Department of Health and Human Services regulations are proposed to be adopted pursuant to the authority contained in sections 2701 through 2763, 2791, and 2792 of the PHS Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended; and Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321–1322, 1324, 1334, 1342–1343, 1401–1402, and 1412, Public Law 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701).

List of Subjects

26 CFR Part 54

Excise taxes, Health care, Health insurance, Pensions, Reporting and recordkeeping requirements.

29 CFR Part 2590

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

45 CFR Part 147

Health care, Health insurance, Reporting and recordkeeping requirements, and State regulation of health insurance.

45 CFR Part 148

Administrative practice and procedure, Health care, Health insurance, Penalties, and Reporting and recordkeeping requirements.

45 CFR Part 156

Administrative practice and procedure, Advertising, Advisory committees, Brokers, Conflict of interest, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, American Indian/Alaska Natives, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, State and local governments, Sunshine Act, Technical assistance, Women, and Youth.

Department of the Treasury

Internal Revenue Service

Accordingly, 26 CFR part 54 is proposed to be amended as follows:

PART 54—PENSION EXCISE TAXES

■ **Paragraph 1.** The authority citation for part 54 continues to read in part as follows:

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

■ **Par. 2.** Section 54.9801–2 is amended by revising the definition of *excepted benefits* as follows:

§ 54.9801–2 Definitions.

* * * * *

Excepted benefits means the benefits described as excepted in § 54.9831(c), or 45 CFR § 148.220 (describing when individual health insurance policies constitute excepted benefits).

* * * * *

■ **Par. 3.** Section 54.9815–2713 is amended by adding paragraph (a)(1) introductory text and revising paragraph (a)(1)(iv) to read as follows:

§ 54.9815–2713 Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

* * * * *

■ **Par. 4.** Section 54.9815–2713A is added to read as follows:

§ 54.9815–2713A Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that

[17] This authority applies to insurance issued with respect to group health plans generally, including plans covering employees of church organizations. Thus, this discussion of federalism applies to all group health insurance coverage that is subject to the PHS Act, including those church plans that provide coverage through a health insurance issuer (but not to church plans that do not provide coverage through a health insurance issuer).

satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services, for each plan year to which the accommodation is to apply, executed by a person authorized to make the certification on behalf of the organization, indicating that the organization satisfies the criteria in paragraphs (a)(1) through (3) of this section, and, specifying those contraceptive services for which the organization will not establish, maintain, administer, or fund coverage, and makes such certification available for examination upon request.

(b) *Contraceptive coverage—self-insured group health plan coverage.* [Reserved.]

(c) *Contraceptive coverage—insured group health plan coverage*—(1) A group health plan established or maintained by an eligible organization and that provides benefits through one or more issuers complies with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or plan administrator furnishes each issuer that would otherwise provide coverage for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section.

(2) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a plan for which the issuer would otherwise provide coverage for any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) must automatically provide health insurance coverage for any contraceptive services required to be covered by § 54.9815–2713(a)(1)(iv) and identified in the self-certification, through a separate health insurance policy that is excepted under 45 CFR 148.220(b)(7), for each plan participant and beneficiary. The issuer providing the individual market excepted benefits policy may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to coverage of those services, or impose any premium, fee, or other charge, or portion thereof, directly or indirectly, on the eligible organization, its group health plan, or plan participants or beneficiaries with respect to coverage of those services.

(d) *Notice of availability of contraceptive coverage.* An issuer providing contraceptive coverage arranged pursuant to paragraph (b) or (c) of this section must provide to plan participants and beneficiaries written notice of the availability of the contraceptive coverage, separate from but contemporaneous with (to the extent possible) application materials distributed in connection with enrollment (or re-enrollment) in group coverage of the eligible organization for any plan year to which this paragraph applies. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph: ''The organization that establishes and maintains, or arranges, your health coverage has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your health coverage will not cover the following contraceptive services: [contraceptive services specified in self-certification]. Instead, these contraceptive services will be covered through a separate individual health insurance policy, which is not administered or funded by, or connected in any way to, your health coverage. You and any covered dependents will be enrolled in this separate individual health insurance policy at no additional cost to you. If you have any questions about this notice, contact [contact information for health insurance issuer].''

Department of Labor

Employee Benefits Security Administration

For the reasons stated in the preamble, the Department of Labor proposes to amend 29 CFR part 2590 as follows:

PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS

■ 1. The authority citation for part 2590 continues to read as follows:

Authority: 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185c, 1185d, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Public Law 104–191, 110 Stat. 1936; sec. 401(b), Public Law 105–200, 112 Stat. 645 (42 U.S.C. 651 note); sec. 512(d), Public Law 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Public Law 111–148, 124 Stat. 119, as amended by Public Law 111–152, 124 Stat. 1029; Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

■ 2. Section 2590.701–2 is amended by revising the definition of *Excepted benefits* as follows:

§ 2590.701–2 Definitions.

* * * * *

Excepted benefits means the benefits described as excepted in § 2590.732(c), or 45 CFR § 148.220 (describing when individual health insurance policies constitute excepted benefits).

* * * * *

■ 3. Section 2590.715–2713 is amended by revising paragraphs (a)(1) introductory text and (a)(1)(iv) to read as follows:

§ 2590.715–2713 Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

* * * * *

■ 4. A new § 2590.715–2713A is added to read as follows:

§ 2590.715–2713A Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services, for each plan year to which the accommodation is to apply, executed by a person authorized to make the certification on behalf of the organization, indicating that the organization satisfies the criteria in paragraphs (a)(1) through (3) of this section, and, specifying those contraceptive services for which the organization will not establish, maintain, administer, or fund coverage, and makes such certification available for examination upon request.

(b) *Contraceptive coverage—self-insured group health plan coverage.* [Reserved.]

(c) *Contraceptive coverage—insured group health plan coverage.* (1) A group health plan established or maintained by an eligible organization and that provides benefits through one or more issuers complies with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or plan administrator furnishes each issuer that would otherwise provide coverage for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section.

(2) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a plan for which the issuer would otherwise provide coverage for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) must automatically provide health insurance coverage for any contraceptive services required to be covered by § 2590.715–2713(a)(1)(iv) and identified in the self-certification, through a separate health insurance policy that is excepted under 45 CFR 148.220(b)(7), for each plan participant and beneficiary. The issuer providing the individual market excepted benefits policy may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to coverage of those services, or impose any premium, fee, or other charge, or portion thereof, directly or indirectly, on the eligible organization, its group health plan, or plan participants or beneficiaries with respect to coverage of those services.

(d) *Notice of availability of contraceptive coverage.* An issuer providing contraceptive coverage arranged pursuant to paragraph (b) or (c) of this section must provide to plan participants and beneficiaries written notice of the availability of the contraceptive coverage, separate from but contemporaneous with (to the extent possible) application materials distributed in connection with enrollment (or re-enrollment) in group coverage of the eligible organization for any plan year to which this paragraph applies. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph: ''The organization that establishes and maintains, or arranges, your health coverage has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your health coverage will not cover the following contraceptive services: [contraceptive services specified in self-certification]. Instead, these contraceptive services will be covered through a separate individual health insurance policy, which is not administered or funded by, or connected in any way to, your health coverage. You and any covered dependents will be enrolled in this separate individual health insurance policy at no additional cost to you. If you have any questions about this notice, contact [contact information for health insurance issuer].''

Department of Health and Human Services

For the reasons stated in the preamble, the Department of Health and Human Services proposes to amend 45 CFR Subtitle A parts 147, 148, and 156 as follows:

PART 147—HEALTH INSURANCE REFORM REQUIREMENTS FOR THE GROUP AND INDIVIDUAL HEALTH INSURANCE MARKETS

■ 1. The authority citation for part 147 continues to read as follows:

Authority: 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg–63, 300gg–91, and 300gg–92), as amended.

■ 2. Section 147.130 is amended by revising paragraphs (a)(1) introductory text and (a)(1)(iv) to read as follows:

§ 147.130 Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

* * * * *

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

* * * * *

■ 2. A new § 147.131 is added to read as follows:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a ''religious employer'' is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended.

(b) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization maintains in its records a self-certification, made in the manner and form specified by the Secretary of Health and Human Services, for each plan year to which the accommodation is to apply, executed by a person authorized to make the certification on behalf of the organization, indicating that the organization satisfies the criteria in paragraphs (b)(1) through (3) of this section, and, specifying those contraceptive services for which the

organization will not establish, maintain, administer, or fund coverage, and makes such certification available for examination upon request.

(c) *Contraceptive coverage—insured group health plan coverage.* (1) A group health plan established or maintained by an eligible organization and that provides benefits through one or more issuers complies with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or plan administrator furnishes each issuer that would otherwise provide coverage for any contraceptive services required to be covered under § 147.130(a)(1)(iv) with a copy of the self-certification described in paragraph (b)(4) of this section.

(2) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a plan for which the issuer would otherwise provide coverage for any contraceptive services required to be covered under § 147.130(a)(1)(iv) must automatically provide health insurance coverage for any contraceptive services required to be covered by § 147.130(a)(1)(iv) and identified in the self-certification, through a separate health insurance policy that is excepted under § 148.220(b)(7) of this subtitle, for each plan participant and beneficiary. The issuer providing the individual market excepted benefits policy may not impose any cost sharing requirement (such as a copayment, coinsurance, or a deductible) with respect to coverage of those services, or impose any premium, fee, or other charge, or portion thereof, directly or indirectly, on the eligible organization, its group health plan, or plan participants or beneficiaries with respect to coverage of those services.

(d) *Notice of availability of contraceptive coverage.* An issuer providing contraceptive coverage arranged pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of the contraceptive coverage, separate from but contemporaneous with (to the extent possible) application materials distributed in connection with enrollment (or re-enrollment) in group coverage of the eligible organization for any plan year to which this paragraph applies. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph: ''The organization that establishes and maintains, or arranges, your health coverage has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your health coverage will not cover the following contraceptive services: [contraceptive services specified in self-certification]. Instead, these contraceptive services will be covered through a separate individual health insurance policy, which is not administered or funded by, or connected in any way to, your health coverage. You and any covered dependents will be enrolled in this separate individual health insurance policy at no additional cost to you. If you have any questions about this notice, contact [contact information for health insurance issuer].''

(e) *Application to student health insurance coverage.* The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to ''plan participants and beneficiaries'' is a reference to student enrollees and their covered dependents.

PART 148—REQUIREMENTS FOR THE INDIVIDUAL HEALTH INSURANCE MARKET

■ 3. The authority citation for part 148 continues to read as follows:

Authority: Secs. 2741 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg–41 through 300gg–63, 300gg–91, and 300gg–92).

■ 4. Section 148.220 is amended as follows:

■ a. In the introductory text of paragraph (b), the reference ''(b)(6)'' is removed and the reference ''(b)(7)'' is added in its place.

■ b. Adding paragraph (b)(7).

The addition reads as follows:

§ 148.220 Excepted benefits.

* * * * *

(b) * * *

(7) Individual health insurance coverage that provides coverage only for contraceptive services pursuant to § 147.131(c) of this subtitle, 26 CFR 54.9815–2713A(b) or (c), or 29 CFR 2590.715–2713A(b) or (c), but only if such coverage complies with the requirements in the following provisions:

(i) Section 2703 of the PHS Act (relating to guaranteed renewability of coverage).

(ii) Section 2711 of the PHS Act (relating to the prohibition on lifetime and annual dollar limits on benefits).

(iii) Section 2712 of the PHS Act (relating to the prohibition on rescissions of coverage).

(iv) Section 2719 of the PHS Act (relating to internal appeals and external review).

PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES

■ 5. The authority citation for part 156 continues to read as follows:

Authority: Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321–1322, 1324, 1334, 1342–1343, 1401–1402, and 1412, Pub. L. 111–148, 124 Stat. 119 (42 U.S.C. 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. 36B, and 31 U.S.C. 9701).

■ 6. Section 156.150 is amended by adding paragraph (d) to read as follows:

§ 156.50 Financial support.

* * * * *

(d) *Adjustment of Federally-facilitated Exchange user fee.* If a QHP issuer (or another issuer in the same issuer group) provides individual health insurance coverage consisting of coverage for any contraceptive services required to be covered under § 147.130(a)(1)(iv) of this subchapter, and identified in the self-certification referenced in § 147.131(b)(4) of this subchapter, to any plan participant or beneficiary with respect to whom the QHP issuer receives the written notice referenced in 26 CFR 54.9815–2713A(b) or 29 CFR 2590.715–2713A(b), the QHP issuer may qualify for a reduction in the user fee for a Federally-facilitated Exchange specified in paragraph (c) as described in this paragraph (d).

(1) In order for a QHP issuer to be eligible for the Federally-facilitated Exchange user fee reduction, in providing such contraceptive coverage to such individuals, the QHP issuer (or another issuer in the same issuer group) may not impose any cost-sharing requirement (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, directly or indirectly, with respect to such contraceptive coverage, and must satisfy the other conditions set forth in this section.

(2) If an issuer provides such contraceptive coverage to such individuals, and it, or another issuer in the same issuer group, is required to pay

the Federally-facilitated Exchange user fee, a reduction in that user fee may be sought for the HHS-approved estimated cost of such contraceptive coverage.

(3) In order for a QHP issuer to be eligible for the Federally-facilitated Exchange user fee reduction, the issuer of such contraceptive coverage to such individuals must (jointly with the issuer seeking the reduction in the Federally-facilitated Exchange user fee, if not the same issuers) do all of the following:

(i) Provide monthly data on the number of individuals to whom the contraceptive coverage is being provided, and provide an attestation by the issuer providing the contraceptive coverage that the issuer received a copy of the written notice referenced in 26 CFR 54.9815–2713A(b) or 29 CFR 2590.715–2713A(b) with respect to each plan participant or beneficiary.

(ii) Provide an attestation by the issuer providing the contraceptive coverage that the issuer provided contraceptive coverage in accordance with paragraph (d) of this section and that the issuer passed the portion of the reduction in the Federally-facilitated Exchange user fee attributable to reasonable charges by third party administrators on to the third party administrators.

(iii) Identify the QHP(s) being offered through a Federally-facilitated Exchange with respect to which the user fee reduction is to be applied, and, if the issuer providing the contraceptive coverage is not the issuer seeking the user fee reduction, provide an attestation by the issuer providing the contraceptive coverage that both the issuer providing the contraceptive coverage and the issuer seeking the user fee reduction belong to the same issuer group.

(iv) Submit an estimate of the cost of the contraceptive coverage to HHS for approval, in the manner and timeframe specified by HHS, concurrent with documentation or data supporting that estimate.

(4) If the information specified under paragraphs (d)(3)(i) through (iii) of this section is provided and the estimate specified under paragraph (d)(3)(iv) of this section is submitted and approved by HHS, the issuer of the identified QHP(s) will be provided a reduction in its obligation to pay the Federally-facilitated Exchange user fee specified in paragraph (c) in an amount equal in value to the approved estimated cost of the contraceptive coverage, as long as an exception from OMB Circular No. A–25 is in effect. If the amount of the reduction is greater than the amount of the obligation to pay the Federally-facilitated Exchange user fee in a particular month, the issuer of the identified QHP(s) will be provided a credit in succeeding months in the amount of the excess. An issuer that is eligible for a user fee reduction in accordance with this paragraph (d) prior to January 1, 2014, will be provided a credit in the amount of the user fee reduction beginning January 2014.

(5) An issuer providing contraceptive coverage for which a reduction in the Federally-facilitated Exchange user fee has been provided under paragraph (d)(4) of this section (whether the reduction was provided to the issuer or another issuer in the same issuer group) must maintain for 10 years and make available to HHS upon request all of the following:

(i) Documentation demonstrating that the contraceptive coverage was provided to plan participants or beneficiaries with respect to whom the issuer received a copy of the written notice referenced in 26 CFR 54.9815–2713A(b) or 29 CFR 2590.715–2713A(b).

(ii) Documentation demonstrating that the contraceptive coverage was provided in accordance with paragraph (d) of this section.

(iii) Documentation or data supporting the estimate of the cost of the contraceptive coverage.

(iv) Documentation or data on the actual cost of providing the contraceptive coverage.

Signed this 30th day of January 2013.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement, Internal Revenue Service.

Signed this 30th day of January 2013.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, Department of Labor.

Dated: January 29, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: January 29, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–02420 Filed 2–1–13; 11:15 am]

BILLING CODE 4830–01; 4510–029; 4120–01; 6325–64–P

SAINT LAWRENCE SEAWAY DEVELOPMENT CORPORATION

33 CFR Part 401

[Docket No. SLSDC–2013–0001; 2135–AA31]

Seaway Regulations and Rules: Periodic Update, Various Categories

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Regulations and Rules (Practices and Procedures in Canada) in their respective jurisdictions. Under agreement with the SLSMC, the SLSDC is amending the joint regulations by updating the Seaway Regulations and Rules in various categories. The proposed changes will update the following sections of the Regulations and Rules: Condition of Vessels; Seaway Navigation; Dangerous Cargo; and, Information and Reports. These proposed amendments are necessary to take account of updated procedures and will enhance the safety of transits through the Seaway. Several of the proposed amendments are merely editorial or for clarification of existing requirements.

DATES: Any party wishing to present views on the proposed amendment may file comments with the Corporation on or before March 8, 2013.

ADDRESSES: You may submit comments identified by Docket Number SLSDC 2013–0001 by any of the following methods:

- *Web Site: http://www.Regulations.gov* . Follow the online instructions for submitting comments/submissions.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–001.
- *Hand Delivery:* Documents may be submitted by hand delivery or courier to West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note

that all comments received will be posted without change at *http://www.Regulations.gov* including any personal information provided. Please see the Privacy Act heading under *Regulatory Notices.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.Regulations.gov;* or in person at the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–001, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Carrie Mann Lavigne, Chief Counsel, Saint Lawrence Seaway Development Corporation, 180 Andrews Street, Massena, New York 13662; 315/764–3200.

SUPPLEMENTARY INFORMATION: The Saint Lawrence Seaway Development Corporation (SLSDC) and the St. Lawrence Seaway Management Corporation (SLSMC) of Canada, under international agreement, jointly publish and presently administer the St. Lawrence Seaway Regulations and Rules (Practices and Procedures in Canada) in their respective jurisdictions. Under agreement with the SLSMC, the SLSDC is proposing to amend the joint regulations by updating the Regulations and Rules in various categories. The proposed changes will update the following sections of the Regulations and Rules: Condition of Vessels; Seaway Navigation; Dangerous Cargo; and, Information and Reports. These updates are necessary to take account of updated procedures which will enhance the safety of transits through the Seaway. Many of these proposed changes are to clarify existing requirements in the regulations. Where new requirements or regulations are being proposed, an explanation for such a change is provided below.

Regulatory Notices: 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) or you may visit *http://www.Regulations.gov.*

The SLSDC is proposing to amend two sections of the Condition of Vessels portion of the joint Seaway regulations. Under section 401.10, ''Mooring lines'', the SLSDC is proposing to provide flexibility to vessels by allowing the use of soft lines with a diameter not greater than 64 mm. For safety purposes in section 401.14, ''Anchor marking buoys'', the SLSDC is amending the rules to require vessels to deploy an anchor marking buoy when dropping anchor in the Seaway.

In the Seaway Navigation section the Seaway Corporations propose amending their joint rules in section 401.49, ''Dropping anchor or tying to a canal'', to require every anchor to be suitably rigged for immediate release, holding, and efficient retrieval. Currently, some tug and barge combinations are not equipped with a windlass or other means to retrieve an anchor and therefore must retrieve the anchor using 'block and tackle'' arrangements, which are not suitable for anchor retrieval.

In the Dangerous Cargo section, the rules would be amended to require that before any hot work, which is defined as any work that uses flame or than can produce a source of ignition, cutting or welding, can be carried out on any vessels at SLSMC approach walls or wharfs, a written request must be sent to the SLSMC. In addition, the rules propose special requirements for tankers performing hot work. Such vessels must be gas free or have its tanks inerted in order to obtain clearance from the SLSMC Traffic Control Center.

In the Information and Reports section, a change to section 401.79, ''Advance notice of arrival, vessels requiring inspection'' is being proposed. The amendments would require tug and barge combinations not on the ''Seaway Approved Tow'' list to be inspected prior to every transit of the Seaway unless they are provided with a valid Inspection Report for a round trip transit.

The other changes to the joint regulations are merely editorial or to clarify existing requirements.

Regulatory Evaluation

This proposed regulation involves a foreign affairs function of the United States and therefore Executive Order 12866 does not apply and evaluation under the Department of Transportation's Regulatory Policies and Procedures is not required.

Regulatory Flexibility Act Determination

I certify that this proposed regulation will not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Regulations and Rules primarily relate to commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne mostly by foreign vessels.

Environmental Impact

This proposed regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, et seq.) because it is not a major federal action significantly affecting the quality of the human environment.

Federalism

The Corporation has analyzed this proposed rule under the principles and criteria in Executive Order 13132, dated August 4, 1999, and has determined that this proposal does not have sufficient federalism implications to warrant a Federalism Assessment.

Unfunded Mandates

The Corporation has analyzed this proposed rule under Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 109 Stat. 48) and determined that it does not impose unfunded mandates on State, local, and tribal governments and the private sector requiring a written statement of economic and regulatory alternatives.

Paperwork Reduction Act

This proposed regulation has been analyzed under the Paperwork Reduction Act of 1995 and does not contain new or modified information collection requirements subject to the Office of Management and Budget review.

List of Subjects in 33 CFR Part 401

Hazardous materials transportation, Navigation (water), Penalties, Radio, Reporting and recordkeeping requirements, Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation proposes to amend 33 CFR part 401, Regulations and Rules, as follows:

PART 401—SEAWAY REGULATIONS AND RULES

Subpart A—Regulations

■ 1. The authority citation for subpart A of part 401 continues to read as follows:

Authority: 33 U.S.C. 983(a) and 984(a)(4), as amended; 49 CFR 1.52, unless otherwise noted.

■ 2. In § 401.10, revise paragraph (a)(2); and add a new paragraph (e) to read as follows:

§ 401.10 Mooring lines.

(a) * * *

(2) Have a diameter not greater than 28 mm for wire line and not greater than 64 mm for approved synthetic lines;

* * * * *

(e) Hand held synthetic lines if permitted by the Manager or Corporation shall meet the criteria in paragraph (a) and shall have a minimum length of not less than 65 meters.

* * * * *

■ 3. Revise § 401.14 to read as follows:

§ 401.14 Anchor marking buoys.

(a) A highly visible anchor marking buoy of a type approved by the Manager and the Corporation, fitted with 22 m of suitable line, shall be secured directly to each anchor so that the buoy will mark the location of the anchor when the anchor is dropped.

(b) Every vessel shall deploy the anchor marking buoy when dropping an anchor in Seaway waters.

■ 4. In § 401.28, revise paragraph (d) to read as follows:

§ 401.28 Speed limits.

* * * * *

(d) Notwithstanding the above speed limits, every vessel approaching a free standing lift bridge shall proceed at a speed so that it will not pass the Limit of Approach sign should the raising of the bridge be delayed.

5. Revise § 401.29 to read as follows:

§ 401.29. Maximum draft.

(a) Notwithstanding any provision herein, the loading of cargo, draft and speed of a vessel in transit shall be controlled by the master, who shall take into account the vessel's individual characteristics and its tendency to list or squat, so as to avoid striking bottom.[1]

(b) The draft of a vessel shall not, in any case, exceed 79.2 dm or the maximum permissible draft designated in a Seaway Notice by the Manager and the Corporation for the part of the Seaway in which a vessel is passing.

(c) Any vessel equipped with an operational Draft Information System (DIS) verified by a member of the International Association of Classification Societies (IACS) as compliant with the Implementation Specifications found at *http://www.greatlakes-seaway.com* and having onboard:

(1) An operational AIS with accuracy=1 (DGPS); and

(2) Up-to-date electronic navigational charts; and

(3) Up-to-date charts containing high-resolution bathymetric data, and

(4) The DIS Display shall be located as close to the primary conning position and be visible and legible; and

(5) A pilot plug, if using a portable DIS; will be permitted, when using the DIS, subject to paragraph (a) of this section, to increase their draft by no more than 7 cm above the maximum permissible draft prescribed under paragraph (b) of this section in effect at the time.

(d) Verification document of the DIS must be kept on board the vessel at all times and made available for inspection.

(e) A company letter attesting to officer training on use of the DIS must be kept on board and made available for inspection.

(f) Any vessel intending to use the DIS must notify the Manager or the Corporation in writing at least 24-hours prior to commencement of its initial transit in the System with the DIS.

(g) Any vessel intending to use the DIS to transit at a draft greater than the maximum permissible draft prescribed under paragraph (b) of this section in effect at the time, for subsequent transits must fax a completed confirmation checklist found at *www.greatlakes-seaway.com* to the Manager or the Corporation prior to its transit.

(h) If for any reason the DIS or AIS becomes inoperable, malfunctions, or is not used while the vessel is transiting at a draft greater than the maximum permissible draft prescribed under paragraph (b) of this section in effect at the time, the vessel must notify the Manager or the Corporation immediately.

■ 6. Revise § 401.49 to read as follows:

§ 401.49. Dropping anchor or tying to canal bank.

Except in an emergency, no vessel shall drop anchor in any canal or tie-up to any canal bank unless authorized to do so by the traffic controller. Every anchor shall be suitably rigged for immediate release, holding and efficient retrieval.

■ 7. Revise § 401.73 to read as follows:

§ 401.73 Cleaning tanks—hazardous cargo vessels.

(a) Cleaning and gas freeing of tanks shall not take place:

(1) In a canal or a lock;

(2) In an area that is not clear of other vessels or structures; and

(3) Before gas freeing and tank cleaning has been reported to the nearest Seaway station.

(b) Hot work permission. Before any hot work, defined as any work that uses flame or that can produce a source of ignition, cutting or welding, is carried out by any vessel on any designated St. Lawrence Seaway Management Corporation (SLSMC) approach walls or wharfs, a written request must be sent to the SLSMC, preferably 24 hours prior to the vessel's arrival on SLSMC approach walls or wharfs. The hot work shall not commence until approval is obtained from an SLSMC Traffic Control Center.

(c) Special Requirements for Tankers Performing Hot Work. Prior to arriving at any SLSMC designated approach wall or wharf, a tanker must be gas free or have tanks inerted. The gas-free certificate must be sent to the SLSMC Traffic Control Center in order to obtain clearance for the vessel to commence hot work.

■ 10. In § 401.79 revise paragraph (b)(4) to read as follows:

§ 401.79 Advance notice of arrival, vessels requiring inspection.

* * * * *

(b) * * *

(4) Tug/barge combinations not on the ''Seaway Approved Tow'' list are subject to Seaway inspection prior to every transit of the Seaway unless provided with a valid Inspection Report for a round trip transit.

Issued at Washington, DC, on January 31, 2013.

Saint Lawrence Seaway Development Corporation.

Craig H. Middlebrook,

Deputy Administrator.

[FR Doc. 2013–02601 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–61–P

[1] The main channels between the Port of Montreal and Lake Erie have a controlling depth of 8.23m.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0954 and EPA–R05–OAR–2010–0037; FRL–9772–8]

Approval and Promulgation of Air Quality Implementation Plans; States of Michigan and Minnesota; Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; supplemental.

SUMMARY: In this supplemental notice of proposed rulemaking, EPA is soliciting additional comments on its proposal to disapprove in part the Michigan and Minnesota regional haze State Implementation Plans (SIPs) for failure to mandate best available retrofit technology (BART) for taconite facilities within these states. This proposal supplements an August 15,2012, action that proposed to disapprove these elements of these SIPs and to establish

Federal emission limits representing BART.

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Submit your comments, identified by Docket IDs No. EPA–R05–OAR–2010–0954 and EPA–R05–OAR–2010–0037, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: aburano.douglas@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Douglas Aburano, Chief, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket IDs No. EPA–R05–OAR–2010–0954 and EPA–R05–OAR–2010–0037. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone John Summerhays at (312) 886–6067 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: John Summerhays, Environmental Scientist, Attainment Planning and Maintenance Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6067, *summerhays.john@epa.gov.*

SUPPLEMENTARY INFORMATION: This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?
II. What is the background for this action?
III. What is EPA's review of Minnesota and Michigan's BART determinations for taconite facilities?
A. Minnesota
B. Michigan
IV. How does this action relate to the action to promulgate Federal requirements for taconite plants?
V. Statutory and Executive Order Reviews.

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background for this action?

Minnesota submitted its regional haze plan on December 30, 2009, and further submitted a proposed supplemental submission on January 5, 2012, and a final supplemental submission on May 8, 2012. EPA proposed approval of the Minnesota plan on January 25, 2012 (77 FR 3681). Among other actions, this proposed rule proposed to approve Minnesota's plan as requiring BART for the State's several taconite plants, provided Minnesota submitted its proposed taconite plant BART limits prior to final EPA action. However, comments on Minnesota's and EPA's proposals provided evidence that better, cost-effective technology for control of taconite plant emissions was available. Therefore, EPA published a final rule approving other aspects of the Minnesota regional haze plan on June 12, 2012 (77 FR 34801), but deferred action on BART for Minnesota's taconite facilities.

Michigan submitted its regional haze plan on November 5, 2010. EPA proposed action on the Michigan regional haze plan on August 6, 2012 (77 FR 46912). This proposed rule proposed to approve several aspects of Michigan's regional haze plan, and proposed to disapprove Michigan's BART determinations for a Portland cement plant and a paper mill and proposed Federal limits for those two facilities. However, in this proposed rule, EPA deferred action on BART for the Tilden Mining taconite facility in Michigan. EPA published final action pursuant to this proposal on December 3, 2012 (77 FR 71533), again deferring action on BART for the Tilden Mining taconite plant in Michigan.

Michigan has a second taconite plant, known as Empire Mining. While Empire Mining began operation during the statutory timeframe such that the

facility is BART-eligible, Michigan's plan demonstrates satisfactorily that the impact of this facility is sufficiently small, as a result of the enforceable shutdown of one line, that the facility may justifiably be exempted from the BART requirement. On the other hand, Michigan's plan identifies Tilden Mining as meeting the criteria for being subject to BART. Thus, references in this action to taconite plants in Minnesota and Michigan are meant to refer only to taconite plants in Minnesota and Michigan that are subject to BART, which includes all of the taconite plants in Minnesota and Tilden Mining in Michigan but does not include the Empire Mining plant.

On August 15, 2012 (77 FR 49308), EPA published proposed action on BART for taconite plants in Minnesota and Michigan. In that action, EPA reviewed relevant information regarding the feasibility of various options for the control of emissions from taconite plants and reviewed other information relevant to determining BART for these plants.

Based on this review and the availability of cost-effective controls, EPA proposed Federal emission limits requiring more stringent control of emissions of nitrogen oxides (NO_X) and sulfur dioxide (SO_2) than had been required by Minnesota or Michigan. The notice of proposed rulemaking proposing these limits provided a full discussion of why EPA proposed to conclude that proper consideration of the BART criteria resulted in more stringent control than was required by the States, thus implicitly concluding that the state submittals did not require controls representing BART. Furthermore, the action proposed regulatory text stating that the state submittals failed to require BART for the taconite plants.

Nevertheless, EPA is publishing this supplemental notice of proposed rulemaking to provide additional information regarding the agency's views on Minnesota's and Michigan's plans and to solicit additional comment regarding the proposal to disapprove in part the plans for failing to require BART at the applicable taconite plants. EPA is not soliciting further comment on its proposed Federal limits; this action only addresses whether the state plans must be disapproved for failing to provide proper analysis and require BART for applicable taconite plants. Further discussion regarding the relationship between this action and the action published August 15, 2012 is provided below.

Previous notices of proposed rulemaking addressing the States' plans, i.e., the actions published January 25, 2012, and August 6, 2012, for Minnesota and Michigan, respectively, include substantial discussion of the requirements under sections 169A and 169B of the Clean Air Act and subpart P of 40 CFR 50 for regional haze plans. Most pertinent to today's action are the requirements for BART in Clean Air Act section 169A and 40 CFR 51.308(e). In making BART determinations, section 169A(g)(2) of the Clean Air Act requires the state to consider the following factors: (1) The costs of compliance; (2) the energy and non-air quality environmental impacts of compliance; (3) any existing pollution control technology in use at the source; (4) the remaining useful life of the source; and (5) the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

III. What is EPA's review of Minnesota and Michigan's BART determinations for taconite facilities?

A. Minnesota

In its December 30, 2009, regional haze SIP submittal, Minnesota identified the types of controls that it determined to represent BART for its taconite plants. In all cases, good combustion practice was determined to represent BART with respect to the control of NO_X, existing controls were determined to represent BART for the control of SO_2, and the maximum achievable control technology limits in 40 CFR part 63 subpart RRRRR were determined to represent BART for the control of particulate matter. However, this submittal included no enforceable emission limits to require emissions control at these facilities.

To remedy this deficiency, Minnesota proposed emission limits nominally representing good combustion practice for these facilities on December 19, 2011. EPA provided comments on this proposal, stating that more stringent limits were warranted and necessary because ''information supporting low NO_X main burners as BART is well documented and has been available for some time.'' See letter dated February 10, 2012, signed by Douglas Aburano. These comments provided a timetable showing that an analysis in January 2009 of measures for reducing NO_X emissions at U.S. Steel's Minntac Iron Ore Pelletizing Plant recommended pursuing use of low NO_X main burners. Initial tests were sufficiently successful that a report on these efforts, issued on April 13, 2010, recommended further testing. Then, U.S. Steel submitted a report to Minnesota on October 22, 2010, with test results from Minntac's Line 7 that indicated that a 70 percent reduction in NO_X emissions was achievable via a low NO_X main burner. U.S. Steel reported similar results for Minntac Line 6 to Minnesota on December 1, 2011.

Nevertheless, Minnesota's submittal did not demonstrate requisite consideration of this evidence regarding the availability and feasibility of this more effective control technology. In 2008, the owners of each taconite facility asserted that a low NO_X main burner was infeasible. Minnesota, in its December 2009 SIP submittal summarily concurred with the facilities, and the State in its May 2012 submittal did not reconsider the feasibility of this control option.

EPA's BART Guidelines identify a five-step process for conducting a BART analysis, step two of which is to determine whether the available options identified in step one are technically feasible. The state ''should document a demonstration of technical infeasibility and should explain, based on physical, chemical, or engineering principles, why technical difficulties would preclude the successful use of the control option on the emissions unit under review.'' See Section IV Step 2 of the BART Guidelines, also at 70 FR 39163. Minnesota provided no such demonstration and included no explanation why this control option should be considered infeasible. Beyond lacking any discussion of relevant principles bearing on whether the feasibility of low NO_X burners in other industries suggests that low NO_X main burners are feasible for taconite facilities, Minnesota's submittals do not discuss the successful demonstration of this control option at U.S. Steel's facilities or explain why this control option should not be considered feasible at these plants and at the other Minnesota taconite plants. Since Minnesota improperly considered low NO_X main burners to be infeasible, the State's plan lacked the necessary analysis of the costs, emission reductions, visibility benefits, and other relevant information to determine whether these controls represent BART. Instead, in its May 2012 submittal, Minnesota stated ''The [Minnesota Pollution Control Agency (MPCA)] understood the purpose of the Supplemental SIP was to establish emission limits that correspond to the previously determined BART technology. The MPCA does not believe that completing the emission limits is a vehicle for completely re-evaluating the BART determinations for the taconite facilities.'' Minnesota conceded that the

tests at Minntac ''indicate a potential to reach a 70 percent reduction in NO_X emissions at the subject lines [under certain conditions],'' but Minnesota characterized the tests as ''pilot tests'' that could not be used without substantial additional effort to establish appropriate BART limits. See the 279th page of the Minnesota document entitled ''Regional Haze State Implementation Plan Supplement April 2012.''

EPA has several objections to Minnesota's rationale for failing to require low NO_X burners as BART for its taconite plants. When EPA proposes an action but then receives significant evidence favoring an alternate action, EPA must consider that evidence and take the alternate action if warranted. See *Sierra Club* v. *EPA,* 671 F.3d 955 (9th Cir. 2012). Although EPA initially proposed to approve Minnesota's taconite limits, EPA then received evidence that disapproval was warranted because more effective controls were available. EPA's consideration of this evidence resulted in EPA's August 15, 2012, proposal to disapprove in part Minnesota's regional haze plan with respect to BART for taconite plants and in EPA's action today to publish this supplemental notice of proposed rulemaking.

EPA believes that Minnesota is under similar obligation to reconsider its taconite plant BART limits. The State solicited comments regarding the limits it proposed to establish for its taconite plants, the State received comments demonstrating that significantly tighter limits were warranted, and the State did not give due consideration to those comments. The failure to promulgate limits reflecting low NO_X main burners is especially problematic for Minntac, where the benefits of this technology had been physically demonstrated. Minnesota also did not give due consideration to the evidence that similar technology could be expected to achieve similar emission reductions and benefits at other Minnesota taconite plants.

Furthermore, even at the time Minnesota submitted its original regional haze SIP (December 2009), information was available that low NO_X main burners, which had been successfully demonstrated in several other industries, were likely to be a successful technology for reducing NO_X emissions from taconite facilities as well. Although EPA did not have the relevant information when it published its January 2012 proposed rulemaking, the above chronology suggests that Minnesota had information even in 2009 that warranted considering low NO_X main burners to be a feasible technology.

The requirements in Minnesota's final submittal also reflect significant modifications from the control technology that the State determined in 2009 to reflect BART. Minnesota determined in 2009 that good combustion practice represented BART. However, aside from requiring continuation of the heat recuperation project at the Hibbing Taconite Plant, Minnesota's final submittal provided no evidence that good combustion practice is actually required. Minnesota did not explain what specific measures constitute good combustion practice, stating only that good combustion practice varies from plant to plant. However, Minnesota did not define good combustion practice either in general or on a plant-by-plant basis.

Minnesota determined emission limits by conducting statistical analyses of full sets of recent emissions data measured at the taconite plants. While existing emissions may in some cases reflect some good combustion practices, Minnesota did not differentiate whether any particular data did or did not represent application of good combustion practice. Thus, Minnesota's limits must be considered to represent simply the existing combustion practice in effect during the testing, without regard to whether these limits reflect application of good combustion practices. Because the companies were required to collect these data for purposes of determining these limits, with instructions to operate under worst case conditions, it is reasonable to conclude that the companies would not have employed good combustion practices, as those would not have created ''worst case conditions.''

Further, Minnesota's submittal did not determine whether good combustion practices beyond those currently being implemented are feasible, either in general or on a plant-specific basis. Minnesota's December 2009 submittal determined that BART would be good combustion practice, suggesting that BART would reflect identification, evaluation, and implementation of improvements in combustion practice. However, Minnesota's final submittal lacks any such identification, evaluation, or requirement for any such improvement in combustion practice. Moreover, the submittal does not evaluate whether current combustion practice (or, more precisely, the combustion practice in place during collection of the pertinent emissions data) represents good combustion practice. In these respects, while Minnesota's December 2009 submittal determined BART for NO_X to be good combustion practice, Minnesota's final submittal contained no provisions ensuring that good combustion practice will actually be followed.

Minnesota's final submittal also deviates in other significant respects from its December 2009 submittal. Minnesota's final submittal relies on the Cross-State Air Pollution Rule to satisfy the BART requirement for most of the State's electric generating units, whereas its December 2009 plan determines BART on a plant-by-plant basis. The long-term strategy in Minnesota's final plan provides for taconite plants to conduct modeling and to recommend emission limits that would provide for attainment of the nitrogen dioxide (NO_2) and SO_2 air quality standards, whereas the December 2009 plan provides for the companies to conduct pilot testing of emission control technology. EPA is not conducting rulemaking here on these features of Minnesota's regional haze plan, but these changes demonstrate that Minnesota recognized its latitude to update portions of its December 2009 submittal significantly in light of more recent information. Similarly, Minnesota cannot argue that it was obligated to set limits based on its December 2009 BART determination, in the face of evidence that more effective control is available.

EPA is also concerned that Minnesota rejected flue gas desulfurization as a feasible option for control of SO_2 emissions at United Taconite (UTac). At this facility, Minnesota made its initial BART determination at a time when UTac's Line 1 fired only natural gas or fuel oil and when UTac's Line 2 fired a variety of fuels including coal and petroleum coke. Minnesota determined at that time that BART for SO_2 for UTac reflected the existing particulate matter scrubbers on both lines (without further optimization to control SO_2 emissions) and fuel blending to reduce SO_2 emissions on Line 2. Minnesota concluded that flue gas desulfurization for these lines was not cost effective.

UTac subsequently obtained a permit to burn solid fuels on Line 1. Best available control technology (BACT) was not required in this permit because Minnesota concluded that the fuel blending measures that it had determined to be BART for Line 2, which it incorporated into the permit, would yield a net SO_2 emission reduction. Consequently, the fuel change did not constitute a major modification requiring BACT. Minnesota also chose not to conduct a revised BART analysis, determining limits reflecting existing controls with the original fuels and then adopting an

alternate set of limits that it found equivalent.

EPA believes that Minnesota improperly rejected the use of flue gas desulfurization as a cost effective technology for reducing SO_2 emissions from UTac's two lines. As discussed in the August 15, 2012, notice of proposed rulemaking, EPA believes that flue gas scrubbing, particularly in combination with proper fuel blending, is considerably more cost effective than the cost effectiveness estimates in Minnesota's plan. Furthermore, the significant change in operation at the plant warranted reanalysis of BART at this plant. The higher sulfur content of the new fuels made more aggressive emission control more cost effective, so that a proper reanalysis of BART could have concluded that BART for the new configuration reflected more control and lower emissions than the original configuration. Minnesota's analysis of the plant using its previous fuel mix does not adequately evaluate the appropriateness of controls for the plant as it is currently operated.[1]

EPA also has a variety of concerns about the enforceability of Minnesota's chosen limits. Minnesota's limits are expressed as 30-day rolling averages, but Minnesota in many cases does not require continuous emission monitoring systems (CEMS) to provide data for evaluating compliance. In the absence of CEMS, Minnesota requires ''stack testing * * * for 30 hourly data points.'' Even if the average of the 30 data points exceeds the emission limit, the data can be contested as not necessarily representative of the 720 hours that are in a 30-day average. Minnesota has not addressed whether 720 consecutive hours of stack testing is even practicable, though none of the data used to develop emission limits appears to have been collected in this manner.

EPA has special concerns about the enforceability of the CEMS requirement for Hibbing Taconite. Minnesota requires that the company submit a plan for installing a NO_X CEMS, but it is not clear from the administrative order thatMinnesota or EPA could take enforcement action if Hibbing Taconite failed to install, certify, and properly operate a CEMS at this facility.

The SO_2 emission limits in Minnesota's administrative orders are expressed in terms of pounds of SO_2 emissions per long ton of pellets produced. Pellet production is not routinely measured at the end of an indurating furnace. Further, the administrative orders do not specify methods for determining pellet production by indurating furnaces and do not specify any requirement for the companies to keep records of pellet production. Therefore, the enforceability of these limits is also unclear.

The administrative order for Hibbing Taconite also provides that the company may determine that its limits are not feasible to meet. In that case, the order identifies information that the company must submit to Minnesota so that the State can consider revised emission limits. These provisions raise questions about whether EPA could enforce the terms of the administrative order if the company has declared the limits to be infeasible.

EPA also has concerns about the methods for computing emission limits. For Arcelor/Mittal and Hibbing Taconite, Minnesota appears to have set the limit using the upper predictive limit approach. The equation for calculating the upper predictive limit for normally distributed data is:

$$UPL = \overline{X} + t_{p,df}\, s \sqrt{\frac{1}{m} + \frac{1}{n}}$$

Where:

UPL = Upper predictive limit

n = number of data points

m = number of future data points

$df = n - 1$

$\bar{X}$ is the mean,

$t_{p,df}$ represents the critical t-value with a p-value of p and df degrees of freedom, and

s is the standard deviation

The available emissions data for these facilities appear not to be normally distributed, and so the upper predictive limit equation that Minnesota used is not appropriate for this application. In addition, the analyses contained in the Minnesota submittal do not appropriately apply the upper predictive limit approach for normally distributed data. Most notable is the use of inappropriate values for $t_{p,df}$ and m. A normal distribution has a lower tail of the distribution with the same frequency as the upper tail of the distribution. In seeking, for example, to establish the 95th percentile value in a normal distribution, a one tailed test must be applied, such that the upper tail contains five percent of the distribution and the lower tail is simply part of the 95 percent of the distribution at or below the 95th percentile value. However, Minnesota selected its values for $t_{p,df}$ based on statistics for two tailed tests, which derive, for example, a 95 percent confidence interval that reflects a 2.5 percent upper tail and a 2.5 percent lower tail, which would yield a 97.5th percentile value. (Because normal distributions are symmetric, this error can be addressed by using a value of $t_{p,df}$ for twice as much frequency outside the confidence interval, e.g., using a two-tailed value of $t_{p,df}$ for a confidence interval of 90 percent in order to derive the 95th percentile value, but Minnesota did not make this adjustment.) Thus, Minnesota selected values of $t_{p,df}$ that were unduly high, and higher in the emissions distribution than Minnesota was purporting to choose.

In the above formula, m represents the number of future runs, i.e., the number of future data points. Given that the data sets being used in the analyses are one-hour averages, with CEMS, the value of m should be 720 (30 days times 24 hours). At a minimum, under administrative orders that in the absence of CEMS apparently determine compliance on the basis of 30 hourly data points (presumably intended to represent 30-day average emissions), the appropriate value of m would be 30.

For ArcelorMittal, Minnesota appears to have set the limit based on a p-value of 0.01 (which in a normal distribution would yield an upper tail of 0.5 percent and thus a 99.5 percentile value) and $m = 3$. These values do not represent appropriate values for p or m.

Furthermore, Minnesota did not base its limits for this facility directly on the original data set, but instead used the 157 original data points to create multiple artificial data sets, each including 2000 sets of 30 values randomly selected from the original 157 values. Minnesota then performed statistical analysis of these data sets, using the mean of the original 157 data points plus an adjustment based on the highest standard deviation among the various artificial data sets that was intended to provide a 99th percent upper predictive limit value. Minnesota does not justify use of these artificial data sets as providing a better representation of emissions or being a better basis for determining an appropriate emission limit than direct use of the original data set, nor does Minnesota justify using this particular combination of statistics.

Also of note is the fact that the average of the 157 data points is significantly higher than the results of stack tests conducted between June 2000 and April 2009; specifically, the average is 17 percent higher than the highest of these stack test results and 32 percent higher than the average of these stack test results. This suggests that the data set on which Minnesota used to

[1] While this rulemaking does not address Federal limits that EPA is promulgating elsewhere, it is relevant to note that EPA is promulgating final limits based on the source burning low sulfur fuels.

derive its emission limits reflected poorer combustion practice than was in place during the prior stack tests. This raises further questions as to whether the data sets on which Minnesota bases its limits can even be considered to reflect good combustion practice, much less BART-level emission control.

For Hibbing Taconite, Minnesota appears to have set the limit based on a *p*-value of 0.05 (which would represent a 97.5% confidence interval) and $m = 1$. Again, these are not appropriate values for p or m.

For Northshore Mining, Minnesota appears to have had very little emissions data available as a basis for setting a limit. The hood exhaust portion of the limit appears to be based on one test data point multiplied by a ''compliance margin'' of 1.73. The state provided inadequate justification for the 1.73 multiplier. The waste gas portion of the limit appears to be based on a 95 percent upper confidence limit (one-tailed test) and three data points.

For the U.S. Steel-Minntac and -Keetac facilities, Minnesota set facility-wide limits in terms of tons of SO_2 per day. Minnesota has not demonstrated that limiting the sum of emissions across multiple lines requires control and visibility benefits that are better than those that would be obtained by requiring BART on each line.

In summary, the BART determinations for taconite facilities in Minnesota's plan reflect several deficiencies. Most notably, Minnesota inappropriately rejects significant emission control options as being infeasible. Minnesota summarily states that low NO_X main burners are infeasible, without providing the necessary explanation as to why this technology could not be applied and without properly considering evidence at U.S. Steel's Minntac plant demonstrating successful operation of this control. Similarly, Minnesota inappropriately rejected control options requiring significant reductions in SO_2 emissions. Minnesota determined that good combustion practice represents BART for NO_X control for these plants, but the State did not define the measures that constitute good combustion practice, the State did not evaluate what good combustion practices might be implemented either in general or at specific plants, and the State provided no basis to believe that its adopted limits in fact reflect good combustion practice. Finally, EPA has concerns about the enforceability and the derivation of several of the limits in Minnesota's plan.

B. Michigan

As with Minnesota's plan, EPA's primary concern with Michigan's plan for the Tilden Mining facility is the failure of the plan to require emission control that fully represents BART. The Michigan plan provides no limits on NO_X emissions, and Michigan relies on a state permit to provide a limit on SO_2 emissions that is over four times higher than current emissions. Thus, rather than require implementation of BART, Michigan's plan allows Tilden Mining to increase emissions to levels substantially higher than the levels that are occurring now.

For NO_X, Michigan nominally is defining BART to reflect ''good combustion practices,'' but in fact neither Michigan nor Tilden Mining provide any analysis of what these practices might be and whether any such measures that are not currently being implemented might be required to be instituted. Michigan's plan thus might be considered to define BART to reflect existing combustion practices, except that Michigan's plan provides no limits that would require even the existing combustion practices to be maintained. Instead, Michigan's plan states that Michigan ''accepts Tilden's proposal to set a BART NO_X emission limit in a manner similar to the Minnesota Regional Haze SIP. The new NO_X limits will be set after testing to determine appropriate limits based on 'good combustion practices' before December 31, 2012.'' See page 36 of the document entitled, ''State Implementation Plan Submittal for Regional Haze'' dated October 2010. The plan anticipates that the company will perform stack testing to develop information on which to base such limits. However, Michigan has provided no information to EPA that it has taken any of the steps that it would need to take to establish these limits. In response to a request under authority of Clean Air Act section 114, Tilden Mining provided EPA the results of three stack tests at each of the two furnace stacks. However, Michigan has submitted no information providing any analysis of emission limits to indicate what limit it might find appropriate, and Michigan has evidently not adopted and has not submitted any emission limit that would make any definition of NO_X BART at this facility enforceable.

Appendix 9H of Michigan's submittal, a document labeled Tilden BART Technical Analysis that was apparently prepared by Tilden Mining, states that ''[l]ow NO_X burners have been installed in the preheating section of a straight-grate furnace at another taconite plant; however, the [Tilden] indurating furnace does not contain a pre-heat burner section. If [low NO_X burners] were to be applied in the indurating zone of the furnace, the reduced flame temperatures associated with [low NO_X burners] were to be applied in the indurating zone of the furnace, the reduced flame temperatures associated with [low NO_X burners] would adversely affect taconite pellet product quality. [Low NO_X burners have] not been applied to the indurating or preheat zones of any grate-kiln taconite furnace. Therefore, this option is not technically feasible.'' Michigan's plan accepts Tilden Mining's conclusion that low NO_X burners are not technically feasible at this facility.

As noted above, low NO_X burners now have been applied to a taconite furnace, in particular to the indurating zones of two grate-kiln furnaces. These applications were found not to have adverse effects on product quality. Thus, low NO_X burners must be considered technically feasible for Tilden Mining's indurating furnace. Michigan was aware of the testing of low NO_X main burners at U.S. Steel's Minntac plant and received comments on the subject before the end of the public comment period on its SIP. Insofar as Michigan has not conducted an adequate review of the costs, benefits and other consequences of implementing this technology, and since this control would provide substantially better control compared to current practice at the plant and compared to the unlimited NO_X emissions that Michigan allows, Michigan's plan cannot be considered to require BART for NO_X at Tilden Mining.

With respect to SO_2, Michigan found several emission control options to be feasible, but the State ultimately concurred with Tilden Mining's view that none of the options were cost-effective, based on costs per ton of SO_2 removal ranging from $6,557 per ton to $22,407 per ton. Michigan rejected use of alternative fuels such as natural gas as not required by the BART Guidelines.

In its August 15, 2012 proposed rulemaking, EPA reviewed the cost effectiveness of SO_2 emission controls and concluded that flue gas desulfurization would be more cost effective than the Michigan plan indicated. EPA has received comments on the cost effectiveness of this control, and EPA has also received comments from Cliffs Natural Resources indicating that limits reflecting the firing of natural gas would also be an appropriate basis for setting SO_2 emission limits for Tilden. EPA will evaluate these comments and any additional comments

that EPA receives in response to today's notice of proposed rulemaking, in order to determine whether it considers these findings in Michigan's plan to be problematic. In any case, EPA believes that the SO_2 emission limit for this facility set by Michigan, allowing more than four times more emissions than the facility currently emits, cannot be considered to represent BART.

Michigan's plan also states that ''modeling results showed SO_2 emissions [from Tilden Mining] do not cause visibility impairment to the Class I areas.'' However, Michigan's plan does not include the information that would be necessary to support a statement that is so at odds with the results of other modeling provided in the plan. In any case, the furnace and other parts of the facility have sufficient impact to be subject to the requirement for BART, and the impact of the emissions of one pollutant can be considered as part of a five factor analysis of BART but does not justify failing to perform the necessary BART analysis, nor can such an analysis justify a conclusion that BART reflects substantially greater emissions than the facility currently emits.

IV. How does this action relate to the action to promulgate Federal requirements for taconite plants?

As noted above, in an action published August 15, 2012, EPA proposed both to promulgate Federal limits representing BART for taconite plants in Minnesota and Michigan and to disapprove Minnesota and Michigan's plans with respect to BART for these plants. In response, EPA received comments objecting that the agency had not adequately explained its rationale for proposing to disapprove the state submittals. EPA notes that it expressly proposed revisions to 40 CFR 52.1183 and 52.1235 to disapprove Michigan and Minnesota's plans with respect to taconite plant BART and provided extensive discussion of the limits needed to satisfy the taconite plant BART requirement, which implicitly demonstrated the inadequacy of the states' plans. Nonetheless, EPA agrees that further explanation of the basis for its proposal to disapprove the state plans is warranted. Therefore, EPA is providing this further explanation in this action and is soliciting further comments on this topic.

In these circumstances, EPA views the promulgation of a Federal implementation plan (FIP) and the disapproval of the relevant elements of the state plans as separable actions. A mandate for promulgating Federal limits applies in cases where EPA ''finds that a State has failed to make a required submission.'' EPA ''shall promulgate [a FIP] within two years'' of such a finding, ''unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such Federal implementation plan.'' See Clean Air Act section 110(c)(1)(A). Here, EPA made findings, published on January 14, 2009, at 74 FR 2392, that Minnesota and Michigan had failed to make complete submittals addressing regional haze requirements. Minnesota and Michigan subsequently made complete submittals, but because of the deficiencies discussed in detail in this notice, EPA has not approved these submittals with respect to BART for taconite plants. Therefore, the mandate remains for EPA to promulgate a FIP with respect to taconite plant BART. EPA notes that the agency's mandate to promulgate such a FIP applies without regard to whether EPA has disapproved a state submittal. While EPA has proposed to disapprove Michigan and Minnesota's regional haze SIPs in this instance, publication of final disapproval of the states' submittals is not a prerequisite for promulgating a FIP, and EPA must promulgate a FIP in these circumstances irrespective of whether it has disapproved the state submittals.

As a result, EPA today is publishing a separate action to promulgate a FIP addressing BART for taconite plants in Minnesota and Michigan. That action does not address the approvability of the state submittals, a subject that will be addressed only after EPA considers any additional comments it receives in response to this supplemental notice of proposed rulemaking. Conversely, this action only addresses the deficiencies in the states' submittals without addressing the limits that EPA would find necessary, through Federal promulgation or state adoption, to satisfy the BART requirement for these sources. Similarly, this action is soliciting further comments on the approvability of the state plans with respect to BART for taconite plants, but EPA is not soliciting further comments on the FIP that EPA proposed to promulgate. In addition, commenters that submitted comments on the August 15, 2012, action that addressed the approvability of the state submittals need not resubmit those comments; EPA will consider those comments as well as any comments it receives in response to today's proposal as it prepares final action on the elements of Minnesota and Michigan's plans addressing BART for their taconite plants.

In summary, on August 15, 2012, EPA proposed to partially disapprove Minnesota and Michigan's plans as failing to satisfy the requirements for BART for their taconite plants. Today's supplemental notice of proposed rulemaking provides further explanation of EPA's rationale for proposing that action and solicits further comment on that proposed action.

V. Statutory and Executive Order Reviews.

Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and, therefore, is not subject to review by the Office of Management and Budget.

Paperwork Reduction Act

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Regulatory Flexibility Act

This action merely solicits comment on a proposal to disapprove state law as not meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Unfunded Mandates Reform Act

Because this rule solicits comment on a proposal to disapprove pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it 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).

Executive Order 13132: Federalism

This action also does not have Federalism implications because it does 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 (64 FR 43255, August 10, 1999). This action merely solicits comment on a proposal to disapprove a state plan, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act.

Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Subject to Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has tribal implication, 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 tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action, in conjunction with the FIP promulgation, may have tribal implications. For example, although the FIP does not apply to sources in Indian country, controls and emission reductions arising from the program may affect Indian country or other tribal interests. However, the regulations arising under that action, and the SIP disapproval being addressed here, will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law.

EPA initiated consultation with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA sent an invitation to consult to each Region 5 Tribe on August 15, 2012, along with a copy of the proposed taconite FIP **Federal Register** notice. Conference calls were held on the taconite FIP proposal on August 22, 2012 and September 12, 2012 to provide all Region 5 Tribes with more information on the proposed rulemaking and an opportunity to ask questions of EPA technical staff and request formal individual consultation if desired. Four Region 5 Tribes participated in the August 22, 2012 call. Two Region 5 Tribes participated in the September 12, 2012 discussion. One Region 5 Tribe provided verbal testimony at the public hearing held on the proposed taconite FIP rulemaking on August 29, 2012. One Region 5 Tribal Chair expressed appreciation for the consultation discussions held with the Tribes and gratitude for EPA's careful consideration of the regional haze situation in northeast Minnesota.

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

This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it solicits comment on a proposal to disapprove a state rule.

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

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

National Technology Transfer Advancement Act

In reviewing state submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the state to use voluntary consensus standards (VCS), EPA has no authority to disapprove a state submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a state submission, to use VCS in place of a state submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

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

Executive Order 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 proposed action. 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 proposes to disapprove certain state requirements for inclusion into the SIP under section 110 and subchapter I, part D 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.

List of Subjects in 40 CFR Part 52

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

Dated: January 11, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–01463 Filed 2–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0566; FRL–9776–9]

Approval and Promulgation of Air Quality Implementation Plans; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the State of Michigan's New Source Review (NSR) State Implementation Plan (SIP) including their revised Part 2 NSR permitting rules, and the addition of their Part 19 rules revising Michigan's NSR rules for major sources in nonattainment areas to include the Federal NSR reform rules, and other revisions that are affected by the Federal NSR rules. The Michigan Department of Environmental Quality (MDEQ) submitted these revisions to EPA on March 24, 2009.

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2010–0566, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: damico.genevieve@epa.gov.*
3. *Fax:* (312) 886–0968.
4. *Mail:* Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Genevieve Damico, Chief, Air Permits Section, Air Programs Branch (AR–18J), U.S. Environmental

Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2010–0566. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Constantine Blathras, Environmental Engineer, at (312) 886–0671 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Constantine Blathras, Environmental Engineer, Air Permits, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–0671, *Blathras.constantine@epa.gov.*

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

I. What should I consider as I prepare my comments for EPA?
II. What action is EPA taking?
III. Statutory and Executive Order Reviews

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What action is EPA taking?

EPA is proposing to approve the following Michigan air pollution control rules as a revision to its SIP. On March 24, 2009, Michigan submitted the following rule revision packages to EPA for approval: (1) Part 1, general provisions. Revisions include amendments to R336.1102 to R336.1105 (including R336.1103 and R.336.1104) (definitions; B, C, D, E), R336.1109 (definitions, I), R336.1112 to R336.1114 (including R226.1113) (definitions; L, M, N), and R336.1122 (definitions; V). These revisions were made to modify the definitions that impact the new NSR permitting rules in Part 19 as well as modify the definition of volatile organic compound. (2) Part 2, Air Use Approval. Revisions include amendments to R36.1201 (Permits to install), R336.1202 (Waivers of approval), R336.1205 (Permit to install; approval), R3336.1207 (Denial of permits to install), R336.1219 (Amendments for change of ownership or operational control), R336.1240 (Required air quality models), R336.1241 (Air quality modeling demonstration requirements), R336.1278 (Exclusion from exemption), R.336.1281 (Permit to install exemptions; cleaning, washing, and drying equipment), R336.1284 (Permit to install exemption; containers), R3361285 (Permit to install exemptions; miscellaneous), R3361288 (Permit to install exemptions; oil and gas processing equipment), and R336.1299 (Adoption of standards by reference). In addition, all relevant citations in the Part 2 rules have been changed to reflect Michigan's new permitting authority in the new Part 18 and 19 rules. (3) For Part 19, NSR for Major Sources Impacting Nonattainment Areas, these revisions include R336.2901 (Definitions), R336.2901a (Adoption by reference), R336.2902 (Applicability), R336.2903 (Additional permit requirements for sources impacting nonattainment areas), R336.2907 (Actuals plantwide applicability limits or PALs), and R336.2908 (Conditions for approval of a major new source review permit in a nonattainment area).

EPA has reviewed the rules MDEQ submitted on March 24, 2009, against the Federal nonattainment air quality permitting regulations found in 40 CFR 51.165(a) and (b). EPA has found that the rules as submitted by Michigan for revision into its SIP are at least as stringent as these Federal rules. The Federal rules found at § 51.165(a) and (b) specify the elements of an approvable State permit program for preconstruction review for nonattainment purposes under part D of the Clean Air Act. A major source or major modification that would be located in an area designated as nonattainment and subject to the nonattainment area permit must meet stringent conditions designed to ensure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions will be obtained from existing sources; and that

there will be progress toward achieving the National Ambient Air Quality Standards.

III. Statutory and Executive Order Reviews

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

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

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

List of Subjects in 40 CFR Part 52

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

Dated: January 24, 2013.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2013–02673 Filed 2–5–13; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 78, No. 25

Wednesday, February 6, 2013

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Economic Research Service

Notice of Intent To Request New Information Collection

AGENCY: Economic Research Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to send comments regarding any aspect of this proposed information collection. This is a new collection for the Rural Establishment Innovation Survey (also known as National Survey of Business Competitiveness).

DATES: Written comments on this notice must be received on or before April 8, 2013 to be assured of consideration.

ADDRESSES: Address all comments concerning this notice to Tim Wojan, Resource and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture, 1400 Independence Ave. SW., Mail Stop 1800, Room 6–135B, Washington, DC 20250–0002. Comments may also be submitted via fax to the attention of Tim Wojan at 202–694–5756 or via email to *twojan@ers.usda.gov*.

All written comments will be open for public inspection at the office of the Economic Research Service during regular business hours (8:30 a.m. to 5:00 p.m., Monday through Friday) at 355 E St. SW., Room 6–135B, Washington, DC 20024–3221.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments and replies will be a matter of public record. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

FOR FURTHER INFORMATION CONTACT: For further information contact Tim Wojan at the mailing address in the preamble. Tel. 202–694–5419.

SUPPLEMENTARY INFORMATION: *Title:* Rural Establishment Innovation Survey (aka National Survey of Business Competitiveness)

OMB Number: 0536–XXXX.

Expiration Date: Three years from the date of approval.

Type of Request: New collection.

Abstract: This survey of business establishments, funded through USDA's Rural Development Mission Area, will be conducted over a 6-month period with up to 30,000 respondents to collect information on rural tradable business sectors such as manufacturing and professional services. This information will contribute to a better understanding of how rural businesses and their communities are dealing with the increasing competitive pressures and opportunities associated with the spread of new information technologies through our economy and the business and community characteristics associated with effective response to these pressures and opportunities. This information is critical to the Rural Development Mission Area's aim of creating jobs, developing new markets and increasing competitiveness for rural businesses and communities.

The information to be collected by the Rural Establishment Innovation Survey is necessary to understand: (1) The adoption of innovative practices and their contribution to firm productivity; (2) the availability and use of local and regional assets (such as workforce education, local financial institutions, strong local business and other economic associations, and transportation infrastructure) and the association of these assets with successful adjustment; and (3) the extent and importance of participation in Federal, State and local programs designed to promote rural business vitality and growth. This need is made more urgent by increased international competition in goods and some service markets, particularly from low labor cost countries. The traditional cost advantage of domestic rural establishments has been significantly eroded by these developments, requiring emphasis on new products, new processes, new marketing channels and improved customer service. A thorough understanding of the viability of the rural business sector requires collecting information on the capability for innovation.

As the first collection of information devoted specifically to innovation in rural business establishments, the proposed survey will complement other Federal efforts in gauging innovative activity in the private sector. Information on formal research and development (R&D) activities is collected by the National Science Foundation using the Business R&D and Innovation Survey. While some of this formal research and development activity takes place in nonmetropolitan counties, it is anticipated that the great majority of rural innovation occurs less through the creation of new patentable products than through the adoption of new practices and niche marketing. The emphasis of the proposed collection will be on understanding the process of innovation in business establishments as opposed to measuring R&D inputs.

Another difference between this and other Federal surveys on innovative activity will be the focus on constraints to innovation stemming from nonmetropolitan locations. Information on the availability of skilled workers and the ability to recruit managers and professionals will inform possible human capital impediments to innovation. Information on access to credit needed for business formation and development will allow for assessing financing impediments to innovation. Information on the availability of broadband Internet service and how this capability affects business strategy will allow assessing infrastructure impediments to innovation. Information on interaction with suppliers, customers, competitors, business associations and other local

institutions providing real services to the establishment will inform the importance of regional clusters to innovation.

The survey will collect data from about 30,000 business establishments in tradable sectors that will include mining, manufacturing, wholesale trade, transportation and warehousing, information, finance and insurance, professional/scientific/technical services, arts, and management of businesses. Only businesses with 5 or more employees will be included in the sample. While the focus of the survey will be on establishments in nonmetropolitan counties, establishments from metropolitan counties will be sampled in adequate numbers to allow comparative analysis. Businesses will be selected at random from strata defined by establishment size categories, industry and metropolitan or nonmetropolitan status of the county. The sample will be selected from the business establishment list maintained by state employment security departments where state approval is granted, and from a proprietary business establishment list frame for those states where approval is not granted. The much more comprehensive coverage of new and small establishments available in state administrative data provides a compelling argument for this hybrid sample frame approach, as these establishments are critical to examining processes of entrepreneurship and innovation.

The interview protocol will include a screening interview to identify the most knowledgeable person in the establishment to respond to questions regarding innovative activities of the entity. Screening greatly improves the quality and effectiveness of the contact information. The most appropriate phone number, email address and mailing address will be collected at this time to allow efficient distribution of a multi-modal survey instrument to the most appropriate respondent for the business. Respondents will have the flexibility to respond to a web questionnaire, a mail questionnaire, or a telephone survey based on their personal preference. This protocol will reduce respondent burden by using the survey mode which is most efficient for a given respondent. Past research has demonstrated that multi-modal surveys also increase survey response rates. A limited number of control surveys will be used to assess any mode bias.

Social exchange theory will also be invoked as this is seen as integral to the tailored design methodology (Dillman et al., 2009) that will be employed in this study to increase response rate. In addition to offering mixed survey modes, the design will integrate multiple and mutually supportive ways to appeal to the diversity of respondents in this business population. The following are some examples of these design elements:

- The survey request will be distinguishable from other surveys and will emphasize how the information will be used and describe the benefits back to the population for responding to the survey.
- Survey appeals in contacts will show positive regard and call on the norms of social responsibility by asking for respondents' help and advice as some respondents feel rewarded when they know they have helped others.
- Survey contacts will be personally addressed, toll free numbers will be provided for answering questions and providing help. Confidentiality of responses will be ensured and respondents will know how to contact the surveyor if they have questions on security or other issues.
- All contacts will be personalized and will emphasize why the study is important and express appreciation for respondents' help. They will be formally thanked for promptly completing questionnaires.
- Small tangible token rewards provided in advance and at the time of the survey request will be further tested with small businesses to encourage response. Previous survey research has shown that small cash token incentives provided with the survey significantly increase response rates and do much better than promised rewards or nonmonetary rewards.

A key component of tailored survey design is considering and balancing how features of questions, questionnaires, mailings, interviewing, and the context of the survey will influence trust, cost, and rewards associated with the survey circumstances and respondents.

All study instruments will be kept as simple and respondent-friendly as possible. Responses are voluntary and confidential. Responses will be used to produce statistics and for no other purpose. Data files from the survey will not be released to the public.

Affected Public: Respondents include business establishments with at least 5 employees in both nonmetropolitan and metropolitan counties.

Estimated Number of Respondents: The survey is cross-sectional and will be completed at one point in time. The survey will have a complex mixed survey administration to include telephone screening, pre-notification letter with web access, multi-contact telephone interviewing, follow-up nonrespondent mail questionnaires, and simultaneous web questionnaires offered during all contacts. Completion time for each questionnaire, based on comparisons with similar mixed modes is estimated at 33.5 minutes per completion, including time for reading correspondence, returning an eligibility postcard or responding to a screening call, reviewing instructions, gathering data needed, and responding to questionnaire items. It is also expected that the burden for attempted interviews or contacts with those either ineligible or choosing not to participate will average 18.7 minutes per business.

Full Study: The initial sample size for the full study is 30,000 businesses. 17,040 businesses are expected to be eligible for and complete the study. The total estimated response burden for them is 9,521 hours (17,040 respondents × 33.5 minutes) and for those either ineligible or non-responding business is 4,040 hours (12,960 respondents × 18.7 minutes).

Pilot Study: A pilot test of the survey will be done in advance of the full study survey. The purpose of the pilot is to evaluate the survey protocol, and test instruments and questionnaires. The initial sample size for this phase of the research is 4,000 businesses. 2,272 businesses are expected to be eligible for and complete the study. The total estimated response burden for them is 1,269 hours (2,272 respondents × 33.5 minutes). Non-responding or ineligible businesses will experience 539 hours of burden (1,728 respondents × 18.7 minutes). Total respondent burden is estimated at 15,369 hours (see table below).

Testing will be limited to a maximum of 9 businesses which will be consulted on the questionnaire and asked to complete the questionnaire in a cognitive interview test.

ESTIMATED RESPONDENT BURDEN FOR RURAL ESTABLISHMENT INNOVATION SURVEY

Survey	Sample size	Freq	Responses				Non-response or ineligible				Total burden hours
			Response count	Frequency × count	Minute/ response	Burden hours	Response count	Frequency × count	Minute/ response	Burden hours	
Pilot Study	4,000	1	2,272	2,272	33.5	1,269	1,728	1,728	18.7	539	1,808
Full Study	30,000	1	17,040	17,040	33.5	9,521	12,960	12,960	18.7	4,040	13,561
Total	34000					13,600				1,700	15,369

Dated: January 25, 2013.

Mary Bohman,

Administrator, Economic Research Service.

[FR Doc. 2013–02606 Filed 2–5–13; 8:45 am]

BILLING CODE 3410–18–P

DEPARTMENT OF AGRICULTURE

Economic Research Service

Notice of Intent To Request Revision of the Previously Requested Experimental Economic Research—A New Generic Clearance for Information Collection

AGENCY: Economic Research Service.

ACTION: Notice of changes and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 and Office of Management and Budget (OMB) implementing regulations, this notice announces changes that the Economic Research Service intends to make to a previously request for a new generic clearance vehicle for information collection, namely Experimental Economic Research. On December 2, 2011 and April 24, 2012, ERS published two Notices of solicitation of comments on the aforementioned new information collection in the **Federal Register** (76 FR 75521–75522, December 2, 2011; 77 FR 24455, April 24, 2012). Although ERS did not receive any comments from the general public during the respective commenting periods, it has, since then, engaged in extensive discussions with the Office of Management and Budget (OMB) regarding the nature and scope of the study and the appropriateness and practicability of the proposed protection for respondent information. As a result, ERS intends to make four changes to the aforementioned information collection. Details of the changes are discussed in the **SUPPLEMENTARY INFORMATION** section below.

DATES: Comments on this notice must be received by March 8, 2013 to be assured consideration.

ADDRESSES: Address all comments concerning this notice to Nathaniel Higgins, Resource and Rural Economics Division, Economic Research Service, U.S. Department of Agriculture, 1400 Independence Ave. SW., Mail Stop 1800, Washington, DC 20250–1800. Comments may also be submitted via fax at 202–245–4847 or via email to *nhiggins@ers.usda.gov*.

FOR FURTHER INFORMATION CONTACT: Nathaniel Higgins, using the contact information listed in the **ADDRESSES** section above.

SUPPLEMENTARY INFORMATION: On 2 December 2011 the Economic Research Service (ERS) published a notice and request for comments pursuant to its intent to seek Office of Management and Budget Approval for a new information collection (76 FR 75521–75522) [''60-day notice'']. In that notice ERS stated that a number of research techniques, including laboratory and field techniques, exploratory interviews, pilot experiments and respondent debriefing, would be used to collect to inform or evaluate policies. ERS stated that the number of respondents would be 1,800 and the maximum total burden hours would be 2,300. Additionally, ERS stated that it complies with OMB Implementation Guidance, ''Implementation Guidance for Title V of the E–Government Act, Confidential Information Protection and Statistical Efficiency Act of 2002 (CIPSEA)'' (72 FR 33362, June 15, 2007). In a subsequent notice announcing that the collection had been submitted to OMB for consideration (77 FR 24455–34456, April 24, 2012) [''30-day notice''] ERS stated that the number of respondents would be 5,400 and the total burden hours would be 6,900.

The intent of this notice is to announce four changes to the clearance sought by ERS: (1) The request is being sought as a pilot of the concept of using a generic approval mechanism for the type of experiments listed above and, as such, experiments will be limited to only two topic areas at this time (conservation and nutrition); (2) ERS does not intend to use the information collected under this approval for purposes of developing or evaluating policy; (3) ERS does not intend to invoke CIPSEA for the collection, but instead intends to protect respondent information under the Privacy Act of 1974 and the E-Government Act of 2002, (4) ERS would like to amend the number of respondents to 6,900 and the number of burden hours to 7,025.

The complexity and cost necessary to invoke CIPSEA is not justified given the nature of the collection; the collections would include a very limited amount of personally-identifiable information (PII), and would generally be designed to be hosted in university computer labs, where CIPSEA compliance could not be assured. Consistent with the Privacy Act and the E-Government Act, a Systems of Records Notice (SORN) and a Privacy Impact Assessment (PIA) will be submitted for approval, as appropriate. The SORN and PIA will document the ways in which participant personally identifiable information will be collected, stored, and accessed. Data will be managed for research purposes only.

Specific details regarding information handling will be specified in individual submissions under this generic clearance, but will conform to these broad guidelines.

This notice gives the public the opportunity to comment on: (1) The appropriate and reasonable invocation of the Privacy Act of 1974, as amended and the E-Government Act of 2002 to assure that personal information collected by Federal agencies is protected, and (2) the increase in the number of respondents and the burden hours proposed by ERS. Comments should be sent to the address in the preamble. 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.

Dated:January 29, 2013.

Mary Bohman,

Administrator, Economic Research Service.

[FR Doc. 2013–02607 Filed 2–5–13; 8:45 am]

BILLING CODE 3410–18–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meetings of the New Hampshire and District of Columbia Advisory Committees

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the New Hampshire Advisory Committee to the Commission is rescheduled for Friday, February 8, 2013, at 10:00 a.m. (ET), at the New Hampshire State House, 107 North Main Street, Concord, NH 03301. The purpose of the planning meeting is to plan future activities. The purpose of the press conference is to re-release committee report on Goffstown Prison. This meeting was initially scheduled for Friday, February 1, 2013; same time and location (FR/Vol. 78, No. 14/Tuesday, January 22, 2013/pages 4380–4381).

Notice is also hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a planning meeting of the District of Columbia Advisory Committee to the Commission is rescheduled for Tuesday, February 19, 2013, 12:00 p.m. (ET) at 1331 Pennsylvania Avenue, Suite 1150, Conference Room, Washington, DC 20425. The purpose of the meeting is project planning. This meeting was initially scheduled for February 12, 2013 (FR/Vol. 78, No. 18/Monday, January 28, 2013/Notices, page 5772).

Members of the public are entitled to submit written comments. The comments must be received in the regional office by Friday, March 8, 2013 for the New Hampshire Advisory Committee and Tuesday, March 19, 2013 for the District of Columbia Advisory Committee. Comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376–7548, or emailed to *ero@usccr.gov.* Persons who desire additional information may contact the Eastern Regional Office at 202–376–7533. Persons needing accessibility services should contact the Eastern Regional Office at least five working days before the scheduled date of the meeting.

Records generated from these meetings may be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meeting. Persons interested in the work of these advisory committees are advised to go to the Commission's Web site, *www.usccr.gov*, or to contact the Eastern Regional Office at the above phone number, email or street address.

The meetings will be conducted pursuant to the provisions of the rules and regulations of the Commission and FACA.

Dated in Washington, DC, on January 31, 2013.

David Mussatt,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2013–02553 Filed 2–5–13; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Proposed Information Collection; Comment Request; Trade Adjustment Assistance for Firms

AGENCY: Economic Development Administration (EDA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on the proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before April 8, 2013.

ADDRESSES: Direct all written comments and recommendations for the proposed information collection to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Miriam Kearse, Eligibility Examiner, Trade Adjustment Assistance Division, Room 71028, Economic Development Administration, Washington, DC 20230, telephone (202) 482–3963, facsimile (202) 482–2883 (or via the Internet at *miriam.j.kearse@eda.gov*).

SUPPLEMENTARY INFORMATION:

I. Abstract

EDA administers the Trade Adjustment Assistance for Firms (TAAF) Program, which is authorized under chapters 3 and 5 of title II of the Trade Act of 1974, as amended (19 U.S.C. 2341 *et seq.*) (Trade Act), and the Trade Adjustment Assistance Extension Act of 2011 (Pub. L. 112–40) which reauthorized the program, through a national network of 11 non-profit and university-affiliated Trade Adjustment Assistance Centers (TAACs), each of which serves a different geographic service region. EDA certifies firms as eligible to participate in the TAAF Program and provides funding to allow eligible client-firms to receive adjustment assistance through the TAACs. The information collected on Form ED–840P and relevant supporting documentation is used to determine if a firm is eligible to participate in the program. In accordance with the Trade Act and EDA's regulations as set out at 13 CFR part 315, EDA must verify that the following have occurred: (1) A significant reduction in the number or proportion of the workers in the firm, a reduction in the workers' wage or work hours, or an imminent threat of such reductions; (2) sales or production of the firm have decreased absolutely, as defined in EDA's regulations, or sales or production, or both, of any article or service accounting for at least 25 percent of the firm's sales or production has decreased absolutely; and (3) an increase in imports of articles or services like or directly competitive with those produced or provided by the petitioning firm, which has contributed importantly to the decline in employment and sales or production of that firm. Additionally, the firm must demonstrate that its customers have reduced purchases from the firm in favor of buying items or services from foreign suppliers. The use of the form standardizes and limits the information collected as part of the certification process and eases the burden on applicants and reviewers alike.

In addition, after being determined eligible for TAAF Program assistance using Form ED–840P, firms must create an EDA-approved adjustment proposal, which is each firm's business plan to remain viable in the current global economy, in order to receive financial assistance under the TAAF Program. Each adjustment proposal must meet certain requirements as set out in the Trade Act and EDA's regulation at 13 CFR 315.6. This notice also includes an estimate for adjustment proposals.

II. Method of Collection

Form ED–840P may be obtained in Portable Document Format (PDF) from EDA or the TAACs upon request. TAACs are responsible for preparing the application on the firm's behalf.

Although there is no form associated with adjustment proposals, they must meet the requirements for adjustment proposals set out in EDA's regulation at 13 CFR 315.16. Both petitions for certification on Form ED–840P and adjustment proposals may be submitted via email to *taac@eda.gov* or in hard copy to EDA at Trade Adjustment Assistance for Firms, 1401 Constitution Avenue NW., Room 71028, Washington DC 20230.

III. Data

OMB Control Number: 0610–0091.

Form Number(s): ED–840P.

Type of Review: Regular submission (extension of a currently approved collection).

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 800 (500 petitions for certification and 300 adjustment proposals).

Estimated Time Per Response: 128.2 hours (8.2 for petitions for certification and 120 for adjustment proposals).

Estimated Total Annual Burden Hours: 40,100 (4,100 for petitions for certification and 36,000 for adjustment proposals).

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: January 31, 2013.

Glenna Mickelson,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–02526 Filed 2–5–13; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–10–2013]

Foreign-Trade Zone 84—Houston, TX Application for Expansion

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Port of Houston Authority, grantee of FTZ 84, requesting authority to expand FTZ 84 to include a site in Brazos County, Texas. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on January 31, 2013.

FTZ 84 was approved on July 15, 1983 (Board Order 214, 48 FR 34792, 8/1/83). The zone was expanded on December 24, 1991 (Board Order 551, 57 FR 42, 1/2/92), on December 23, 1993 (Board Order 670, 59 FR 61, 1/3/94), on August 24, 2000 (Board Order 1115, 65 FR 54197, 9/7/00), on March 21, 2003 (Board Order 1271, 68 FR 15431, 3/31/03), on May 14, 2003 (Board Order 1277, 68 FR 27987, 5/22/03), and on April 24, 2009 (Board Order 1611, 74 FR 27777–27778, 6/11/2009).

The general-purpose zone currently consists of 24 sites (2,752.13 acres) at port facilities, industrial parks and warehouse facilities in Houston and the Harris County area. The sites—which are in Houston unless otherwise stated—are as follows: *Site 1* (421 acres)—Houston Ship Channel Turning Basin, Clinton Drive at Highway 610 East Loop; *Site 2* (97 acres)—Houston Ship Channel (Bulk Materials Handling Plant), north bank between Greens Bayou and Penn City Road; *Site 3* (99 acres)—Barbours Cut Turning Basin, Highway 146 at Highway 225; *Site 4* (4 acres)—Cargoways Logistics, 1201 Hahlo Street; *Site 5* (8 acres)—Timco Scrap Processing, 6747 Avenue W; *Site 6* (73 acres)—Odfjell Terminals, 12211 Port Road; *Site 7* (126 acres)—Jacintoport Terminal, Houston Ship Channel,16398 Jacintoport Blvd.; *Site 8* (162 acres)—Central Green Business Park, 16638 Air Center Boulevard; *Site 9* (72 acres)—Manchester Terminal Corporation, 10000 Manchester; *Site 10* (14 acres)—13609 Industrial Road, within the Greens Port Industrial Park along the Houston Ship Channel; *Site 11* (269 acres)—Oiltanking, Inc.,15602 Jacintoport Boulevard; *Site 12* (146 acres)—Kinder Morgan Liquids Terminal LLC, Clinton Drive at Panther Creek and North Witter Street at Bayou Street; *Site 13* (18 acres)—Exel Logistics, Inc., 8833 City Park Loop Street; *Site 14* (22 acres)—George Bush Intercontinental Airport, Fuel Storage Road, Houston jet fuel storage and distribution system; *Site 15* (196 acres)—Magellan Midstream Partners, liquid bulk facility, 12901 American Petroleum Road, Galena Park, Harris County; *Site 16* (72 acres)—Katoen Natie Gulf Coast Warehousing Complex, Miller Road Cutoff and U.S. Highway 225, Harris County; *Site 17* (172 acres total, 2 parcels, sunset 5/31/2014)—within the Highway 225 Industrial Development: Underwood Industrial Park (162 acres), located at 2820 East 13th Street, Deer Park, and Battleground Business Park (10 acres), located at the corner of Porter Road and Old Underwood Road, La Porte; *Site 18* (106 acres, sunset 5/31/2014)—Bay Area Business Park, located at Red Bluff Road and Bay Area Boulevard, Pasadena; *Site 19* (190 acres, sunset 5/31/2014)—Republic Distribution Center, located on the corner of Red Bluff Road and Choate Road, Pasadena; *Site 20* (299 acres, sunset 5/31/2014)—Port Crossing Industrial Park, located along McCabe Road and State Highway 146, La Porte; *Site 22* (146 acres, sunset 5/31/2014)—Port of Houston Authority's Beltway 8 Tract, located at the corner of East Belt Drive and Jacintoport Boulevard; *Site 23* (16.94 acres)—Katoen Natie Gulf Coast, Inc., 102 Old Underwood Road and 1100 Underwood Drive, Deer Park; *Site 24* (11.32 acres, sunset 5/31/2014)—Kuehne + Nagel, Inc., 15450 Diplomatic Plaza Drive; and, *Site 25* (11.87 acres, expires 12/31/2014)—Emerson Process Management Valve Automation, Inc., 19200 Northwest Freeway. (Note: Site 21 was removed from the zone project in December 2012 (S–142–2012).)

The applicant is requesting authority to expand the zone to include the following site: *Proposed Site 26* (1,091.22 acres)—Texas Triangle Park, located at State Highway 6 and Louis E. Mikulin Road, Brazos County. No specific production authority is being requested at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is April 8, 2013. Rebuttal comments in response to material submitted during the foregoing period may be submitted

during the subsequent 15-day period to April 22, 2013.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via www.trade.gov/ftz. For further information, contact Camille Evans at *Camille.Evans@trade.gov* or at (202) 482–2350.

Dated: January 31, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–02641 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–11–2013]

Foreign-Trade Zone 45—Portland, OR; Notification of Proposed Production Activity; SoloPower Inc. (Thin Film Photovoltaic Solar Panels); Portland, OR

SoloPower Inc. (SoloPower) has submitted a notification of proposed production activity for their facility in Portland, Oregon. The notification conforming to the requirements of the regulations of the Board (15 CFR 400.22) was received on January 28, 2013.

The SoloPower facility is located within Site 1 of FTZ 45. The facility is used for the production of thin film photovoltaic solar panels. Pursuant to 15 CFR 400.14(b), FTZ activity would be limited to the specific foreign-status materials and components and specific finished products described in the submitted notification (described below) and subsequently authorized by the FTZ Board.

Production under FTZ procedures could exempt SoloPower from customs duty payments on the foreign status components used in export production (an estimated 90 percent of production). On its domestic sales, SoloPower would be able to choose the duty rate during customs entry procedures that applies to the thin film solar panels (duty-free) for the foreign status inputs noted below. Customs duties also could possibly be deferred or reduced on foreign status production equipment.

The components and materials sourced from abroad include: Polymer film; diodes; conductive paste; junction boxes; sealant; silicone rubber; polyester adhesive tape; sodium citrate; thiourea; selenium shot; gallium oxide; indium chloride concentrate; gallate solution; selenious acid concentrate; gas dispersion machine sputtering targets of molybdenum, copper, ruthenium, indium tin oxide alloy, zinc oxide alloy, chromium metal, and titanium; and cold-rolled stainless steel foil (duty rates range from free to 6.5%). SoloPower indicates that the cold-rolled stainless steel foil is subject to antidumping/countervailing duty (AD/CVD) orders. The FTZ Board's regulations (15 CFR 400.14(e)) require that merchandise subject to AD/CVD actions be admitted to the zone in privileged foreign status (19 CFR 146.41).

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is March 18, 2013.

A copy of the notification will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Diane Finver at *Diane.Finver@trade.gov* (202) 482–1367.

Dated: January 31, 2013.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–02639 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011

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

SUMMARY: In response to requests from interested parties, the Department of Commerce (''Department'') is conducting an administrative review of the antidumping duty order on wooden bedroom furniture (''WBF'') from the People's Republic of China (''PRC''). The period of review (''POR'') is January 1, 2011 through December 31, 2011. During the review, the two mandatory respondents did not cooperate, and the Department preliminarily determines to treat these companies as part of the PRC-wide entity. The Department also preliminarily determines that six companies made no shipments of subject merchandise during the POR and will retain their separate rate status, three companies have demonstrated eligibility for separate rate status, and four companies have failed to establish eligibility for separate rate status. Lastly, the Department intends to rescind the review for two companies that are U.S. importers.

DATES: *Effective Date:* February 6, 2013.

FOR FURTHER INFORMATION CONTACT: Rebecca Pandolph or Patrick O'Connor, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3627 or (202) 482–0989, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Order

The product covered by the order is wooden bedroom furniture, subject to certain exceptions.[1] Imports of subject merchandise are currently classified under the Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings: 9403.50.9042, 9403.50.9045, 9403.50.9080, 9403.50.9041, 9403.60.8081, 9403.20.0018, 9403.90.8041, 7009.92.1000 or 7009.92.5000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written product description in the Order remains dispositive.[2]

Preliminary Determination of No Shipments

Among the companies under review, seven companies reported that they made no shipments of subject merchandise to the United States during the POR.[3] These seven companies are:

[1] For the antidumping duty order, *see Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People's Republic of China,* 70 FR 329 (January 4, 2005) (''Order'').

[2] For a complete description of the scope of the order, *see* ''*Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Review: Wooden Bedroom Furniture from the People's Republic of China,*'' from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, (''Preliminary Decision Memorandum''), dated concurrently with this notice.

[3] For a full explanation of the Department's analysis, *see* Memorandum to Abdelali Elouaradia, Director, Office 4, AD/CVD Operations, regarding ''Analysis of No Sales/Shipments Claims Made by

Continued

(1) Alexandre International Corp.: Southern Art Development Ltd.; Alexandre Furniture (Shenzhen) Co., Ltd.; Southern Art Furniture Factory (collectively, ''Alexandre Group''); (2) Clearwise Company Limited (''Clearwise''); (3) Dongguan Yujia Furniture Co., Ltd. (''Yujia''); (4) Golden Well International (HK) Ltd. (''Golden Well''); (5) Hangzhou Cadman Trading Co., Ltd. (''Cadman''); (6) Yeh Brothers World Trade, Inc. (''Yeh Brothers''); and (7) Zhejiang Tianyi Scientific and Educational Equipment Co., Ltd. (''Zhejiang Tianyi'').

Based on the certifications of all companies and our analysis of U.S. Customs and Border Protection (''CBP'') information, we preliminarily determine that Clearwise, Yujia, Golden Well, Cadman, Yeh Brothers, and Zhejiang Tianyi did not have any reviewable transactions during the POR. However, the Department finds that consistent with its recently announced refinement to its assessment practice in non-market economy (''NME'') cases, it is not appropriate to rescind the review with respect to these companies but, rather, to complete the review with respect to these six companies and issue appropriate instructions to CBP based on the final results of the review.[4] *See* Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties, 76 FR 65694 (October 24, 2011) and the ''Assessment Rates'' section below.

Record evidence contradicts Alexandre Group's claim of no shipments during the POR.[5] For further information regarding our treatment of the Alexandre Group see the *''Separate Rates''* section below.

Intent to Rescind the Review, in Part

Foliot Furniture Pacific Inc. (''Foliot Pacific''), Foliot Furniture Corporation (''Foliot Corporation''), and Foliot Furniture Inc./Meubles Foliot Inc. (''Foliot/Meubles'') requested a review of its exports and imports of subject merchandise.[6] While Foliot/Meubles is a foreign exporter of subject merchandise, Foliot Pacific and Foliot Corporation have been identified as U.S. importers. The Department does not conduct administrative reviews of U.S. importers. Therefore, the Department intends to rescind the review with respect to Foliot Pacific and Foliot Corporation.

Methodology

The Department has conducted this review in accordance with section 751(a)(1)(A) of the Tariff Act of 1930, as amended (''the Act''). In making our findings, we have relied, in part, on facts available, and because the two mandatory respondents did not act to the best of their ability to respond to the Department's requests for information, we have drawn an adverse inference in selecting from among the facts otherwise available.[7] In addition, we assigned a dumping margin to the separate rate recipients based on Departmental practice which is described in the *''Separate Rates''* section below.

For a full description of the methodology underlying our conclusions, please see the Preliminary Decision Memorandum hereby adopted by this notice. The Preliminary 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''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly on the internet at http://www.trade.gov/ia/. The signed Preliminary Decision Memorandum and the electronic versions of the Preliminary Decision Memorandum are identical in content.

Separate Rates

In the *Initiation Notice,* we informed parties of the opportunity to request a separate rate. In proceedings involving NME countries, the Department begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to an administrative review involving an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent so as to be entitled to a separate rate.

Companies that wanted to be considered for a separate rate in this review were required to timely file a separate rate application or a separate rate certification to demonstrate eligibility for a separate rate. Separate rate applications and separate rate certifications were due to the Department within 60 calendar days of the publication of the *Initiation Notice.*

In the *Initiation Notice,* we stated that ''for exporters and producers who submit a separate-rate application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate-rate status unless they respond to all parts of the questionnaire as mandatory respondents.''[8] After we selected Shanghai Maoji Imp and Exp Co., Ltd (''Maoji'') and Dongguan Huansheng Furniture Co., Ltd (''Huansheng'') as mandatory companies, Maoji failed to answer all sections of the Department's antidumping questionnaire and failed to respond to a supplemental Section A questionnaire while Huansheng failed to answer two supplemental questionnaires and withdrew from participating in the review. Therefore, neither Maoji nor Huansheng has established its eligibility for a separate rate and we will treat both companies as part of the PRC-wide entity. The PRC-wide entity rate is 216.01 percent.

In addition, four companies that remain under review have failed to provide separate rate applications or certifications necessary to establish their eligibility for a separate rate.[9] The Department has preliminarily determined to treat these companies, namely the Alexandre Group, Billy Wood, Huanghekou, and Sheng Jing as part of the PRC-wide entity. As noted above, although the Alexandre Group claimed that it made no shipments during the POR, record evidence contradicts the claim.

Lastly, three companies that are still under review, Baigou Crafts Factory of Fengkai (''Baigou Crafts''), Foliot, and Hualing, applied for separate rate status.[10] After examining the

Certain Companies'' (''No Shipment Claims Memorandum'') dated concurrently with this notice.

[4] *See Id.*

[5] *See* No Shipment Claims Memorandum, dated concurrently with this notice.

[6] In the *Wooden Bedroom Furniture From the People's Republic of China: Initiation of Administrative Review,* 77 FR 12235 (February 29, 2012)(*''Initiation Notice''*), the Department initiated a review for both Foliot Furniture Inc. and Meubles Foliot Inc.; however, Foliot has explained that it requested a review of only one exporter and it uses both names to refer to the exporter in the course of business because it has English and French customers. Because of this, we will treat Foliot Furniture Inc. and Meubles Foliot Inc. as one company.

[7] *See* sections 776(a) and (b) of the Act.

[8] *See Initiation Notice,* 77 FR at 12237.

[9] The company groupings for three of the four companies are as follows: (1) Billy Wood Industrial (Dong Guan) Co., Ltd.; Great Union Industrial (Dongguan) Co., Ltd.; Time Faith Ltd. (collectively, ''Billy Wood''); (2) Dongying Huanghekou Furniture Industry Co., Ltd. (''Huanghekou''); and (3) Sheng Jing Wood Products (Beijing) Co., Ltd.; Telstar Enterprises Ltd. (collectively, ''Sheng Jing'').

[10] The three company groupings are Baigou Crafts Factory of Fengkai (''Baigou Crafts''); Foliot Furniture Inc./Meubles Foliot Inc. (collectively, ''Foliot'') Hualing Furniture (China) Co., Ltd.; Tony

information provided by these companies, we have preliminarily determined that Baigou Crafts, Foliot, and Hualing have established their eligibility for a separate rate. Because the Department is not calculating antidumping duty margins for the mandatory respondents in this proceeding, we are relying on the most recent rates calculated for the nonselected companies in question, unless we calculated in a more recent review a rate for any company that was not zero, *de minimis* or based entirely on facts available. The most recently completed segment of this proceeding in which an antidumping duty margin was calculated for a company that was not zero, *de minimis,* or based entirely on facts available is the 2009 administrative review in which we calculated an antidumping duty margin of 41.75 percent for the mandatory respondent of that review, Dalian Huafeng Furniture Group Co., Ltd. Therefore, the Department has preliminarily assigned a rate of 41.75 percent to Baigou Crafts, Foliot, and Hualing.

Preliminary Results of Review

The Department preliminarily determines that the following dumping margins exist for the period January 1, 2011, through December 31, 2011:

Exporter	Weighted-Average margin
Baigou Crafts Factory of Fengkai	41.75
Foliot Furniture Inc./Meubles Foliot Inc.	41.75
Hualing Furniture (China) Co., Ltd.; Tony House Manufacture (China) Co., Ltd.; Buysell Investments Ltd.; and Tony House Industries Co., Ltd.	41.75
PRC-wide Entity[11]	216.01

[11] The PRC-wide entity includes, among other companies: Shanghai Maoji Import and Export Corp. Ltd; Dongguan Huansheng Furniture Co., Ltd; Alexandre International Corp.: Southern Art Development Ltd.; Alexandre Furniture (Shenzhen) Co., Ltd.; Southern Art Furniture Factory; Billy Wood Industrial (Dong Guan) Co., Ltd.; Great Union Industrial (Dongguan) Co., Ltd.; Time Faith Ltd.; Dongying Huanghekou Furniture Industry Co., Ltd.; Sheng Jing Wood Products (Beijing) Co., Ltd.; and Telstar Enterprises Ltd.

Public Comment

Interested parties may submit written comments no later than 30 days after the date of publication of these preliminary results of review.[12] Rebuttals to written comments may be filed no later than five days after the written comments are filed.[13]

Any interested party may request a hearing within 30 days of publication of this notice.[14] Hearing requests should contain the following information: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If a request for a hearing is made, parties will be notified of the time and date for the hearing to be held at the U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.[15] The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[16] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. Additionally, pursuant to a recently announced refinement to its assessment practice in NME cases, if the Department continues to determine that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the PRC-wide rate. For a full discussion of this practice, *see Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For Cadman, Clearwise, Golden Well, Yeh Brothers, Yujia, and Zhejiang Tianyi, which claimed no shipments, the cash deposit rate will remain unchanged from the rate assigned to these companies in the most recently completed review of the companies; (2) for Baigou Crafts, Foliot, and Hualing, which have a separate rate, the cash deposit rates will be the rates established in the final results of this review; (3) for previously investigated or reviewed PRC and non-PRC exporters who are not under review in this segment of the proceeding but who have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (4) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate the cash deposit rate will be the PRC-wide rate of 216.01 percent;[17] and (5) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporter(s) that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these results in accordance with sections

House Manufacture (China) Co., Ltd.; Buysell Investments Ltd.; and Tony House Industries Co., Ltd. (collectively, ''Hualing'').

[12] *See* 19 CFR 351.309(c).

[13] *See* 19 CFR 351.309(d).

[14] *See* 19 CFR 351.310(c).

[15] *See* 19 CFR 351.310(d).

[16] *See* 19 CFR 351.212(b)(1).

[17] For an explanation of the calculation of the PRC-wide rate, *see Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China,* 72 FR 46957 (August 22, 2007).

751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.213.

Dated: January 30, 2013.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

List of Topics Discussed in the Preliminary Decision Memorandum

1. Background
2. Scope of the Order
3. Respondent Selection
4. Non-Market Economy (''NME'') Country Status
5. Separate Rates
6. Margins for Separate Rate Recipients Not Individually Examined
7. Use of Facts Available and AFA

[FR Doc. 2013–02670 Filed 2–5–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC484

Fisheries of the South Atlantic and the Gulf of Mexico; South Atlantic Fishery Management Council (SAFMC) and Gulf of Mexico Fishery Management Council (GMFMC); Public Meeting

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

ACTION: Webinar of the SAFMC and GMFMC Joint Committee on South Florida Management Issues.

SUMMARY: The SAFMC and the GMFMC will hold a meeting of the Joint Committee on South Florida Management Issues.

DATES: The meeting will be held via Webinar on Monday, February 25, 2013, from 12:30 p.m. until 4 p.m.

ADDRESSES:

Meeting address: The meeting will be held via a GoToMeeting Conference webinar. The webinar is open to members of the public. Those interested in participating should contact Kim Iverson at SAFMC (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request meeting information at least 24 hours in advance of the meeting.

Council address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405; Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa FL 33607.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, SAFMC; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION: The items of discussion in the committee agenda are as follows:

1. Approve the agenda; state the background and purpose of the meeting; and establish how the joint committee will function.

2. Discuss the following issues: yellowtail snapper management; mutton snapper management; and the commercial harvest of grouper in Monroe County.

3. Discuss the establishment of a special management unit that allows for consistent state and federal fishery regulations across the South Florida area

4. Discuss the allocation of fisheries' landings in Monroe County.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal Council action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Dated: February 1, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–02586 Filed 2–5–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA774

Marine Mammals; File No. 13927

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

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that a major amendment to Permit No. 13927 has been issued to that Dr. James H.W. Hain, Associated Scientists at Woods Hole, Box 721, Woods Hole, MA 02543.

ADDRESSES: The permit amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Carrie Hubard or Amy Hapeman, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On May 10, 2012, notice was published in the **Federal Register** (77 FR 27441) that a request for an amendment to Permit No. 13927 to conduct research on North Atlantic right whales (*Eubalaena glacialis*) had been submitted by the above-named applicant. The requested permit amendment has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

Permit No. 13927, issued on October 19, 2011 (76 FR 67151), authorizes the permit holder to harass North Atlantic right and humpback whales (*Megaptera*

novaeangliae) during aerial and vessel surveys off the U.S. southeast coast. Bottlenose (*Tursiops truncatus*) and Atlantic spotted dolphins (*Stenella frontalis*) may be incidentally harassed during research activities. The permit was amended to increase take numbers of North Atlantic right whales from 50 to 100 per year during aerial surveys and from ten to 60 per year during vessel surveys. The permit is valid through October 31, 2016.

A supplemental environmental assessment (SEA) analyzing the effects of the permitted activities on the human environment was prepared in compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Based on the analyses in the SEA, NMFS determined that issuance of the permit would not significantly impact the quality of the human environment and that preparation of an environmental impact statement was not required. That determination is documented in a Finding of No Significant Impact (FONSI), signed on January 18, 2013.

As required by the ESA, issuance of this permit amendment was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: February 1, 2013.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–02645 Filed 2–5–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC072

Takes of Marine Mammals Incidental to Specified Activities; Marine Geophysical Survey Off the Central Coast of California, November to December, 2012

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

ACTION: Notice, withdrawal of an incidental take authorization application.

SUMMARY: Notice is hereby given that Lamont-Doherty Earth Observatory of Columbia University (L–DEO), in cooperation with the Pacific Gas and Electric Company (PG&E) has withdrawn its application for an Incidental Harassment Authorization (IHA). The following action relates to a proposed IHA to L–DEO and PG&E for the take of small numbers of marine mammals, by Level B harassment only, incidental to conducting a marine geophysical (seismic) survey off the central coast of California, November to December, 2012.

ADDRESSES: The documents and the application related to this action are available by writing to P. Michael Payne, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, or by telephoning the contact listed here.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–427–8401.

SUPPLEMENTARY INFORMATION: On May 17, 2012, NMFS received an application from L–DEO and PG&E requesting that NMFS issue an IHA for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting a marine seismic survey within the U.S. Exclusive Economic Zone of the central coast of California during November to December, 2012. NMFS received a revised application on August 31, 2012 and October 10, 2012. L–DEO and PG&E planned to use one source vessel, the R/V *Marcus G. Langseth* (*Langseth*) and a seismic airgun array to collect seismic data as part of the Offshore Central California Seismic Imaging Project located in the central area of San Luis Obispo County, California. On September 19, 2012, NMFS published a notice in the **Federal Register** (77 FR 58256) disclosing the effects on marine mammals, making preliminary determinations, and proposed issuing an IHA. The notice initiated a 30-day public comment period. On December 5, 2012, NMFS received a letter from PG&E withdrawing their IHA application for the proposed action. PG&E explained that on November 14, 2012, the California Coastal Commission (CCC) voted to deny issuance of a Coastal Development Permit/Federal Consistency Certification for the Offshore Central Coastal California Imaging Project. Based upon this decision by L–DEO and PG&E, NMFS hereby withdraws its proposal to issue an IHA for this activity.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–02587 Filed 2–5–13; 8:45 am]

BILLING CODE 3510–22–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (CNCS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) (44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning its proposed instrument to aggregate the responses to its approved information collection instruments: The Senior Corps Independent Living Client Survey and the Senior Corps Respite Client Survey. All Senior Companion Program (SCP) grantees are required to uses these instruments to collect performance measures outcome data, beginning in fiscal year 2013. The instruments are optional for the RSVP Program grantees. Senior Corps will require all grantee organizations that participate in the survey to summarize survey results and submit those results to the Corporation.

Copies of the information collection request can be obtained by contacting the office listed in the addresses section of this notice.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by April 8, 2013.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Senior Corps; Attention Angela Roberts, Associate Director, Room 9401; 1201 New York Avenue NW., Washington, DC, 20525.

(2) By hand delivery or by courier to the CNCS mailroom at Room 8100 at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except Federal holidays.

(3) *By fax to:* (202) 606–3475, Attention: Angela Roberts, Associate Director

(4) Electronically through *www.regulations.gov.* Individuals who use a telecommunications device for the deaf (TTY–TDD) may call 1–800–833–3722 between 8:00 a.m. and 8:00 p.m. Eastern Time, Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Angela Roberts, (202) 606–6822, or by email at *aroberts@cns.gov.*

SUPPLEMENTARY INFORMATION: CNCS is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of CNCS, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are expected to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses).

Background

Senior Corps adopted new, required performance measures for its programs beginning in Fiscal Year 2013. Under a separate information collection approval, two Independent Living Performance Measures Surveys were cleared for use by grantees of the Senior Companion Program (required) and the RSVP Program (optional). All Senior Companion Program grantees are required to use the previously cleared surveys to solicit outcome data from clients and caregivers served by Senior Companion volunteers. The information collection instrument proposed in this Notice will serve as the required template for grantees to use to provide two levels of information: (1) A row on the spreadsheet template corresponding to each individual client, without any personal information that could identify the individual; and (2) aggregate project level performance measures data for submission to CNCS. Grantees will complete the template, by transcribing information from the individual surveys completed by the clients and caregivers served by Senior Companion volunteers (required) and RSVP volunteers (optional) to the spreadsheet template.

Current Action

This is a new information collection request. The proposed standardized spreadsheet will incorporate all questions listed on the currently approved Independent Living Performance Measures Surveys for both clients and caregivers. Respondents will aggregate data on the proposed spreadsheet for submission to CNCS.

Type of Review: New.

Agency: Corporation for National and Community Service.

Title: Independent Living Surveys Performance Measures Aggregation Tool.

OMB Number: None.

Agency Number: None.

Affected Public: All grantees of the Senior Companion Program. Grantees of the RSVP Program that voluntarily adopt the Performance Measures Surveys.

Total Respondents: 350.

Frequency: Annual.

Average Time per Response: Averages 7 hours.

Estimated Total Burden Hours: 2,450.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 30, 2013.

Erwin Tan,

Senior Corps.

[FR Doc. 2013–02509 Filed 2–5–13; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0016]

Manual for Courts-Martial; Proposed Amendments

AGENCY: Joint Service Committee on Military Justice (JSC), DoD.

ACTION: Annual Review of the Manual for Courts-Martial, United States.

SUMMARY: Pursuant to Executive Order 12473—Manual for Courts-Martial, United States, 1984, and Department of Defense Directive 5500.17, Role and Responsibility of the Joint Service Committee (JSC) on Military Justice, the JSC is conducting an annual review of the Manual for Courts-Martial (MCM), United States.

The committee invites members of the public to suggest changes to the Manual for Courts-Martial. Please provide supporting rationale for any proposed changes.

DATES: Proposed changes must be received no later than April 8, 2013.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.*

Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 4800 Mark Center Drive, East Tower, Suite 02G09, Alexandria, VA 22350–3100.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Major Daniel C. Mamber, Chief of Joint Service Policy and Legislation Section, Air Force Military Justice Division, AFLOA/JAJM, 1500 West Perimeter Road, Suite 1130, Joint Base Andrews, Maryland 20762, 240–612–4828, email jsc_public_comments@pentagon.af.mil.

Dated: February 1, 2013.

Aaron Siegel,

Alternate OSD **Federal Register** *Liaison Officer, Department of Defense.*

[FR Doc. 2013–02636 Filed 2–5–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2013–ICCD–0009]

Agency Information Collection Activities; Comment Request; Private School Universe Survey 2013–16

AGENCY: Department of Education (ED), Institute of Education Sciences (IES).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 3501 *et seq.*), ED is proposing a revision of an existing information collection of a previously approved information collection.

DATES: Interested persons are invited to submit comments on or before April 8, 2013.

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–2013–ICCD–0009 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.

FOR FURTHER INFORMATION CONTACT: Electronically mail ICDocketMgr@ed.gov. Please do not send comments here.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. 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: Private School Universe Survey 2013–16.

OMB Control Number: 1850–0641.

Type of Review: a revision of an existing information collection of a previously approved information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 25,567.

Total Estimated Number of Annual Burden Hours: 6,410.

Abstract: The Private School Universe Survey (PSS) is the NCES collection of basic data from the universe of private elementary and secondary schools in the United States. The PSS is designed to gather biennial data on the total number of private schools, teachers, and students, along with a variety of related data, including: religious orientation; grade-levels taught and size of school; length of school year and of school day; total student enrollment by gender (K–12); number of high school graduates; whether a school is single-sexed or coeducational; number of teachers employed; program emphasis; and existence and type of its kindergarten program. The PSS includes all schools that are not supported primarily by public funds, that provide classroom instruction for one or more of grades K–12 or comparable ungraded levels, and that have one or more teachers. The PSS is also used to create a universe list of private schools that can be used as a sampling frame for NCES surveys of private schools. No substantive changes have been made to the survey or its procedures since its last approved PSS 2010–13. This clearance is for the 2013–14 and 2015–16 PSS data collections, and the 2015–16 PSS list- and area-frame building operations.

Dated: February 1, 2013.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2013–02676 Filed 2–5–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Board for Education Sciences; Meeting

AGENCY: U.S. Department of Education, Institute of Education Sciences.

ACTION: Notice of an open meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of an upcoming meeting of the National Board for Education Sciences. The notice also describes the functions of the Committee. Notice of this meeting is required by Section 10(a)(2) of the Federal Advisory Committee Act and is intended to notify the public of their opportunity to attend the meeting.

DATES: February 22, 2013.

TIME: 8:30 a.m. to 5:00 p.m. Eastern Standard Time.

ADDRESSES: 80 F Street NW., Room 100, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Ellie Pelaez, 555 New Jersey Avenue NW, Room 600 E, Washington, DC 20208; phone: (202) 219–0644; fax: (202) 219–1402; email: *Ellie.Pelaez@ed.gov*.

SUPPLEMENTARY INFORMATION: The National Board for Education Sciences is authorized by Section 116 of the Education Sciences Reform Act of 2002 (ESRA), 20 U.S.C. 9516. The Board advises the Director of the Institute of Education Sciences (IES) on, among other things, the establishments of activities to be supported by the Institute, on the funding for applications for grants, contracts, and cooperative agreements for research after the completion of peer review, and reviews and evaluates the work of the Institute.

On February 22, 2013, starting at 8:30 a.m., the Board will approve the agenda and hear remarks from the NBES Chair, Bridget Terry Long. John Easton, Director of IES, will swear in one newly appointed Board member and four reappointed Board members. John Easton and the Commissioners of IES's national centers will then give an overview of recent developments at IES.

From 10:00 to 11:15 a.m., Board members will hear from John Easton about new IES Research Programs. After opening remarks from Dr. Easton, the Board members will participate in roundtable discussion. A break will take place from 11:15 to 11:30 a.m.

From 11:30 a.m. to 1:00 p.m., the Board will consider what the common core of state standards means for education and IES. Following opening presentations by Richard Laine, Education Division Director at the National Governors Association Center for Best Practices, and Carmel Martin,

Assistant Secretary for Planning, Evaluation and Policy Development at the U.S. Department of Education, Board members will engage in roundtable discussion of the issues raised. The meeting will break for lunch from 1:00 to 2:00 p.m.

The Board meeting will resume from 2:00 to 3:00 p.m. for the members to discuss the topic, ''The Role of the Researcher in Dissemination.'' After opening remarks by Amber Winkler, Research Director at Thomas B. Fordham Institute, and Ruth Neild, Commissioner of the National Center for Education Evaluation, the Board will engage in roundtable discussion of the topic.

From 3:00 to 4:00 p.m., the Board will consider the topic, ''IES and the Major Education Research Associations.'' Kris Gutierrez and Judith Singer, NBES members, will provide the opening remarks and roundtable discussion will take place after.

An afternoon break will occur from 4:00 to 4:15 p.m.

From 4:15 to 4:45 p.m., the Board will discuss the Board's Executive Director position and the 2013 Annual Report. This discussion will be led by Bridget Terry Long, NBES Chair, and John Easton.

Between 4:45 and 5:00 p.m., there will be closing remarks and a consideration of next steps from the IES Director and NBES Chair, with adjournment scheduled for 5:00 p.m.

There will not be an opportunity for public comment. However, members of the public are encouraged to submit written comments related to NBES to Ellie Pelaez (see contact information above). A final agenda is available from Ellie Pelaez (see contact information above) and is posted on the Board Web site *http://ies.ed.gov/director/board/agendas/index.asp*. Individuals who will need accommodations for a disability in order to attend the meeting (e.g., interpreting services, assistance listening devices, or materials in alternative format) should notify Ellie Pelaez no later than February 8. We will attempt to meet requests for accommodations after this date but cannot guarantee their availability. The meeting site is accessible to individuals with disabilities.

Records are kept of all Board proceedings and are available for public inspection at 555 New Jersey Avenue NW, Room 602 K, Washington, DC 20208, from the hours of 9 a.m. to 5 p.m., Eastern Standard Time Monday through Friday.

Electronic Access to This Document: You may view this document, as well as other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *www.ed.gov/news/fed-register/index.html*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC area at (202) 512–0000.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to this official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *www.gpoaccess.gov/nara/index.html*

John Q. Easton,

Director, Institute of Education Science.

[FR Doc. 2013–02573 Filed 2–5–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Biomass Research and Development Technical Advisory Committee

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces an open meeting of the Biomass Research and Development Technical Advisory Committee. The Federal Advisory Committee Act (Pub. L.92–463, 86 Stat. 770) requires that this document be published in the **Federal Register**.

DATES:

February 27, 2012 1:00 p.m.–6:30 p.m.
February 28, 2012 9:00 a.m.–5:00 p.m.

ADDRESSES: American Geophysical Union, 2000 Florida Avenue NW, Washington, DC 20009.

FOR FURTHER INFORMATION CONTACT: Elliott Levine, Designated Federal Officer, Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; Email: *Elliott.Levine@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; Email: *rtiley@bcs-hq.com*.

SUPPLEMENTARY INFORMATION:

Purpose of Meeting: To provide advice and guidance that promotes research and development leading to the production of biobased fuels and biobased products.

Tentative Agenda: Agenda will include the following:

- Update on USDA Biomass R&D Activities
- Update on DOE Biomass R&D Activities
- Overview of DOE and USDA R&D Programs
- Overview of Other Biomass R&D Agency Programs

Public Participation: In keeping with procedures, members of the public are welcome to observe the business of the Biomass Research and Development Technical Advisory Committee. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, you must contact Elliott Levine by email at *Elliott.Levine@ee.doe.gov* or Roy Tiley at (410) 997–7778 ext. 220; Email: *rtiley@bcs-hq.com* at least 5 business days prior to the meeting. Members of the public will be heard in the order in which they sign up at the beginning of the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Co-chairs of the Committee will make every effort to hear the views of all interested parties. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. The Co-chairs will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of the meeting will be available for public review and copying at the following Web site: *http://biomassboard.gov/committee/meetings.html*.

Issued at Washington, DC, on January 30, 2013.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2013–02603 Filed 2–5–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC13–10–000]

Commission Information Collection Activities (FERC Form 6–Q); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A), the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information

collection, FERC Form 6–Q, Quarterly Financial Report of Oil Pipeline Companies.

DATES: Comments on the collection of information are due April 8, 2013.

ADDRESSES: You may submit comments (identified by Docket No. IC13–10–000) by either of the following methods:

- *eFiling at Commission's Web Site: http://www.ferc.gov/docs-filing/efiling.asp*
- *Mail/Hand Delivery/Courier:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE., Washington, DC 20426.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov/help/submission-guide.asp.* For user assistance contact FERC Online Support by email at *ferconlinesupport@ferc.gov*, or by phone at: (866) 208–3676 (toll-free), or (202) 502–8659 for TTY.

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov/docs-filing/docs-filing.asp.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov*, telephone at (202) 502–8663, and fax at (202) 273–0873.

SUPPLEMENTARY INFORMATION:

Title: FERC Form 6–Q (Quarterly Financial Report of Oil Pipeline Companies).

OMB Control No.: 1902–0206.

Type of Request: Three-year extension of the FERC Form 6–Q information collection requirements with no changes to the current reporting requirements.

Abstract: Under the Interstate Commerce Act (ICA),[1] the Commission is authorized and empowered to make investigations and to collect and record data to the extent FERC may consider to be necessary or useful for the purpose of carrying out the provisions of the ICA. FERC must ensure just and reasonable rates for transportation of crude oil and petroleum products by pipelines in interstate commerce.

The Commission uses the information collected by FERC Form 6–Q to carry out its responsibilities in implementing the statutory provisions of the ICA to include the authority to prescribe rules and regulations concerning accounts, records and memoranda, as necessary or appropriate. Financial accounting and reporting provides necessary information concerning a company's past performance and its future prospects. Without reliable financial statements prepared in accordance with the Commission's Uniform System of Accounts and related regulations, the Commission would be unable to accurately determine the costs that relate to a particular time period, service, or line of business.

The Commission uses data from the FERC Form 6–Q to assist in: (1) Implementation of its financial audits and programs, (2)continuous review of the financial condition of regulated companies, (3)assessment of energy markets, 4)rate proceedings and economic analyses, and (5)research for use in litigation.

Financial information reported on the quarterly FERC Form 6–Q provides FERC, as well as customers, investors and others, an important tool to help identify emerging trends and issues affecting jurisdictional entities within the energy industry. It also provides timely disclosures of the impacts that new accounting standards, or changes in existing standards, have on jurisdictional entities, as well as the economic effects of significant transactions, events, and circumstances. The reporting of this information by jurisdictional entities assists the Commission in its analysis of profitability, efficiency, risk and in its overall monitoring.

Type of Respondents: Oil Pipelines.

Estimate of Annual Burden:[2] The Commission estimates the total Public Reporting Burden for this information collection as:

FERC FORM 6–Q—QUARTERLY FINANCIAL REPORT OF OIL PIPELINE COMPANIES

Number of respondents (A)	Number of responses per respondent (B)	Total number of responses (A)×(B)=(C)	Average burden hours per response (D)	Estimated total annual burden (C)×(D)
155 (D)	3	465	150	69,750

The total estimated annual cost burden to respondents is $4,882,500 [69,750 hours * $70/hour[3] = $4,882,500].

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: January 30, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–02552 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

[1] 49 U.S.C. Part 1, Section 20, 54 Stat. 916.

[2] The Commission defines burden as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, reference 5 Code of Federal Regulations 1320.3.

[3] FY2013 Estimated Average Hourly Cost per FERC FTE, including salary + benefits.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–53–000]

Northern Natural Gas Company; Notice of Application

Take notice that on January 18, 2013, Northern Natural Gas Company (Northern), 1111 South 103rd Street, Omaha, Nebraska 68124, filed in Docket No. CP13–53–000, an application pursuant to section 7(c) of the Natural Gas Act (NGA), to amend its certificate

of public convenience and necessity to authorize it to construct and operate facilities to offload liquefied natural gas (LNG) at its Garner LNG storage facility (Garner Plant) for operational use throughout Northern's system, liquefy and deliver LNG to third parties on an interruptible basis from its Garner Plant and approval of the associated tariff sheets, all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Any questions regarding the applications should be directed to Michael T. Loeffler, Sr. Director, Certificates, Media and External Affairs, Northern Natural Gas Company, 1111 South 103rd Street, Omaha, Nebraska 68124, or call 402–398–7103; or by calling Donna Martens, Senior Regulatory Analyst at 402–398–7138.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below, file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 7 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on February 20, 2013.

Dated: January 30, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–02551 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 739–034]

Appalachian Power Company; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Application to amend shoreline management plan.

b. *Project No:* 739–034.

c. *Date Filed:* June 27, 2012.

d. *Applicant:* Appalachian Power Company.

e. *Name of Project:* Claytor Hydroelectric Project.

f. *Location:* The Claytor Hydroelectric Project is located on the New River in Pulaski County, Virginia.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Teresa Rogers, American Electric Power, Hydro Generation, P.O. Box 2021, Roanoke, VA 24022–2121, (540) 985–2441.

i. *FERC Contact:* Hillary Berlin at (202) 502–8915, or email: *hillary.berlin@ferc.gov.*

j. *Deadline for filing comments, motions to intervene, and protests:* March 4, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Secretary,

Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. Please include the project number (P–739–034) on any comments, motions, or recommendations filed.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. *Description of Request:* As required by article 414 of the December 27, 2011 Order Issuing New License, Appalachian Power filed a request to amend the approved shoreline management plan (SMP) for the project. Specifically, article 414 required amendments to provide clarification on the manner in which section 2.5.4(22), regarding dock replacement and maintenance, and any similar sections of the plan are to be implemented, and to provide a description of the criteria and justification that Appalachian Power will use in reviewing a request for a variance (section 3.3). A request to amend other sections of the SMP, resulting from consultation with Friends of Claytor Lake to resolve other issues with the plan, is also included in Appalachian Power's filing.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov,* for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above. Agencies may obtain copies of the application directly from the applicant.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214, respectively. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. *Filing and Service of Documents:* Any filing must (1) Bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

Dated: January 31, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–02574 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP13–489–000.
Applicants: Wyoming Interstate Company, L.L.C.
Description: WIC FL&U Filing effective March 1, 2013 to be effective 3/1/2013.
Filed Date: 1/29/13.
Accession Number: 20130129–5073.
Comments Due: 5 p.m. ET 2/11/13.

Docket Numbers: RP13–490–000.
Applicants: Arlington Storage Company, LLC.
Description: Arlington Storage Company, LLC—Compliance Filing Docket No. CP12–466–000 to be effective 4/1/2013.
Filed Date: 1/29/13.
Accession Number: 20130129–5122.
Comments Due: 5 p.m. ET 2/11/13.

Docket Numbers: RP13–491–000.
Applicants: Southern LNG Company, L.L.C.
Description: Dredging Surcharge Cost Adjustment—2013 to be effective 3/1/2013.
Filed Date: 1/30/13.
Accession Number: 20130130–5023.
Comments Due: 5 p.m. ET 2/11/13.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP13–73–002.
Applicants: Stingray Pipeline Company, L.L.C.
Description: Refile per Staff Instructions to be effective 12/1/2012.
Filed Date: 1/29/13.
Accession Number: 20130129–5160.
Comments Due: 5 p.m. ET 2/11/13.

Docket Numbers: RP13–80–002.
Applicants: Nautilus Pipeline Company, L.L.C.
Description: Refile at Staff Request to be effective 12/1/2012.
Filed Date: 1/29/13.
Accession Number: 20130129–5147.
Comments Due: 5 p.m. ET 2/11/13.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated January 30, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02651 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG13–12–000.
Applicants: Delano Energy Center, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Delano Energy Center, LLC.
Filed Date: 1/25/13.
Accession Number: 20130125–5077.
Comments Due: 5 p.m. ET 2/15/13.

Docket Numbers: EG13–13–000.
Applicants: Alpaugh 50, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Alpaugh 50, LLC.
Filed Date: 1/25/13.
Accession Number: 20130125–5174.
Comments Due: 5 p.m. ET 2/15/13.

Docket Numbers: EG13–14–000.
Applicants: Alpaugh North, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Alpaugh North, LLC.
Filed Date: 1/25/13.
Accession Number: 20130125–5175.
Comments Due: 5 p.m. ET 2/15/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER12–2124–000.
Applicants: Westar Energy, Inc.
Description: Supplement to the Triennial Market Power Report to be effective N/A.
Filed Date: 1/25/13.
Accession Number: 20130125–5093.
Comments Due: 5 p.m. ET 2/15/13.

Docket Numbers: ER13–780–002.
Applicants: New York Independent System Operator, Inc.
Description: NYISO refiling of errata to January 18, 2013 filing to be effective 3/20/2013.
Filed Date: 1/25/13.
Accession Number: 20130125–5197.
Comments Due: 5 p.m. ET 2/15/13.

Docket Numbers: ER13–802–000.
Applicants: New Energy Services LLC.
Description: New Energy Services, LLC Market Based Rate Tariff to be effective 3/1/2013.
Filed Date: 1/25/13.
Accession Number: 20130125–5202.
Comments Due: 5 p.m. ET 2/15/13.

Docket Numbers: ER13–803–000.
Applicants: MET MA LLC.
Description: Notice of Cancellation to be effective 1/25/2013.
Filed Date: 1/25/13.
Accession Number: 20130125–5203.
Comments Due: 5 p.m. ET 2/15/13.

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA12–4–000.
Applicants: BP Energy Company, BP West Coast Products LLC, Cedar Creek Wind Energy, LLC, Cedar Creek II, LLC, Flat Ridge 2 Wind Energy LLC, Flat Ridge Wind Energy, LLC, Fowler Ridge II Wind Farm LLC, Fowler Ridge III Wind Farm LLC, Fowler Ridge Wind Farm LLC, Goshen Phase II LLC, Long Island Solar Farm LLC, Mehoopany Wind Energy LLC, Rolling Thunder I Power Partners, LLC, Watson Cogeneration Company, and Whiting Clean Energy, Inc.
Description: Quarterly Land Acquisition Report of BP Energy Company, Inc. *et al.*
Filed Date: 1/28/13.
Accession Number: 20130128–5130.
Comments Due: 5 p.m. ET 2/19/13.

Docket Numbers: LA12–4–000.
Applicants: APDC, Inc., Atlantic Power Energy Services (US) LLC, Auburndale Power Partners, L.P., Cadillac Renewable Energy, LLC, Canadian Hills Wind, LLC, Delta Person Limited Partnership Frederickson Power L.P., Lake Cogen, Ltd., Manchief Power Company LLC, Meadow Creek Project Company LLC, Morris Cogeneration, LLC, Pasco Cogen, Ltd., Piedmont Green Power, LLC, Rockland Wind Farm LLC, Burley Butte Wind Park, LLC, Camp Reed Wind Park, LLC, Golden Valley Wind Park, LL,; Milner Dam Wind Park, LLC, Oregon Trail Wind Park, LLC, Payne's Ferry Wind Park, LLC, Pilgrim Stage Station Wind Park, LLC, Salmon Falls Wind Park, LLC, Thousand Springs Wind Park, LLC, Tuana Gulch Wind Park, LLC, and Yahoo Creek Wind Park, LLC.
Description: Quarterly Land Acquisition Report of APDC, Inc., *et al.*
Filed Date: 1/25/13.
Accession Number: 20130125–5239.
Comments Due: 5 p.m. ET 2/15/13.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf*. For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 28, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02655 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–70–000
Applicants: Dynegy Danskammer, L.L.C.
Description: Application for Approval under Section 203 of the Federal Power Act and Request for Expedited Action.
Filed Date: 1/29/13
Accession Number: 20130129–5202
Comments Due: 5 p.m. ET 2/19/13

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–2855–005; ER11–2856–005; ER11–2857–005; ER10–2722–003; ER10–2787–003; ER10–2532–003; ER10–2488–006
Applicants: Avenal Park LLC, Sand Drag LLC, Sun City Project LLC, Eurus Combine Hills I LLC, Eurus Combine Hills II LLC, Crescent Ridge LLC, Oasis Power Partners, LLC
Description: Notice of Change in Status of Avenal Park LLC, et al.
Filed Date: 1/29/13
Accession Number: 20130129–5196
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: ER11–3731–004
Applicants: LWP Lessee, LLC
Description: Amendment to December 26, 2012 Notice of Non-Material Change in Status of LWP Lessee, LLC.
Filed Date: 1/18/13
Accession Number: 20130118–5304
Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–685–001
Applicants: Public Service Company of New Mexico
Description: Addendum to Filing in Docket ER13–685–001 to be effective N/A.
Filed Date: 1/30/13
Accession Number: 20130130–5000
Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–821–000
Applicants: Scrubgrass Generating Company, L.P.

Description: Scrubgrass Generating Company, L.P. to be effective 3/30/2013.
Filed Date: 1/29/13
Accession Number: 20130129–5092
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: ER13–822–000
Applicants: Niagara Mohawk Power Corporation, New York Independent System Operator, Inc.
Description: SECI Agreement no. 923 between NiMo/New Athens Generating Company to be effective 3/31/2013.
Filed Date: 1/29/13
Accession Number: 20130129–5094
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: ER13–823–000
Applicants: Castleton Commodities Merchant Trading L.P.
Description: Notice of Succession to be effective 1/1/2013.
Filed Date: 1/29/13
Accession Number: 20130129–5123
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: ER13–824–000
Applicants: Southwest Power Pool, Inc.
Description: Revisions to Attachment X, Article 3 and Appendix E to be effective 3/30/2013.
Filed Date: 1/29/13
Accession Number: 20130129–5177
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: ER13–825–000
Applicants: ISO New England Inc., Holyoke Gas & Electric Department
Description: ISO New England Inc. and The City of Holyoke Gas and Electric Department submit a Notice of Cancellation of Small Generator Interconnection Agreement.
Filed Date: 1/30/13
Accession Number: 20130130–5100
Comments Due: 5 p.m. ET 2/20/13

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES13–16–000
Applicants: ITC Great Plains, LLC
Description: Application pursuant to Section 204 of the Federal Power Act and Part 34 of the regulations of the Federal Energy Regulatory Commission of ITC Great Plains, LLC for authorization to issue debt securities.
Filed Date: 1/29/13
Accession Number: 20130129–5200
Comments Due: 5 p.m. ET 2/19/13

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA12–4–000
Applicants: Alabama Electric Marketing, LLC, Big Sandy Peaker Plant, LLC, California Electric Marketing, LLC, Crete Energy Venture, LLC, CSOLAR IV South, LLC, High Desert Power Project, LLC, Kiowa Power Partners, LLC, Lincoln Generating Facility, LLC, New Covert Generating Company, LLC, New Mexico Electric Marketing, LLC, Rolling Hills Generating, L.L.C., Tenaska Alabama Partners, L.P., Tenaska Alabama II Partners, L.P., Tenaska Frontier Partners, Ltd., Tenaska Gateway Partners, Ltd., Tenaska Georgia Partners, L.P., Tenaska Power Management, LLC, Tenaska Power Services Co., Tenaska Virginia Partners, L.P., Texas Electric Marketing, LLC, TPF Generation Holdings, LLC, Wolf Hills Energy, LLC
Description: Quarterly Land Acquisition Report of Tenaska MBR Sellers.
Filed Date: 1/29/13
Accession Number: 20130129–5198
Comments Due: 5 p.m. ET 2/19/13

Docket Numbers: LA12–4–000
Applicants: Astoria Generating Company, L.P.
Description: Quarterly Land Acquisition Report of Astoria Generating Company, L.P.
Filed Date: 1/30/13
Accession Number: 20130130–5033
Comments Due: 5 p.m. ET 2/20/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 30, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02656 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–66–000
Applicants: Westwood Generation, LLC
Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Action of Westwood Generation, LLC.
Filed Date: 1/22/13
Accession Number: 20130122–5192
Comments Due: 5 p.m. ET 2/12/13

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER11–4267–004; ER11–4270–004; ER11–4269–005; ER11–4268–004; ER11–113–005; ER10–2682–004; ER12–1680–002 ER11–4694–001
Applicants: Algonquin Energy Services Inc., Algonquin Windsor Locks LLC, Algonquin Tinker Gen Co., Algonquin Northern Maine Gen Co., Sandy Ridge Wind, LLC, Granite State Electric Company, Minonk Wind, LLC, GSG 6, LLC
Description: Notice of Change in Status of Algonquin Energy Services Inc., et al.
Filed Date: 1/22/13
Accession Number: 20130122–5240
Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–674–001
Applicants: Midwest Independent Transmission System Operator, Inc.
Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35.17(b): 01–22–13 Errata re AIC ATXI Att O to be effective 1/1/2013.
Filed Date: 1/22/13
Accession Number: 20130122–5162
Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–783–000
Applicants: BP Energy Company
Description: BP Energy Company submits tariff filing per 35.13(a)(2)(iii: Revised Market-Based Rate Tariff to be effective 1/23/2013.
Filed Date: 1/22/13
Accession Number: 20130122–5159
Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–784–000
Applicants: Northern States Power Company, a Minnesota corporation
Description: Northern States Power Company, a Minnesota corporation submits tariff filing per 35.13(a)(2)(iii: 2013_01_22–SMMPA–LBA Meter Agrmt-540 to be effective 12/20/2012.
Filed Date: 1/22/13
Accession Number: 20130122–5174
Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–785–000
Applicants: FirstEnergy Generation, LLC
Description: FirstEnergy Generation, LLC submits tariff filing per

35.13(a)(2)(iii: Revised Market Based Rate Power Sales Tariff to be effective 12/23/2012.

Filed Date: 1/22/13

Accession Number: 20130122–5182

Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–786–000

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3485; Queue No. W2–039 to be effective 12/21/2012.

Filed Date: 1/22/13

Accession Number: 20130122–5185

Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–787–000

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii: Original Service Agreement No. 3487; Queue No. Y1–054 to be effective 12/21/2012.

Filed Date: 1/22/13

Accession Number: 20130122–5220

Comments Due: 5 p.m. ET 2/12/13

Docket Numbers: ER13–788–000

Applicants: J. Aron & Company

Description: J. Aron & Company submits tariff filing per 35.13(a)(2)(iii: 3rd Revised MBR to be effective 1/23/2013.

Filed Date: 1/22/13

Accession Number: 20130122–5224

Comments Due: 5 p.m. ET 2/12/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 22, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02654 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER13–281–001

Applicants: Star Energy Partners LLC

Description: Star Energy Partners LLC submits Notice of Non-Material Change in Status.

Filed Date: 1/30/13

Accession Number: 20130130–5166

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–435–001

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits NYISO Compliance Filing re: definition of the term ''blind trust'' in the OATT to be effective 1/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5223

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–437–001

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits NYISO Compliance Filing re: the term, ''blind trust'' in the ISO Agreement to be effective 1/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5225

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–772–000

Applicants: NorthWestern Corporation

Description: SA 576—WKN Montana II LGIA—1st Revised, Amended, 2nd Corrected Redline to be effective N/A.

Filed Date: 1/30/13

Accession Number: 20130130–5124

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–826–000

Applicants: RPA Energy, Inc.

Description: RPA Energy, Inc. to be effective 3/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5139

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–827–000

Applicants: Carolina Power & Light Company

Description: Service Agreement No. 328 under Carolina Power and Light OATT to be effective 1/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5140

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–828–000

Applicants: EverPower Wind Holdings, Inc.

Description: Notice of Cancellation to be effective 3/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5143

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–829–000

Applicants: Southwest Power Pool, Inc.

Description: 1628R4 Western Farmers Electric Cooperative NITSA NOA to be effective 1/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5152

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–830–000

Applicants: J.P. Morgan Ventures Energy Corporation

Description: Cost-Based Rate Compliance Filing to be effective 4/1/2013.

Filed Date: 1/30/13

Accession Number: 20130130–5158

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: ER13–831–000

Applicants: Carolina Power & Light Company

Description: Service Agreement No. 326 under Carolina Power and Light OATT to be effective 1/1/2013 under ER13–831 Filing Type: 10

Filed Date: 1/30/13

Accession Number: 20130130–5165

Comments Due: 5 p.m. ET 2/20/13

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES11–40–002

Applicants: Entergy Services, Inc., Entergy Arkansas, Inc., Entergy Gulf States Louisiana, L.L.C., Entergy Louisiana, LLC, Entergy Mississippi, Inc., Entergy New Orleans, Inc., Entergy Texas, Inc.

Description: Response to Commission Request for Additional Information of Entergy Services, Inc.

Filed Date: 1/22/13

Accession Number: 20130122–5382

Comments Due: 5 p.m. ET 2/5/13

Take notice that the Commission received the following land acquisition reports:

Docket Numbers: LA12–4–000

Applicants: AEE2, L.L.C., AES Alamitos, LLC, AES Armenia Mountain Wind, LLC, AES Beaver Valley, L.L.C., AES Creative Resources, L.P., AES Eastern Energy, L.P., AES Energy Storage, LLC, AES ES Westover, LLC, AES Huntington Beach, L.L.C., AES Laurel Mountain, LLC, AES Redondo Beach, L.L.C., Condon Wind Power, LLC, Lake Benton Power Partners, LLC, Mountain View Power Partners, LLC Mountain View Power Partners IV, LLC, Storm Lake Power Partners II, LLC, Indianapolis Power & Light Company,

The Dayton Power and Light Company, DPL Energy, Inc.

Description: Report of Generation Site Acquisitions for Q4 2012 of The AES Corporation.

Filed Date: 1/30/13

Accession Number: 20130130–5193

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: LA12–4–000

Applicants: ArcLight Energy Marketing, LLC, Panther Creek Power Operating, LLC, Scrubgrass Generating Company, L.P.

Description: Quarterly Land Acquisition Report of ArcLight Energy Marketing, LLC, et al.

Filed Date: 1/30/13

Accession Number: 20130130–5205

Comments Due: 5 p.m. ET 2/20/13

Docket Numbers: LA12–4–000

Applicants: EC&R O&M, LLC, Munnsville Wind Farm, LLC, Pioneer Trail Wind Farm, LLC, Settlers Trail Wind Farm, Stony Creek Wind Farm, LLC and Wildcat Wind Farm I, LLC

Description: Quarterly Land Acquisition Report of E.ON CRNA Sellers.

Filed Date: 1/30/13

Accession Number: 20130130–5228

Comments Due: 5 p.m. ET 2/20/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

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Dated: January 30, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02657 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: CP13–57–000
Applicants: Dominion Transmission, Inc.
Description: Application to Abandon Rate Schedules X–15 and X–58.
Filed Date: 1/23/13
Accession Number: 20130123–5200
Comments Due: 5 p.m. ET 2/5/13

Docket Numbers: RP13–348–000
Applicants: El Paso Natural Gas Company, L.L.C.
Description: El Paso Natural Gas Company, L.L.C. submits Compliance Filing to show an amended summary to the Operational Purchases and Sales Report.
Filed Date: 1/24/13
Accession Number: 20130124–5155
Comments Due: 5 p.m. ET 2/5/13

Docket Numbers: RP13–468–000
Applicants: Trailblazer Pipeline Company LLC
Description: Change Penalty Refund from Quarterly to Annually to be effective 2/22/2013
Filed Date: 1/22/13
Accession Number: 20130122–5234
Comments Due: 5 p.m. ET 2/4/13

Docket Numbers: RP13–469–000
Applicants: CenterPoint Energy—Mississippi River T
Description: Fuel Adjustment Filing of CenterPoint Energy—Mississippi River Transmission, LLC
Filed Date: 1/22/13
Accession Number: 20130122–5237
Comments Due: 5 p.m. ET 2/4/13

Docket Numbers: RP13–470–000
Applicants: Puget Sound Energy
Description: Amendment No. 13 to be effective 12/27/2012
Filed Date: 1/22/13
Accession Number: 20130122–5243
Comments Due: 5 p.m. ET 2/4/13

Docket Numbers: RP13–476–000
Applicants: Black Marlin Pipeline Company
Description: Petition of Black Marlin Pipeline Company under New Docket for Extension of Exemptions from Certain Tariff Provisions
Filed Date: 1/25/13
Accession Number: 20130125–5160
Comments Due: 5 p.m. ET 2/6/13

Docket Numbers: RP13–477–000
Applicants: Iroquois Gas Transmission System, L.P.
Description: 01/25/13 Negotiated Rates—JP Morgan Ventures Energy Corp (HUB) 6025–89 to be effective 1/24/2013
Filed Date: 1/25/13
Accession Number: 20130125–5166
Comments Due: 5 p.m. ET 2/6/13

Docket Numbers: RP13–478–000
Applicants: Iroquois Gas Transmission System, L.P.
Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 01/25/13 Negotiated Rates—Tenaska Gas Storage (HUB)—1175–89 to be effective 1/24/2013
Filed Date: 1/25/13
Accession Number: 20130125–5173
Comments Due: 5 p.m. ET 2/6/13

Docket Numbers: RP13–479–000
Applicants: Northwest Pipeline GP
Description: NWP LS Rate Schedule Cleanup to be effective 2/25/2013
Filed Date: 1/25/13
Accession Number: 20130125–5189
Comments Due: 5 p.m. ET 2/6/13

Docket Numbers: RP13–480–000
Applicants: Rockies Express Pipeline LLC
Description: Neg Rate 2013–01–25 Encana to be effective 2/1/2013
Filed Date: 1/28/13
Accession Number: 20130128–5098
Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–481–000
Applicants: Northern Natural Gas Company
Description: 20121102 Waiver of Trial by Jury to be effective 2/28/2013
Filed Date: 1/28/13
Accession Number: 20130128–5156
Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–482–000
Applicants: Questar Overthrust Pipeline Company
Description: Sec. 6.16 Request to Acquire Released Capacity to be effective 3/1/2013
Filed Date: 1/28/13
Accession Number: 20130128–5191
Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–483–000
Applicants: Questar Southern Trails Pipeline Company
Description: Sec. 7.16 Request to Acquire Released Capacity to be effective 3/1/2013
Filed Date: 1/28/13
Accession Number: 20130128–5192
Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–484–000
Applicants: Questar Pipeline Company
Description: Questar Pipeline Company submits tariff filing per 154.203: Negotiated Rate—Berry Petroleum to be effective 2/7/2013
Filed Date: 1/28/13
Accession Number: 20130128–5216

Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–485–000

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 01/28/13 Negotiated Rates—Hess Corporation (HUB)—1365–89 to be effective 1/27/2013

Filed Date: 1/28/13

Accession Number: 20130128–5217

Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–486–000

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 01/28/13 Negotiated Rates—JP Morgan Ventures Energy Corp (HUB)—6025–89 to be effective 1/26/2013

Filed Date: 1/28/13

Accession Number: 20130128–5220

Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–487–000

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 01/28/13 Negotiated Rates—Sequent Energy Management (HUB)—3075–89 to be effective 1/25/2013

Filed Date: 1/28/13

Accession Number: 20130128–5225

Comments Due: 5 p.m. ET 2/11/13

Docket Numbers: RP13–488–000

Applicants: Iroquois Gas Transmission System, L.P.

Description: Iroquois Gas Transmission System, L.P. submits tariff filing per 154.204: 01/28/13 Negotiated Rates—United Energy Trading (HUB)—5095–89 to be effective 1/25/2013

Filed Date: 1/28/13

Accession Number: 20130128–5226

Comments Due: 5 p.m. ET 2/11/13

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated January 29, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02658 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC13–64–000

Applicants: Orange and Rockland Utilities, Inc.

Description: Application of Orange and Rockland Utilities, Inc. for an order pursuant to Section 203 of the Federal Power Act.

Filed Date: 1/18/13

Accession Number: 20130118–5306

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: EC13–65–000

Applicants: NGP Blue Mountain I LLC

Description: Application for Authorization for Disposition of Jurisdictional Facilities and Request for Expedited Treatment of NGP Blue Mountain I LLC.

Filed Date: 1/18/13

Accession Number: 20130118–5310

Comments Due: 5 p.m. ET 2/8/13

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2984–008

Applicants: Merrill Lynch Commodities, Inc.

Description: Notice of Non-Material Change in Status of Merrill Lynch Commodities, Inc.

Filed Date: 1/18/13

Accession Number: 20130118–5305

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER10–3117–002; *ER10–3115–001*

Applicants: Lea Power Partners, LLC, Waterside Power, LLC

Description: Notice of change in status of Lea Power Partners, LLC, et al.

Filed Date: 1/18/13

Accession Number: 20130118–5260

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER11–4105–001

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits response to the December 13, 2012 deficiency letter.

Filed Date: 1/18/13

Accession Number: 20130118–5270

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER12–2536–002

Applicants: Frontier El Dorado Refining LLC

Description: Notice of Non-Material Change in Status of Frontier El Dorado Refining LLC.

Filed Date: 1/18/13

Accession Number: 20130118–5224

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER12–2542–001

Applicants: Prairie Rose Wind, LLC

Description: Notice of Change in Status of Prairie Rose Wind, LLC.

Filed Date: 1/18/13

Accession Number: 20130118–5217

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER12–480–005

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits tariff filing per 35: 01–18–13 Attachment FF–6 Errata Compliance to be effective 6/1/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5176

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–351–001

Applicants: AES Huntington Beach, L.L.C.

Description: AES Huntington Beach, L.L.C. submits tariff filing per 35: Compliance Filing Under Docket ER13–351 to be effective 1/9/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5166

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–522–001

Applicants: Northern Indiana Public Service Company

Description: Amendment of CIAC Agreement Filing to be effective 12/7/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5003

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–538–001

Applicants: Consumers Energy Company

Description: Consumers Energy Company submits tariff filing per 35.17(b): Consumers Energy Company—MBR to be effective 12/11/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5180

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–578–001

Applicants: Genesee Power Station Limited Partnership

Description: Genesee Power Station Limited Partnership submits tariff filing per 35.17(b): Genesee Power Station—MBR to be effective 12/19/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5223

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–579–001

Applicants: Grayling Generation Station Limited Partnership

Description: Grayling Generation Station Limited Partnership submits tariff filing per 35.17(b): Grayling Generating Station—MBR to be effective 12/20/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5242

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–580–001

Applicants: Dearborn Industrial Generation, L.L.C.

Description: Dearborn Industrial Generation, L.L.C. submits tariff filing per 35.17(b): Dearborn Industrial Gen—MBR to be effective 12/20/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5212

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–581–001

Applicants: CMS Generation Michigan Power, LLC

Description: CMS Generation Michigan Power, LLC submits tariff filing per 35.17(b): CMS Generation Michigan Power—MBR to be effective 12/20/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5171

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–610–001

Applicants: Northern Indiana Public Service Company

Description: Amendment to Pending CIAC Agreement Filing to be effective 12/22/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5005

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–777–000

Applicants: PJM Interconnection, L.L.C.

Description: Queue Nos. N15, P10, and P10/Y2–043; 1st Rev. Svc Agreement Nos. 2199, et al to be effective 12/18/2012.

Filed Date: 1/18/13

Accession Number: 20130118–5008

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–778–000

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: SA 2503 GRE–OTP Hudson 115kV TLIA to be effective 1/19/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5072

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–779–000

Applicants: SmartEnergy Holdings, LLC

Description: SmartEnergy Holdings, LLC submits tariff filing per 35.12: SmartEnergy Holdings Market Based Rate Tariff to be effective 2/11/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5249

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–780–000

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits tariff filing per 35: NYISO tariff filing to set forth proposed interface pricing rules to be effective 3/30/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5255

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–781–000

Applicants: NorthWestern Corporation

Description: NorthWestern Corporation submits tariff filing per 35.13(a)(2)(iii: SA 654—MDT Gallatin Canyon Turning Lanes to be effective 1/19/2013.

Filed Date: 1/18/13

Accession Number: 20130118–5257

Comments Due: 5 p.m. ET 2/8/13

Docket Numbers: ER13–782–000

Applicants: ITC Arkansas LLC, ITC Texas LLC, ITC Louisiana LLC, ITC Mississippi LLC

Description: Application of ITC Arkansas LLC, et. al., under FPA Section 205 for approval for the accounting and ratemaking treatment for certain pension and post-retirement welfare plan costs.

Filed Date: 1/18/13

Accession Number: 20130118–5303

Comments Due: 5 p.m. ET 2/8/13

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES13–15–000

Applicants: Rockland Electric Company

Description: Application of Rockland Electric Company for an order pursuant to Section 204 of the Federal Power Act under ES13–15.

Filed Date: 1/18/13

Accession Number: 20130118–5307

Comments Due: 5 p.m. ET 2/8/13

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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Dated: January 22, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02653 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AC13–35–000]

PPL Colstrip I, LLC, PPL Colstrip II, LLC, PPL Montana, LLC; Notice of Filing

Take notice that on December 21, 2012, PPL Colstrip I, LLC (PPL Colstrip I), PPL Colstrip II, LLC (PPL Colstrip II) and PPL Montana, LLC (PPL Montana) (collectively, the PPL Companies) submitted to the Federal Energy Regulatory Commission (Commission) a request for waivers of Parts 41, 101 and 141 of the Commission's regulations concerning accounting and reporting requirements, except for sections 141.14 and 141.15. PPL Colstrip I requests such waivers effective as of the effective date of its first jurisdictional tariff on September 1, 2005, while PPL Colstrip II and PPL Montana request such waivers effective as of January 1, 2000. PPL Companies argue such waivers are requested in order to avoid the need for these entities to file FERC Form No. 1, FERC Form No. 3–Q and meet other regulatory and accounting requirements imposed by these Parts from the later of the dates their previously-granted waivers expired (for PPL Colstrip II and PPL Montana as of January 2000) or when their respective first jurisdictional tariffs became effective (for PPL Colstrip I as of September 1, 2005). PPL Companies argues that PPL Colstrip I and II have never made any jurisdictional sales. PPL Montana has made jurisdictional sales only pursuant to its market-based rate tariff. Accordingly, PPL Montana and PPL Colstrip II have not made any sales at cost-based rates pursuant to the OATT that they had on file, which now has been terminated.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 or 385.214). Protests will be considered by the Commission in determining the

[1] Letter order in ER12–2597–000 issued November 5, 2012.

appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on February 28, 2013.

Dated: January 31, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–02575 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–797–000]

EBRFUEL, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of EBRFUEL, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is February 19, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 29, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02659 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–802–000]

New Energy Services LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of New Energy Services LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is February 19, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at http://www.ferc.gov. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 29, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02660 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–826–000]

RPA Energy, Inc.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of RPA Energy, Inc.'s application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is February 20, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 31, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02662 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER13–821–000]

Scrubgrass Generating Company, L.P.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of Scrubgrass Generating Company, L.P.'s application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is February 20, 2013.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 31, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02661 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD12–12–000]

Coordination between Natural Gas and Electricity Markets; Supplemental Notice of Technical Conference

As announced in the Notice issued on December 7, 2012,[1] the Federal Energy Regulatory Commission (Commission) staff will hold a technical conference on Wednesday, February 13, 2013 from 9:00 a.m. to approximately 5:00 p.m. to discuss information sharing and communications issues between natural gas and electric power industry entities. The conference will be held at the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. The agenda and list of roundtable participants for this conference is attached. This conference is free of charge and open to the public. Commission members may participate in the conference.

If you have not already done so, those who plan to attend the technical conference are strongly encouraged to complete the registration form located at: *https://www.ferc.gov/whats-new/registration/gas-elec-mkts-02-13-13-form.asp.* There is no deadline to register to attend the conference.

The technical conference will not be transcribed. However, there will be a free webcast of the conference. The

[1] Coordination between Natural Gas and Electricity Markets, Docket No. AD12–12–000 (December 7, 2012) (Notice Of Request for Comments and Technical Conference) (*http://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=13126954*);

webcast will allow persons to listen to the technical conference, but not participate. Anyone with Internet access who wants to listen to the conference can do so by navigating to the Calendar of Events at *www.ferc.gov* and locating the technical conference in the Calendar. The technical conference will contain a link to its webcast. The Capitol Connection provides technical support for the webcast and offers the option of listening to the meeting via phone-bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or call 703–993–3100.[2]

Notice is also hereby given that the discussions at the conference may address matters at issue in the following Commission proceeding(s) that are either pending or within their rehearing period: ISO New England Inc., Docket No. ER13–356–000.

Information on the technical conference will be posted on the Web site *http://www.ferc.gov/industries/electric/indus-act/electric-coord.asp,* as well as the Calendar of Events on the Commission's web site, *http://www.ferc.gov,* prior to the conference.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about the technical conference, please contact:

Caroline Daly (Technical Information), Office of Energy Policy and Innovation, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8931, *Caroline.Daly@ferc.gov.*

Anna Fernandez (Legal Information), Office of General Counsel, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–6682, *Anna.Fernandez@ferc.gov.*

Sarah McKinley (Logistical Information), Office of External Affairs, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8004, *Sarah.McKinley@ferc.gov.*

Dated: January 29, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02652 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

[2] The webcast will continue to be available on the Calendar of Events on the Commission's Web site *www.ferc.gov* for three months after the conference.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. P–14471–000]

West Street Hydro, Inc.; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

On December 10, 2012, West Street Hydro, Inc., filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Ashuelot River Dam Hydroelectric Project (project) to be located on the Ashuelot River, near the City of Keene, Cheshire County, New Hampshire. The sole purpose of a preliminary permit, if issued, is to grant the permit holder priority to file a license application during the permit term. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise enter upon lands or waters owned by others without the owners' express permission.

The proposed project would consist of: (1) The existing 160-foot-long, 16-foot-high, stone-masonry Ashuelot Park Dam with a 134-foot-long spillway; (2) an existing 34-acre impoundment with a normal maximum water surface elevation of 472 feet above mean sea level; (3) a new intake structure; (4) a new powerhouse containing two 43-killowatt (kW) turbine-generating units for a total installed capacity of 86 kW; (5) a new tailrace; (6) a new 330-foot-long, 34.5-kilovolt transmission line; and (7) appurtenant facilities. The estimated annual generation of the project would be 360 megawatt-hours.

Applicant Contact: Mr. Kenneth A. Stewart, West Street Hydro, Inc., 20 Central Square, Keene, NH 03431; phone: (603) 352–2448.

FERC Contact: Michael Watts; phone: (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Competing applications and notices of intent must meet the requirements of 18 CFR 4.36. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and seven copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

More information about this project, including a copy of the application, can be viewed or printed on the ''eLibrary'' link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–14471) in the docket number field to access the document. For assistance, contact FERC Online Support.

Dated: January 30, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–02550 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to

respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e) (1) (v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped chronologically, in ascending order. These filings are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC, Online Support at FERCOnlineSupport@ferc.gov or toll free at (866)208–3676, or for TTY, contact (202)502–8659.

Docket No.	Filed Date	Presenter or requester
Prohibited		
1. P–2503–000	01–14–13	David Nett.
2. RM10–23–000	01–22–13	Patrick Cullen.
Exempt		
1. CP12–495–000	01–10–13	FERC Staff.[1]
2. P–14447–000	01–15–13	FERC Staff.[2]
3. P–12790–000	01–22–13	FERC Staff.[3]
4. CP13–8–000	01–23–13	U.S. Congress.[4]
5. CP07–52–000, CP07–53–000, CP07–53–001	01–23–13	Mayor Stan Choptiany.

[1] Telephone record.
[2] Telephone record.
[3] Email record.
[4] Letter signed by Hons. Benjamin L. Cardin, Steny Hoyer, C.A. Dutch Ruppersberger, Barbara A. Mikulski, Elijah E. Cummings and John Sarbanes.

Dated: January 29, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–02663 Filed 2–5–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0014; FRL–9377–1]

Product Cancellation Order for Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces EPA's order for the cancellations, voluntarily requested by the registrants and accepted by the Agency, of the products listed in Table 1 and Table 2 of Unit II., pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). This cancellation order follows a July 6, 2012 **Federal Register** Notice of Receipt of Requests from the registrants listed in Table 3 of Unit II., to voluntarily cancel these product registrations. In the July 6, 2012 notice, EPA indicated that it would issue an order implementing the cancellations, unless the Agency received substantive comments within the 180 day comment period that would merit its further review of these requests, or unless the registrants withdrew their requests. The Agency received one comment on the notice but it did not merit its further review of the request. Further, the registrants did not withdraw their requests. Accordingly, EPA hereby issues in this notice a cancellation order granting the requested cancellations. Any distribution, sale, or use of the products subject to this cancellation order is permitted only in accordance with the terms of this order, including any existing stocks provisions.

DATES: The cancellations are effective February 6, 2013.

FOR FURTHER INFORMATION CONTACT: John W. Pates, Jr., Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8195; email address: *pates.john@epa.gov@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2010–0014, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), EPA West Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What action is the agency taking?

This notice announces the cancellation, as requested by registrants, of 340 products registered under FIFRA section 3. These registrations are listed in sequence by registration number (or company number and 24(c) number) in Tables 1 and 2 of this unit.

TABLE 12—PRODUCT CANCELLATIONS

EPA Registration No.	Product name	Chemical name
000100–00863	Sentinel 40WG Turf Fungicide	Cyproconazole.
000100–00874	Sentinel 40 WG for Repackaging Use Only	Cyproconazole.
000352–00712	Dupont Throttle MP Herbicide	Sulfometuron, Sulfentrazone, Chlorsulfuron.
000527–00106	ML–13G	Poly(oxy-1,2- ethanediyl (dimethy limino)-1,2- ethanediyl(dimethy limino)-1,2- ethanediyl dichloride).
000527–00122	ML–8S	Poly(oxy-1,2- ethanediyl(dimethy limino)-1,2- ethanediyl(dimethy limino)-1,2- ethanediyl dichloride).
000527–00127	CS–EZ	Poly(oxy-1,2- ethanediyl(dimethy limino)-1,2- ethanediyl(dimethy limino)-1,2- ethanediyl dichloride).
001903–00028	Petco Ear Mite Remedy	Pyrethrins, Piperonyl butoxide.
002724–00616	Speer Dairy and Livestock RTU Spray	Piperonyl butoxide, Pyrethrins.
003090–00165	Sanitized Brand T96–21	Triclosan.
005204–00001	Biomet TBTO	Tributyltin oxide.
005383–00127	Microbanish R	Triclosan.
009339–00012	Flextin Wood Treatment Concentrate	Tributyltin oxide.
009339–00014	Flexgard Waterbase Preservative	Tributyltin oxide.
009688–00300	RG Indoor Insect Control	Piperonyl butoxide, Pyrethrins.
010088–00070	Bio-Cide	Carbamodithioic acid, methyl-, monopotassium salt, Carbamodithioic acid, cyano-, disodium salt.
040849–00014	Enforcer Flea and Tick Shampoo for Pets	MGK 264, Piperonyl butoxide, Pyrethrins.
040849–00033	Enforcer Ant & Roach Killer III	MGK 264, Pyrethrins, Permethrin.
040849–00034	Enforcer Flea & Tick Spray for Pets II	Piperonyl butoxide, Permethrin, Pyrethrins.
045385–00089	Cenol Space and Contact Spray	Phenothrin, Tetramethrin.
047000–00044	Home-Garden and Pet Insecticide	MGK 264, Piperonyl butoxide, Pyrethrins.
050600–00012	Alas-478	Phosphoric acid, Benzenesulfonic acid, C10–16-alkyl derivs.
058687–00001	Chlorine—Liquified Gas Under Pressure	Chlorine.
059807–00013	Pyriproxyfen 11.23% Insect Growth Regulator	Pyriproxyfen.
063191–00010	St. Gabriel Laboratories Hot Pepper Wax Insect Repellent.	Capasaicin.
070385–00002	Microban Institutional Spray X–580	Bromine, MGK–264, Piperonyl butoxide, Pyrethrins, o- Phenylphenol, Benzenemethanamini um, N,N-dimethyl-N- (2-(2-(4-(1,1,3,3-tetramethylbutyl)p henoxy)ethoxy)ethy l)-, chloride.
CO020008	Distinct Herbicide	Diflufenzopyr- sodium Dicamba, sodium salt.
MA070001	Dual Magnum	S-Metolachlor.
WA030014	WIN–FLO 4F	Pentachloronitroben zene.
WA910013	Clean Crop Phorate 20G	Phorate.

Table 2 contains a list of registrations for which companies paying at one of the maintenance fee caps requested cancellation in the FY 2012 maintenance fee billing cycle. Because maintaining these registrations as active would require no additional fee, the Agency is treating these requests as voluntary cancellations under 6(f)(1).

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES

EPA Registration No.	Product name	Chemical name
000100–00897	Zephyr 0.15 EC Miticide/insecticide	Abamectin.
000100–00902	Emamectin Benzoate Technical	Emamectin benzoate.
000100–01109	Cyper EC Insecticide	Cypermethrin.
000100–01138	Thiolux Jet	Sulfur.
000100–01197	Azoxystrobin Mold-Retardant 2.08 SC	Azoxystrobin.
000100–01223	Tecto MP 340	Thiabendazole.
000100–01229	Azo-Shield	Azoxystrobin.
000100–01233	Propi-Shield	Propiconazole.
000100–01234	Cypro-Shield	Cyproconazole.
000100–01237	Fludi-Shield	Fludioxonil.
000100–01252	Tecto-Shield MP 100	Thiabendazole.
000100–01255	Difeno-Shield	Difenoconazole.
000228–00160	Riverdale 3 Plus 3 Amine	2,4–D, dimethylamine salt; MCPP-p, DMA salt.
000228–00220	Riverdale 1.25% Hexazinone Liquid Ready-To-Use Weed and Brush Killer.	Hexazinone.
000228–00221	Riverdale 2D + 2DP Amine	2,4–D, dimethylamine salt; 2,4–DP-p, DMA salt.
000228–00230	Riverdale 1% Bromacil Granular Weed Killer	Bromacil.
000228–00231	Riverdale 2% Bromacil Granular Weed Killer	Bromacil.
000228–00232	Riverdale 1% Bromacil Granular Weed Killer	Bromacil.
000228–00240	Riverdale Liquid Chlorine Sanitizer	Sodium hypochlorite.
000228–00241	Riverdale 2.5% Bromacil Liquid Ready-To-Use Weed Killer.	5-Bromo-3-sec-butyl-6-methyluracil, lithium salt.
000228–00263	Riverdale Super Green Weed and Feed	2,4–D, 2-ethylhexyl ester.
000228–00290	Riverdale MCPA–6 Amine	MCPA, dimethylamine salt.

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES—Continued

EPA Registration No.	Product name	Chemical name
000228–00358	Esteron 99 Concentrate Herbicide	2,4–D, 2-ethylhexyl ester.
000228–00364	Riverdale Credit Herbicide	Glyphosate- isopropylammonium.
000228–00375	Riverdale Corsair Selective Herbicide	Chlorsulfuron.
000228–00384	Riverdale Tahoe 3A Herbicide	Triclopyr, triethylamine salt.
000228–00385	Riverdale Tahoe 4E Herbicide	Acetic acid, ((3,5,6-trichloro- 2-pyridinyl)oxy)-, 2-butoxyethyl ester.
000228–00394	Riverdale Resound 720	Chlorothalonil.
000228–00396	Riverdale Banderole Fungicide	Propiconazole.
000228–00398	Riverdale Endurance Herbicide	Prodiamine.
000228–00399	Riverdale Predict Herbicide	Norflurazon.
000228–00437	Bifenthrin 0.029% Plus Fertilizer	Bifenthrin.
000228–00438	Bifenthrin 7.9% FL Nursery	Bifenthrin.
000228–00439	Bifenthrin P1 Granular Insecticide	Bifenthrin.
000228–00450	Menace PL Granular Insecticide	Bifenthrin.
000228–00452	Menace GC Granular Insecticide	Bifenthrin.
000228–00454	Menace Nursery Granular Insecticide	Bifenthrin.
000228–00456	Proclipse 65 WDG	Prodiamine.
000228–00481	Bifenthrin 0.058% Granular Insecticide	Bifenthrin.
000228–00482	Bifenthrin 0.115% Granular	Bifenthrin.
000228–00486	Mantra 2F Greenhouse and Nursery Insecticide	Imidacloprid.
000228–00497	Bifenthrin 0.2% Granular	Bifenthrin.
000228–00518	Tahoe 3A Herbicide	Triclopyr, triethylamine salt.
000228–00519	Menace GC 0.058% Plus Fertilizer	Bifenthrin.
000228–00532	Imidacloprid 4.6 F PCO	Imidacloprid.
000228–00550	ETI 108 10 H	Dithiopyr.
000228–00556	Menace 25 MC	Bifenthrin.
000228–00559	NUP 06211 GC Insecticide	Bifenthrin, Imidacloprid.
000228–00560	NUP 06211	Bifenthrin, Imidacloprid.
000228–00561	Trooper 101 Mixture Herbicide	Picloram; 2,4–D, Triisopropanolamine salt.
000228–00574	Atera GC Granular Insecticide	Bifenthrin, Imidacloprid.
000228–00575	Atera LC Granular Insecticide	Bifenthrin, Imidacloprid.
000228–00576	Atera 0.36 GC Granular Insecticide	Bifenthrin, Imidacloprid.
000228–00577	Atera 0.36 LC Granular Insecticide	Bifenthrin, Imidacloprid.
000228–00578	Atera 0.3 GC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00579	Atera 0.3 LC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00580	Atera 0.225 GC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00581	Atera 0.225 LC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00582	Atera 0.18% GC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00583	Atera 0.18% LC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00584	Atera 0.15% GC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00585	Atera 0.15% LC Fertilizer Insecticide	Bifenthrin, Imidacloprid.
000228–00598	Nufarm Bifenthrin Pro 2	Bifenthrin.
000228–00605	Nufarm Permethrin Pro	Permethrin.
000228–00622	Chlorpyrifos SPC 0.5% MCB Insecticide	Chlorpyrifos.
000228–00634	Quinclorac G-Pro 75 DF	Quinclorac.
000228–00645	Oxadiazon E-Pro Granular Herbicide	Oxadiazon.
000228–00646	Mepiquat E-Ag Plant Growth Regulator	Mepiquat chloride.
000228–00648	T-Pac E-Pro EC Plant Growth Regulator	Trinexapac-ethyl.
000228–00650	ETI 106 01 I—NC	Abamectin.
000228–00651	ETI 106 01 I—C	Abamectin.
000228–00663	ETI 105 01 H	Oxyfluorfen.
000228–00664	ETI 114 01 H	Nicosulfuron.
000228–00677	ETI 114 02 H	Nicosulfuron.
000264–00380	Prep Brand Plant Regulator for Cotton	Ethephon.
000264–00686	Tribute Solo WG32 Herbicide	Foramsulfuron; Iodosulfuron-methyl-sodium.
000264–00732	Sencor 70% Wettable Powder Sugarcane Herbicide.	Metribuzin.
000264–00821	Ginstar (R) 4.5 SC Cotton Defoliant	Diuron; Thidiazuron.
000264–00828	Gaucho 600 SC Insecticide	Imidacloprid.
000264–00857	NTN 33893 Liquid Ant Bait	Imidacloprid.
000264–00962	Gaucho 480 FS Flowable	Imidacloprid.
000264–00963	Gaucho 75 ST FS Insecticide	Imidacloprid.
000264–01037	RTP 072006 Liquid Ant Bait	Imidacloprid.
000264–01058	RTP 017495	Imidacloprid.
000264–01110	Aeris Votivo	Imidacloprid; Thiocarb; Bacillus firmus strain I–1582.
000524–00370	Roundup L & G Concentrate Grass & Weed Killer	Glyphosate- isopropylammonium.
000524–00440	Roundup Rainfast Herbicide	Glyphosate- isopropylammonium.
000524–00526	MON 37525W Herbicide MON 37525 NC	Sulfosulfuron.
000524–00541	MON 78736 Herbicide	Glyphosate- isopropylammonium; triclopyr, triethylamine salt.
000524–00542	MON 78783 Herbicide	Glyphosate- isopropylammonium; triclopyr, triethylamine salt.
000524–00546	MON 79158 Herbicide	Diquat dibromide; Glyphosate- isopropylammonium; Imazapic-ammonium.
000524–00547	MON 78868 Herbicide	Diquat dibromide; Glyphosate- isopropylammonium; Imazapic-ammonium.

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES—Continued

EPA Registration No.	Product name	Chemical name
000577–00552	Vinyl Waterbase Antifouling Paint 888	Cuprous oxide.
000577–00553	8010–682–6437 Paint, Antifouling, Vinyl-Red MIL–P–15931B, Formula 121/.	Cuprous oxide.
000577–00554	8010–290–4247 Paint, Antifouling Vinyl-Black MIL–P–16189B FORM 129/63.	Copper as elemental; Cupric oxide; Cuprous oxide.
000577–00555	Paint, Antifouling Cold Plastic Shipbottom, Formula 105 MIL–P–19451B.	Cuprous oxide.
000577–00563	Copper Paint No. 1	Cuprous oxide.
000577–00564	Copper Paint No. 2	Cuprous oxide.
000577–00565	Rappahannock Copper Paint 4	Cuprous oxide.
000577–00566	Rappahannock Copper Paint 7	Cuprous oxide.
000577–00567	Copper Paint No. 3 Rappoxy 75 Red	Cuprous oxide.
000577–00568	Copper Paint No. 5 Rappoxy 60 Red	Cuprous oxide.
000829–00279	SA–50 Dursban 2E Insecticide	Chlorpyrifos.
000829–00280	SA–50 Dursban 4–E Insecticide	Chlorpyrifos.
000829–00294	Deltamethrin 0.1% Granules	Deltamethrin.
000961–00273	Lebanon Preemergence Weed Control	DCPA.
000961–00376	Koos Crabgrass Preventer with 0.574 Barricade Preemergence Herbicide.	Prodiamine.
000961–00377	Koos Crabgrass Preventer with 0.383 Barricade Preemergence Herbicide.	Prodiamine.
000961–00384	Par Ex Slow Release Fertilizer with 0.21% Barricade Herbicide.	Prodiamine.
000961–00385	Par Ex Slow Release Fertilizer with 0.275% Barricade Herbicide.	Prodiamine.
000961–00386	Par Ex Slow Release Fertilizer with 0.30% Barricade.	Prodiamine.
001381–00217	Prosolutions Propiconazole	Propiconazole.
001529–00047	Fungitrol 2010	Chlorthalonil; Carbamic acid, butyl-, 3 iodo-2-propynyl ester.
001529–00048	Fungitrol 2002	Chlorthalonil; 1,3,5-Triazine-2,4-diamine, N-Cyclopropyl-N'-(1,1-dimethylethyl)-6-(methylthio)-.
001677–00208	Spiriclens Spray	Isopropyl alcohol.
001677–00224	Premier 70/30 Sterile IPA Spray	Isopropyl alcohol.
001677–00227	Performance LS Laundry Sanitizer	Ethaneperoxoic acid; Hydrogen peroxide.
002517–00080	Sergeant's Cyphenothrin + IGR Squeeze-On for Dogs.	Cyphenothrin; Pyripoxyfen.
002517–00085	Sergeant's Cyphenothrin Squeeze-On for Dogs	Cyphenothrin.
002596–00122	Hartz 2 in 1 Flea & tick Spray with Deodorant for Dogs III.	Gardona (cis-isomer).
002596–00123	Hartz 2 in 1 Fast Acting Flea & Tick Spray for Cats with Rabon.	Gardona (cis-isomer).
002724–00651	Farnam Natural Bug Guard Mist A.	Pyrethrins; Piperonyl butoxide.
002724–00690	Ion Moss	Copper as elemental; Zinc.
003008–00017	Osmose K–33–C (72%) Wood Preservative	Arsenic oxide; Chromic acid; Cupric oxide.
003432–00028	On Guard Premium Pool Algaecide Granular Concentrate.	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
004787–00036	Glyfos Au Herbicide	Glyphosate- isopropylammonium.
004822–00410	Fresh Scent Vanish Thick Liquid Toilet Bowl Cleaner.	Alkyl* dimethyl ethylbenzyl ammonium chloride; Hydrochloric acid.
004822–00450	Off! Yard & Deck Area Repellent II	Permethrin; d-trans-Allethrin.
005785–00068	Bromine Chloride	Bromine chloride.
006836–00210	Dantobrom TC	1-Bromo-3-chloro-5,5- dimethylhydantoin; 1,3-Dichloro-5,5-dimethylhydantoin; 1,3-Dichloro-5-ethyl-5-mehtyl-hydantoin.
007313–00020	ABC 3 Marine Antifouling Paint	Cuprous oxide.
007969–00223	Regent TS Insecticide	Fipronil.
008622–00026	Halobrom-G	2,4- Imidazolidinedione, 1-bromo-3-chloro-5,5-dimethyl-.
008622–00027	Halobrom T–30	2,4- Imidazolidinedione, 1-bromo-3-chloro-5,5-dimethyl-.
008622–00065	Biobrom C–100T	2,2-Dibromo-3-nitrilopropionamide.
008622–00066	Sodium Bromide 45%	Sodium bromide.
008622–00067	Sodium Bromide 43%	Sodium bromide.
008622–00076	Fuzzicide-SP (Ammonium Bromide)	Ammonium bromide.
035935–00001	Trifluralin 50W	Trifluralin.
040810–00020	Irgaguard F3000	Thiabendazole.
042964–00031	A–456–N	Alkyl* dimethyl benzyl ammonium chloride *(50%C14, 40%C12, 10%C16); 1-Decanaminium, N-decyl-N,N-dimethyl, chloride.
045309–00010	Aqua Clear Algae Preventative	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
045309–00011	Spa Clear Non-Foaming Algaecide	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
045309–00037	Swim Free Non-Foaming Black Algaecide for Swimming Pool.	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES—Continued

EPA Registration No.	Product name	Chemical name
045309–00038	Hydrology Cooling Tower Microbiocide	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
045309–00080	Aqua Clear Algae Eliminator	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
048273–00012	Asulam Herbicide	Asulam, sodium salt.
048273–00020	Marman Mancozeb 80% WP	Mancozeb.
050534–00114	Tuffcide 960	Chlorothalonil.
050534–00115	Tuffcide 404	Chlorothalonil.
050534–00197	Tuffcide 500	Chlorothalonil.
050534–00227	Tufficide 960 MUP	Chlorothalonil.
050534–00228	Tuffcude 404 MUP	Chlorothalonil.
051036–00448	Glyphosate Isopropylamine Salt 62% Technical Solution.	Glyphosate-isopropylammonium.
055146–00051	ACP Flowable Sulfur	Sulfur.
055146–00061	Gibgro 2LS	Gibberellic acid.
055146–00066	Gibgro 10% Powder	Gibberellic acid.
055146–00067	Gibgro 20% Tablet	Gibberellic acid.
055146–00068	Gibgro P	Gibberellic acid.
055146–00069	Gibgro 2L	Gibberellic acid.
055146–00089	Fireman	Calcium oxytetracycline.
055146–00095	Enable WSP/Agritin Agricultural Fungicide Co-Pack.	Fenbuconazole; Fentin hydroxide.
055146–00104	NUP 08103	Myclobutanil.
061272–00004	Weed Out 2,4-D Amine 6 Pound	2,4-D,dimethylamine salt.
061483–00011	P1/P13 Creosote Oil	Creosote Oil (Note: Derived from any source).
061483–00012	P2 Creosote Coal Tar Solution	Coal tar; Creosote oil.
066330–00397	Supremacy Herbicide Tank Mix	Fluroxypyr 1-methylheptyl ester; Thifensulfuron; Tribenuron-methyl.
066330–00398	Everest KO Herbicide Tank Mix	Flucarbazone-sodium; Fluroxypyr 1-methylheptyl ester.
067071–00012	Acticide DQ	5-Chloro-2-methyl-3(2H)- isothiazolone; 2-Methyl-3(2H)-isothiazolone.
067071–00052	Acticide MBL 5505	Bronopol; 2-Methyl-3(2H)- isothiazolone; 1,2-Benziso-thiazolin-3-one.
067262–00008	Aqua Chem Balanced for Clean Spas Algaecide	Poly(oxyethylene(dimethylimino) ethylene(dimethylimino)ethylene dichloride).
067690–00027	Spin Out 300	Copper hydroxide.
069681–00023	Clor Mor Cal-Shock Plus	Calcium hypochlorite; Boron sodium oxide, penta hydrate.
070506–00117	Clopyr Brush	3,6-Dichloro-2-pyridinecarboxylic acid, alkanolamine salts.
070506–00215	Orbit 45WP Agpak/Dupont Super Tin 80WP Agpak	Fentin hydroxide; Propiconazole.
071368–00015	2,4-D 2-EHE Gel Broadleaf Herbicide	2,4-D, 2-ethylhexyl ester.
071368–00016	Rhonox (R) EW Broadleaf Herbicide	MCPA, 2-ethylhexyl ester.
071368–00019	Weedone 638 Solventless Broadleaf Herbicide	2,4-D; 2,4-D, 2-ethylhexyl ester.
071368–00023	Nufarm Kamba 4SL Herbicide	Benoic acid, 3,6-dichloro-2-methoxy-, compound with N-methylmethamine (1:1).
071368–00026	Mextrol WP Herbicide	Bromoxynil octanoate.
071368–00041	Pasture MD	2,4-D, dimethylamine salt; Dicamba, dimethylamine salt; Metsulfuron.
071368–00064	Assert SG Herbicide	Imazamethabenz.
071368–00067	Bromox/MCPA 2–2 Herbicide	Bromoxynil octanoate; MCPA, 2-ethylhexyl ester.
071368–00068	Bromox + Atrazine	Atrazine; Bromoxynil octanoate.
071368–00069	Bromox 2E	Bromoxynil octanoate.
071368–00072	Cutback	2,4-D, triisopropanolamine salt; 3,6-Dichloro-2-pyridinecarboxylic acid, alkanolamine salts.
071368–00073	NUP 05 022 Herbicide	Clopyralid; MCPA, 2-ethylhexyl ester.
085827–00001	Green Light Wettable Dusting Sulphur	Sulfur.
085827–00010	Green Light Com-Pleet 18% Systemic Grass & Weed Killer.	Glyphosate-isopropylammonium.
085827–00011	Green Light Com-Pleet 1.92% Systemic Grass & Weed Killer.	Glyphosate-isopropylammonium.
085827–00012	Green Light Com-Pleet Systemic Grass & Weed Killer.	Glyphosate-isopropylammonium.
085827–00013	Green Light Permethrin Dust	Permethrin.
AK020001	Linex 50 DF	Linuron.
AL020007	Super Boll	Ethephon.
AL020008	Acephate 75SP	Acephate.
AL070004	Provado 1.6 Flowable Insecticide	Imidacloprid.
AR050002	Ricestar HT Herbicide	Fenoxaprop-p-ethyl.
AR050008	Ignite 280 SL Herbicide	Glufosinate.
AR960004	Linex 4L	Linuron.
AZ060010	Karate Insecticide	Lambda-Cyhalothrin.
AZ070001	Bollgard Cotton	Bacillus thuringiensis var. kurstaki dekta endotaoxin protein as produced by the CrylA(c) gene.
AZ990003	Imidan 70–WP Agricultural Insecticide	Phosmet.

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES—Continued

EPA Registration No.	Product name	Chemical name
CA050005	Direx 4L	Diuron.
CA050008	Courier 40SC Insect Growth Regulator	Buprofezin.
CA060005	Admire Pro Systemic Protectant	Imidacloprid.
CA070010	Talus 40 SC Insect Growth Regulator	Buprofezin.
CA860037	Furadan 4 Flowable	Carbofuran.
CA980018	Olin HTH Dry Chlorinator Granular	Calcium hypochlorite.
CO000003	Acephate 75SP	Acephate.
CO030003	Balance 4SC Herbicide	Isoxaflutole.
CO030010	Epic DF Herbicide	Flufenacet; Isoxaflutole.
CO070005	Talus 40 SC Insect Growth Regulator	Buprofezin.
CO970001	Linex 50 DF	Linuron.
CT020002	Captan 50 Wettable Powder	Captan.
DE080001	Ridomil Gold Copper	Copper hydroxide; Metalaxyl-M.
FL040012	Courier 40SC Insect Growth Regulator	Buprofezin.
FL050005	Karmex DF	Diuron.
FL070004	Provado 1.6 Flowable Insecticide	Imidacloprid.
FL860008	Decco Salt No. 19	Thiabendazole.
FL940012	Captec 4L-Captan Flowable Fungicide	Captan.
FL980005	Folicur 3.6 F Foliar Fungicide	Tebuconazole.
GA020004	Super Boll	Ethephon.
GA040001	Chlorpyrifos 4# AG	Chlorpyrifos.
GA040008	Dupont Asana XL Insecticide	Esfenvalerate.
HI960004	Ethepon 2#	Ethephon.
ID020019	Acephate 75SP	Acephate.
ID050003	Everest 70% Water Dispersible Granular Herbicide	Flucarbazone-sodium.
ID060003	Furadan LFR Insecticide/nematicide	Carbofuran.
ID080008	Endura Fungicide	Boscalid.
ID940008	Dimethoate 4E	Dimethoate.
ID960013	Aliette WDG Fungicide	Fosetyl-Al.
ID970011	Dimethoate 4E	Dimethoate.
KS030006	Direx 4L	Diuron.
KS050001	Balance Pro	Isoxaflutole.
KS050002	Epic DF Herbicide	Flufenacet; Isoxaflutole.
KS050005	Radius Herbicide	Flufenacet; Isoxaflutole.
KS090002	Balance Flexx Herbicide	Isoxaflutole.
LA020004	Direx 4L	Diuron.
LA040003	Phorate 20–G	Phorate.
LA050002	Ricestar HT Herbicide	Fenoxaprop-p-ethyl.
LA050005	Acephate 90SP	Acephate.
LA080011	Baseline Pretreatment Termiticide	Bifenthrin.
LA990016	Griffin Linuron 4L Flowable Weed Killer	Linuron.
MD980002	Princep Caliber 90 Herbicide	Simazine.
ME050002	Dupont Assure II Herbicide	Quizalofop-p-ethyl.
MN000003	Axiom DF Herbicide	Flufenacet; Metribuzin.
MN000006	Dupont Assure II Herbicide	Quizalofop-p-ethyl.
MN060001	Everest 70% Water Dispersable Granular Herbicide.	Flucarbazone-sodium.
MO990002	Epic	Flufenacet; Isoxaflutole.
MS010007	Glyphosate 4 Herbicide	Glyphosate-isopropylammonium.
MS020019	Acephate 90SP	Acephate.
MS070001	Chlorpyrifos 4E AG	Chlorpyrifos.
MS080002	Temprano	Abamectin.
MS110005	A15189 Herbicide	Glyphosate; Mesotrione; S-Metolachlor.
MS960007	Linex 4L	Linuron.
MT080002	Endura Fungicide	Boscalid.
MT990005	Gustafson LSP Flowable Fungicide	Thiabendazole.
NC010003	Captan 50–WP	Captan.
NC080006	Permethrin 3.2 AG	Permethrin.
NC100002	Prime + EC	Flumetralin.
ND010012	Kumulus DF	Sulfur.
ND110006	AE 0172747 Herbicide	Tembotrione.
NM020001	Arsenal Herbicide	Imazapyr, isopropylamine salt.
NY070005	4-Poster-Tickicide	Permethrin.
NY080013	Headline Fungicide	Pyraclostrobin.
NY110001	Headline SC	Pyraclostrobin.
OH040001	Dual Magnum Herbicide	S-Metolachlor.
OH060002	Dual Magnum	S-Metolachlor.
OR040017	Axiom DF Herbicide	Flufenacet; Metribuzin.
OR040022	Hoelon 3EC Herbicide	Diclofop-methyl.
OR050027	Everest 70% Water Dispersible Granular Herbicide	Flucarbazone-sodium.
OR060017	Furadan LFR Insecticide/nematicide	Carbofuran.
OR080013	Pendant 3.3 EC	Pendimethalin.

TABLE 2—CANCELLATIONS OF PRODUCTS DUE TO NON-PAYMENT OF MAINTENANCE FEES—Continued

EPA Registration No.	Product name	Chemical name
OR080023	Rely 200 Herbicide	Glufosinate.
PA070004	Talus 40 SC Insect Growth Regulator	Buprofezin.
PA080003	Dual Magnum	S-Metolachlor.
PR020002	Mertect (R) 340–F Fungicide	Thiabendazole.
PR030001	Reglone Dessicant	Diquat dibromide.
PR890002	Ethrel Pineapple Growth Regualtor	Ethephon.
SC040001	Chlorpyrifos 4# AG	Chlorpyrifos.
SC960007	Captan 50 Wettable Powder	Captan.
SC980006	Captan 50 Wettable Powder	Captan.
SD000015	Balance Pro Herbicide	Isoxaflutole.
SD040001	Define SC Herbicide	Flufenacet.
SD040005	Princep 4L	Simazine.
SD040006	Axiom DF Herbicide	Flufenacet; Metribuzin.
SD050002	Epic DF Herbicide	Flufenacet; Isoxaflutole.
SD060004	Frontier 6.0 Herbicide	Dimethenamid.
SD060008	Domain DF Herbicide	Flufenacet; Metribuzin.
TN070003	Provado 1.6 Flowable Insecticide	Imidacloprid.
TX010015	Griffin Linuron 4L Flowable Weed Killer	Linuron.
TX030008	Direx 4L	Diuron.
TX070002	Vista	Fluroxypyr 1-methyl ester.
TX090005	Dupont Layby Pro Herbicide	Diuron; Linuron.
TX930021	Dimethoate 4E	Dimethoate.
UT000001	Acephate 75SP	Acephate.
UT090003	Endura Fungicide	Boscalid.
VA070001	Talus 40 SC Insect Growth Regulator	Buprofezin.
WA000014	Daconil SDG	Chlorothalonil.
WA010018	Manzate 200 DF Fungicide	Mancozeb.
WA010033	Carzol SP Miticide/insecticide in Water Soluble Packaging.	Formetanate hydrochloride.
WA030023	Axiom DF Herbicide	Flufenacet; Metribuzin.
WA050006	Mycoshield	Calcium oxytetracycline.
WA050011	Mycoshield	Calcium oxytetracycline.
WA060010	Osprey Herbicide	Mesosulfuron-methyl.
WA940026	Captan 50 Wettable Powder	Captan.
WA960003	Dimethoate 4E	Dimethoate.
WA970030	Dimethoate 4E	Dimethoate.
WI020018	Acephate 75SP	Acephate.
WV070001	Provado 1.6 Flowable Insecticide	Imidacloprid.
WY080004	Endura Fungicide	Boscalid.

Table 3 of this unit includes the names and addresses of record for all registrants of the products in Tables 1 and 2 of this unit, in sequence by EPA company number. This number corresponds to the first part of the EPA registration numbers of the products listed in this unit.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS

EPA company No.	Company name and address
100:	
AZ060010; DE080001; MA070001; MD980002; MS110005; NC100002, OH040001; OH060002; PA080003; PR020002; PR030001; SD040005.	Syngenta Crop Protection, LLC, d/b/a Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–300.
228	Nufarm Americas, Inc., 4020 Aerial Center Pkwy., Suite 103, Morrisville, NC 27560.
264:	
AL070004; AR050002; AR050008; CA060005; CO030003; CO030010; FL980005; FL070004; ID960013; KS050001; KS050002; KS050005; KS090002; LA050002; MN000003; MO990002; MT990005; ND110006; OR040017; OR040022; OR080023; PR890002; SD000015; SD040001; SD040006; SD050002; SD060008; TN070003; WA030023; WA060010; WV070001.	Bayer Cropscience LP, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709.
352:	
AK020001; AL020007; AR960004; CA050005; CO970001; GA020004; GA040008; KS030006; LA990016; LA020004; ME050002; MN000006; MS960007; TX010015; TX030008; TX090005.	E. I. Du Pont De Nemours And Company (S300/419), 1007 Market St., Wilmington, DE 19898–0001.
524:	
AZ070001	Monsanto Co., 1300 I St., NW., Suite 450 E., Washington, DC 20005.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS—Continued

EPA company No.	Company name and address
527	Rochester Midland Corporation 155 Paragon Dr., Rochester, NY 14624.
577	The Sherwin-Williams Co., Cuprinol Group/The Thompson's Co., 101 Prospect Ave., Cleveland, OH 44115–1075.
829	Southern Agricultural Insecticides, Inc., P.O. Box 218, Palmetto, FL 34220.
961	Lebanon Seaboard Corp., 1600 E. Cumberland St. Lebanon, PA 17042.
1258:	
CA980018	Arch Chemicals, Inc., 5660 New Northside Dr., NW., Suite 1100 Atlanta, GA 30328.
1381:	
OR08001	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164–0589.
1529	International Specialty Products, 1361 Alps Rd., Wayne, NJ 07470
1677	Ecolab, Inc., 370 North Wabasha St., St. Paul, MN 55102.
1903	Eight in One Pet Products, Inc., 3001 Commerce St. Blacksburg, VA 24060.
2517	Sergeant's Pet Care Products, Inc., 2625 South 158th Plaza Omaha, NE 68130.
2596	The Hartz Mountain Corp., 400 Plaza Dr., Secaucus, NJ 07094.
2724	Wellmark International, d/b/a Central Life Sciences, 1501 E. Woodfield Rd., Suite 200 W., Schaumburg, IL 60173.
3008	Osmose, Inc., 980 Ellicott St., Buffalo, NY 14209.
3090	Sanitized, Inc., 57 New Milford Tkpe., P.O. Box 2211, New Preston, CT 06777–0211.
3432	N. Jonas & Co., Inc., P.O. Box 425 B, Bensalem, PA 19020.
4787	Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209.
4822	S.C. Johnson & Son, Inc., 1525 Howe St., Racine, WI 53403.
5204	Arkema, Inc., 900 First Ave., King of Prussia, PA 19406–1308.
5383	Troy Chemical Corp., 8 Vreeland Rd., P.O. Box 955, Florham Park, NJ 07932–4200.
5785	Great Lakes Chemical Corp., P.O. Box 2200, West Lafayette, IN 47996–2200.
6836	Lonza, Inc., 90 Boroline Rd., Allendale, NJ 07401.
7313	PPG Architectural Finishes Inc., 4325 Rosanna Dr., Allison Park, PA 15101.
7969:	
ID080008; MT080002; NY080013; NY110001; SD060004; UT090003; WY080004.	BASF Corp., Agricultural Products, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
8622	ICL–IP America, Inc., 95 Maccorkle Ave. Southwest, South Charleston, WV 25303.
9339	Flexabar Corp., 1969 Rutgers University Blvd., Lakewood, NJ 08701.
9688	Chemsico, P.O. Box 142642, St. Louis, MO 63114–0642.
10088	Athea Laboratories, Inc., P.O. Box 240014, Milwaukee, WI 53224.
10163:	
AZ990003; WA010033	Gowan Co., P.O. Box 5569, Yuma, AZ 85366–8844.
35935	Nufarm Limited, 4020 Aerial Center Pkwy., Suite 103, Morrisville, NC 27560.
40810	BASF Corp., 100 Campus Dr., Florham Park, NJ 07932.
40849	Zep Commercial Sales & Service, Agent: Connie Welch and Associates, 4196 Merchant Plaza 344, Lake Ridge, VA 22192.
42964	Airkem Professional Products Division of Ecolab, Inc., 370 North Wabasha St., St. Paul, MN 55102.
45309	Aqua Clear Industries, LLC P.O. Box 2456, Suwanee, GA 30024–0980.
45385	CTX-Cenol, Inc., Agent: H.R. McLane, Inc., 7210 Red Rd., Suite 206A, Miami, FL 33143.
47000	Chem-Tech, LTD., 4515 Fleur Dr., 303, Des Moines, IA 50321.
48273	Marman USA, Inc., 500 N. Westshore Blvd., Suite 405, Tampa, FL 33609.
50534:	
WA000014	GB Biosciences Corp., P.O. Box 18300, Greensboro, NC 27419–5458.
50600	Shepard Bros., Inc., 503 S. Cypress St., La Habra, CA 90631.
51036:	
MS010007	BASF Sparks, LLC, P.O. Box 13528, Research Triangle Park, NC 27709–3528.
55146:	
WA050006; WA050011	Nufarm Americas, Inc., 4020 Aerial Center Pkwy., Suite 103, Morrisville, NC 27560.
58687	Georgia Gulf Chemicals & Vinyls, LLC, P.O. Box 629, Plaquemine, LA 70765–0629.

TABLE 3—REGISTRANTS OF CANCELLED PRODUCTS—Continued

EPA company No.	Company name and address
59807	OHP, Inc., Agent: Exponent Inc., 1150 Conn. Ave., NW., Suite 1100, Washington, DC 20036.
61272	Nufarm USA, Inc., 4020 Aerial Center Pkwy., Suite 101, Morrisville, NC 27560–8563.
61483	KMG-Bernuth, Inc., 9555 W. Sam Houston Pkwy. South, Suite 600, Houston, TX 77099.
63191	St. Gabriel Organics, LLC, d/b/a St. Gabriel Organics, Agent: Center for Regulatory Services, 5200 Wolf Run Shoals Rd., Woodbridge, VA 22192.
66330:	
AL020008; CO000003; CT020002; FL940012; A040001;HI960004; ID940008; ID970011; ID020019; ID050003; LA050005; MN060001; MS020019; MS070001; NC010003; NC080006; ND010012; OR050027; SC960007; SC980006; SC040001; TX930021; UT000001; WA940026; WA960003; WA970030; WI020018.	Arysta Lifescience North America, LLC, 15401 Weston Pkwy., Suite 150, Cary, NC 27513.
67071	THOR GMBH, Agent: THOR Specialties, Inc., 50 Waterview Dr., Shelton, CT 06484.
67262	Recreational Water Products Inc., d/b/a Recreational Water Products, P.O. Box 1449, Buford, GA 30515–1449.
67690	Sepro Corp., 11550 N. Meridian St., Suite 600, Carmel, IN 46032.
69681	Allchem Performance Products, Inc., 6010 NW, First Place, Gainesville, FL 32607.
70385	Prorestore Products, Agent: Lewis & Harrison, LLC, 122 C St., NW., Suite 740, Washington, DC 20001.
70506:	
WA010018	United Phosphorus, Inc., 630 Freedom Business Center, Suite 402, King of Prussia, PA 19406.
71368	Nufarm Americas, Inc., 4020 Aerial Center Pkwy., Suite 103, Morrisville, NC 27560.
85827	Green Light, A Valent U.S.A. Co., c/o Valent U.S.A. Corp., 1101 14th St., NW., Suite 1050, Washington, DC 20005.
CA050008; CA070010; CO070005; FL040012; PA070004; VA070001	Nichino America, Inc., 4550 New Linden Hill Rd., Suite 501, Wilmington, DE 19808.
CA860037; ID060003; LA080011; OR060017	FMC Corp., Agricultural Products Group, Attn: Michael C. Zucker, 1735 Market St., Rm. 1978, Philadelphia, PA 19103.
CO020008	BASF Corporation,, Agricultural Products, 26 Davis Dr., P.O. Box 13528, Research Triangle Park, NC 27709–3528.
FL040012	Nichino America, Inc., 4550 New Linden Hill Rd., Suite 501, Wilmington, DE 19808.
FL050005	Griffin, LLC, P.O. Box 1847, Valdosta, GA 31603–1847.
FL860008	Decco US Post-Harvest, Inc., 1713 South California Ave., Monrovia, CA 91016–0120.
LA040003	Winfield Solutions, LLC, P.O. Box 64589, St. Paul, MN 55164–0589.
MS080002	Cheminova, Inc., 1600 Wilson Blvd., Suite 700, Arlington, VA 22209.
NM020001	BASF Corp., P.O. Box 13528, Research Triangle Park, NC 27709–3528.
NY070005	Y-Tex Corp., P.O. Box 1450, Cody, WY 82414–1450.
PR110003	Argo Servicios, Inc., P.O. Box 360393, San Juan, PR 00936–0393.
TX070002	Dow Agrosciences, LLC, 9330 Zionsville Rd. 308/2A, Indianapolis, IN 46268–1054.
WA030004	Champion Technologies, 3200 Southwest Freeway, Suite 2700, Houston, TX 77027.
WA030014	Amvac Chemical Corporation 4695 MacArthur Ct., Suite1250, Newport Beach, CA 92660–1706.
WA910013	Loveland Products, Inc., P.O. Box 1286, Greeley, CO 80632–1286.

III. Summary of Public Comments Received and Agency Response to Comments

During the public comment period provided, EPA received one comment in response to the July 6, 2012 **Federal Register** notice (77 FR 40039) (FRL–9351–8) announcing the Agency's receipt of the requests for voluntary cancellations of product listed in Table 1 of Unit II. The Agency does not believe that the comment submitted during the comment period merits further review or a denial of the request for voluntary cancellation.

IV. Cancellation Order

Pursuant to FIFRA section 6(f), EPA hereby approves the requested cancellations of the registrations identified in Table 1 of Unit II. Accordingly, the Agency hereby orders that the product registrations identified in Table 1 of Unit II., are canceled. The effective date of the cancellations that are the subject of this notice is February 6, 2013. Any distribution, sale, or use of existing stocks of the products identified in Table 1 of Unit II., in a manner inconsistent with any of the provisions for disposition of existing stocks set forth in Unit VI., will be a violation of FIFRA.

V. What is the agency's authority for taking this action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, following the public comment period, the EPA Administrator may approve such a request. The notice of receipt for this action was published for comment in the **Federal Register** of July 6, 2012. The comment period closed on January 2, 2013.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which were packaged, labeled, and released for shipment prior to the effective date of the cancellation action. The existing stocks provisions for the products subject to this order are as follows.

A. Registrations Listed in Table I of Unit II

The registrants may continue to sell and distribute existing stocks of products listed in Table 1 of Unit II., until February 6, 2014, which is 1 year after the publication of the Cancellation Order in the **Federal Register**. Thereafter, the registrants are prohibited from selling or distributing products listed in Table 1 of Unit II., except for export in accordance with FIFRA section 17, or proper disposal. Persons other than the registrants may sell, distribute, or use existing stocks of products listed in Table 1 of Unit II., until existing stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

B. Registrations Listed in Table 2 of Unit II, Except Nos. CA860037, ID060003, and OR060017

The effective date of cancellation is the date of this cancellation order. The Agency had allowed registrants to sell and distribute existing stocks of these products until January 13, 2013, which is 1 year after the date on which the maintenance fee was due. Thereafter, registrants will be prohibited from selling or distributing the pesticides identified in Table 2 of Unit II., except for export consistent with FIFRA section 17 or for proper disposal. Persons other than registrants will generally be allowed to sell, distribute, or use existing stocks until such stocks are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the cancelled products.

C. Registration Nos. CA860037, ID060003, and OR060017

The effective date of cancellation of these products is the date of publication of the cancellation order in the **Federal Register**. EPA will prohibit the continued sale and distribution of existing stocks of these products after the effective date of this cancellation.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: January 31, 2013.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2013–02698 Filed 2–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0850; FRL–9376–5]

Chlorpyrifos Registration Review; Preliminary Evaluation of the Potential Risk From Volatilization; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's preliminary volatilization assessment for the registration review of chlorpyrifos and opens a public comment period on this document. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. As part of the registration review process, the Agency has completed a preliminary volatilization assessment for chlorpyrifos uses. After reviewing comments received during the public comment period, EPA will issue a revised volatilization assessment, explain any changes to the preliminary volatilization assessment, respond to comments, and evaluate the need for risk mitigation for chlorpyrifos. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0850, by one of the following methods:

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

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

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information contact:* Joel Wolf, Chemical Review Manager, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 347–0228; fax number: (703) 308–8005; email address: *wolf.joel@epa.gov.*

For general questions on the registration review program, contact: Jane Smith, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–0048; fax number: (703) 308–8005; email address: *smith.jane-scott@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action

to a particular entity, consult the Chemical Review Manager listed under **FOR FURTHER INFORMATION CONTACT.**

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. Authority

EPA is conducting its registration review of chlorpyrifos pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

III. Registration Reviews

A. What action is the agency taking?

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registration for chlorpyrifos to ensure that it continues to satisfy the FIFRA standard for registration—that is, that chlorpyrifos can still be used without unreasonable adverse effects on human health or the environment. Chlorpyrifos is an organophosphate (OP) used to control many foliar and soil borne insect pests. EPA has completed a comprehensive volatilization assessment for chlorpyrifos uses.

Pursuant to 40 CFR 155.53(c), EPA is providing an opportunity, through this notice of availability, for interested parties to provide comments and input concerning the Agency's volatilization assessment for chlorpyrifos. Such comments and input could address, among other things, the Agency's volatilization assessment uncertainties and assumptions, as applied to this preliminary volatilization assessment. The Agency will consider all comments received during the public comment period and make changes, as appropriate, to the preliminary volatilization assessment. EPA will then issue a revised volatilization assessment, explain any changes to the preliminary volatilization assessment, and respond to comments.

1. *Other related information.* Additional information on chlorpyrifos is available on the Pesticide Chemical Search Web page for this pesticide, *http://iaspub.epa.gov/apex/pesticides/f?p=CHEMICALSEARCH:3:1567203687598401::NO:21,3,31,7,12,25:P3_XCHEMICAL_ID:1822.* Information on the Agency's registration review program and its implementing regulation is available at *http://www.epa.gov/oppsrrd1/registration_review.*

2. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

List of Subjects

Environmental protection, Chlorpyrifos, Pesticides and pests.

Dated: January 30, 2013.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2013–02691 Filed 2–5–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to the Federal Communications Commission via email to *PRA@fcc.gov* and *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1034.

Title: Digital Audio Broadcasting Systems and their Impact on the Terrestrial Radio Broadcast Service; Digital Notification Form, FCC Form 335.

Form Number: FCC Form 335.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 1,310 respondents; 1,310 responses.

Estimated Time per Response: 1–8 hours.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in Sections 154(i), 303, 310 and 533 of the Communications Act of 1934, as amended.

Total Annual Burden: 1,780 hours.

Total Annual Cost: $606,500.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: On January 29, 2010, the Commission released the Order, Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service (Order), DA 10–208, MM Docket 99–325. The Order established these non-rule information collection requirements:

(1) Eligible authorized FM stations to commence operation of FM digital facilities with operating power up to −14 dB upon notice to the Commission on either Form 335 (the licensee of a super-powered FM station must file an informal request for any increase in the station's FM Digital ERP).

(2) Licensees to submit an application to the Media Bureau, in the form of an informal request, for any increase in FM Digital ERP beyond 6 dB.

(3) Licensees submitting such a request must use a simplified method set forth in the Order todetermine the proponent station's maximum permissible FM Digital ERP.

(4) In situations where the simplified method is not applicable due to unusual terrain or other environmental or technical considerations or when it produces anomalous FM Digital ERP results, the Bureau will accept applications for FM Digital ERP in excess of −14 dB on a case-by-case basis when accompanied by a detailed showing containing a complete explanation of the prediction methodology used as well as data, maps and sample calculations.

(5) Finally, the Order implements interference mitigation and remediation procedures to resolve promptly allegations of digital interference to an authorized FM analog facility resulting from an FM Digital ERP power increase undertaken pursuant to the procedures adopted in the Order. Pursuant to these procedures, the affected analog FM station may file an interference complaint with the Bureau. In order to be considered by the Bureau, the complaint must contain at least six reports of ongoing (rather than transitory) objectionable interference. For each report of interference, the affected FM licensee must submit a map showing the location of the reported interference and a detailed description of the nature and extent of the interference being experienced at that location. Interference reports at locations outside a station's protected analog contour will not be considered. The complaint must also contain a complete description of the tests and equipment used to identify the alleged interference and the scope of the unsuccessful efforts to resolve the interference.

Existing information collection requirements before FCC Order DA 10–208: 47 CFR 73.404(b) states in situations where interference to other stations is anticipated or actually occurs, AM licensees may, upon notification to the Commission, reduce the power of the primary Digital Audio Broadcasting (DAB) sidebands by up to 6 dB. Any greater reduction of sideband power requires prior authority from the Commission via the filing of a request for special temporary authority or an informal letter request for modification of license.

47 CFR 73.404(e) states licensees (commercial and noncommercial AM and FM radio stations) must provide notification to the Commission in Washington, DC, within 10 days of commencing in-band, on channel (IBOC) digital operation. The notification must include the following information:

(1) Call sign and facility identification number of the station;

(2) date on which IBOC operation commenced;

(3) certification that the IBOC DAB facilities conform to permissible hybrid specifications;

(4) name and telephone number of a technical representative the Commission can call in the event of interference;

(5) FM digital effective radiated power used and certification that the FM analog effective radiated power remains as authorized;

(6) transmitter power output; if separate analog and digital transmitters

are used, the power output for each transmitter;

(7) if applicable, any reduction in an AM station's primary digital carriers;

(8) if applicable, the geographic coordinates, elevation data, and license file number of the auxiliary antenna employed by an FM station as a separate digital antenna;

(9) if applicable, for FM systems employing interleaved antenna bays, a certification that adequate filtering and/or isolation equipment has been installed to prevent spurious emissions in excess of the limits specified in § 73.317;

(10) a certification that the operation will not cause human exposure to levels of radio frequency radiation in excess of the limits specified in § 1.1310 of the Commission's rules and is therefore categorically excluded from environmental processing pursuant to § 1.1306(b). Any station that cannot certify compliance must submit an environmental assessment (EA) pursuant to § 1.1311 and may not commence IBOC operation until such EA is ruled upon by the Commission.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02525 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1088.

Title: Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, Report and Order and Third Order on Reconsideration, CG Docket No. 05–338, FCC 06–42.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and Individuals or households.

Number of Respondents and Responses: 5,340,000 respondents; 6,057,305 responses.

Estimated Time per Response: 3 minutes (.05 hours) to 30 minutes (.50 hours).

Frequency of Response: Annual, monthly, and on occasion reporting requirements; Recordkeeping requirement; and Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. The authorizing statutes for this information collection are: Telephone Consumer Protection Act of 1991, Pub. L. 102–243. 105 Stat. 2394 (1991); Junk Fax Prevention Act, Pub. L. 109–21, 119 Stat. 359 (2005).

Total Annual Burden: 3,673,825 hours.

Total Annual Cost: $10,223,000.

Nature and Extent of Confidentiality: Confidentiality is an issue to the extent that individuals and households provide personally identifiable information, which is covered under the FCC's updated system of records notice (SORN), FCC/CGB–1, ''Informal Complaints and Inquiries'', which became effective on January 25, 2010.

Privacy Impact Assessment: The Privacy Impact Assessment (PIA) for Informal Complaints and Inquiries was completed on June 28, 2007. It may be reviewed at *http://www.fcc.gov/omd/privacyact/Privacy_Impact_Assessment.html.* The Commission is in the process of updating the PIA to incorporate various revisions to it as a result of revisions to the SORN.

Needs and Uses: On April 5, 2006, the Commission adopted a Report and Order and Third Order on Reconsideration, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, CG Docket Nos. 02–278 and 05–338, FCC 06–42, which modified the Commission's facsimile advertising rules to implement the Junk Fax Prevention Act. The Report and Order and Third Order on Reconsideration contained information collection requirements pertaining to: (1) Opt-out Notice and Do-Not-Fax Requests Recordkeeping in which the rules require senders of unsolicited facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender; (2) Established Business Relationship Recordkeeping whereas the Junk Fax Prevention Act provides that the sender, e.g., a person, business, or a nonprofit/institution, is prohibited from faxing an unsolicited advertisement to a facsimile machine unless the sender has an ''established business relationship'' (EBR) with the recipient; (3) Facsimile Number Recordkeeping in which the Junk Fax Prevention Act provides that an EBR alone does not entitle a sender to fax an advertisement to an individual or business. The fax number must also be provided voluntarily by the recipient; and (4) Express Invitation or Permission Recordkeeping where in the absence of an EBR, the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.

On October 14, 2008, the Commission released an Order on Reconsideration, FCC 08–239, addressing certain issues raised in petitions for reconsideration and/or clarification filed in response to

the Commission's Report and Order and Third Order on Reconsideration (Junk Fax Order), FCC 06–42. In document FCC 08–239, the Commission clarified that: (1) Facsimile numbers compiled by third parties on behalf of the facsimile sender will be presumed to have been made voluntarily available for public distribution so long as they are obtained from the intended recipient's own directory, advertisement, or Internet site; (2) Reasonable steps to verify that a recipient has agreed to make available a facsimile number for public distribution may include methods other than direct contact with the recipient; and (3) a description of the facsimile sender's opt-out mechanism on the first Web page to which recipients are directed in the opt-out notice satisfies the requirement that such a description appear on the first page of the Web site.

The Commission believes these clarifications will assist senders of facsimile advertisements in complying with the Commission's rules in a manner that minimizes regulatory compliance costs while maintaining the protections afforded consumers under the Telephone Consumer Protection Act (TCPA).

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02510 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC 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 Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0942.

Title: Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service.

Form Number: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 20 respondents; 20 responses.

Estimated Time per Response: 2–15 hours.

Frequency of Response: Annual reporting requirements, third party disclosure requirements and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. sections 1, 4(i), and (j), 201–209, 218–222, 254 and 403.

Total Annual Burden: 56 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting respondents to submit confidential information to the Commission. If the Commission requests respondents to submit information to the Commission that the respondents believe are confidential, respondents may wish request confidential treatment of such information pursuant to 47 CFR 0.459 of the Commission's rules.

Needs and Uses: The Commission will submit this expiring information collection to the Office of Management and Budget (OMB) as a revision after this comment period in order to obtain the full three year clearance from them.

The Commission adopted a Report and Order, FCC 00–193, which required the Commission to take further action to further accelerate the development of competition in the local and long-distance telecommunications markets, and to further establish explicit universal service support that will be sustainable in an increasingly competitive marketplace, pursuant to the mandate of the Telecommunications Act of 1996. The Commission requires the following information to be reported to the following entities under the Coalitions for Affordable Local and Long Distance Service (CALLS) Proposal: 1) modified tariff filings with the Commission; 2) quarterly and annual data filings (line counts, price cap and revenue data); and 3) cost support information. In the USF/ICC Transformation Order, FCC 11–161, the Commission eliminated the remaining universal service data filings previously contained in this information collection. The burdens associated with those filings are being removed from this information collection.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02513 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the

following information collection(s). Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees. The FCC 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 Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Benish Shah, Federal Communications Commission, via the Internet at *Benish.Shah@fcc.gov.* To submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Benish Shah, Office of Managing Director, (202) 418–7866.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0953.

Title: Sections 95.1111 and 95.1113, Frequency Coordination/Coordinator, Wireless Medical Telemetry Service.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit and not-for-profit institutions.

Number of Respondents: 3,000 respondents; 3,000 responses.

Estimated Time Per Response: 1–4 hours.

Frequency of Response: On occasion reporting requirement, third party disclosure requirement and recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 12,000 hours.

Total Annual Cost: $600,000.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: No information is requested that would require assurance of confidentiality.

Needs and Uses: The Commission will submit this information collection to OMB as an extension (there has been an adjustment in the reporting, recordkeeping requirements and/or third party disclosure requirements, the number of respondents/operators increased from 2,728 to 3,000, therefore, the annual burden and cost has also increased) after this 60 day comment period to obtain the full three-year clearance from them.

On June 12, 2000, the Commission released a Report and Order, ET Docket No. 99–255, FCC 00–211, which allocated spectrum and established rules for a ''Wireless Medical Telemetry Service'' (WMTS) that allows potentially life-critical equipment to operate in an interference-protected basis. Medical telemetry equipment is used in hospitals and health care facilities to transmit patient measurement data such as pulse and respiration rate to a nearby receiver, permitting greater patient mobility and increased comfort. The Commission designated a frequency coordinator, who maintains a database of all WMTS equipment. All parties using equipment in the WMTS are required to coordinate/register their operating frequency and other relevant technical operating parameters with the designated coordinator. The database provides a record of the frequencies used by each facility or device to assist parties in selecting frequencies to avoid interference. Without a database, there would be no record of WMTS usage because WMTS transmitters will not be individually licensed. The designated frequency coordinator has the responsibility to maintain an accurate engineering database of all WMTS transmitters, identified by location (coordinates, street address, building), operating frequency, emission type and output power, frequency range(s) used, modulation scheme used, effective radiated power, number of transmitters in use at the health care facility at the time of registration, legal name of the authorized health care provider, and point of contact for authorized health care provider. The frequency coordinator will make the database available to WMTS users, equipment manufacturers and the public. The coordinator will also notify users of potential frequency conflicts.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02519 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

AGENCY: Federal Communications Commission.

ACTION: Notice; request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burden and as required by the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3520), the Federal Communications Commission invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s). Comments are requested concerning: Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information burden for small business concerns with fewer than 25 employees.

The FCC 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 Paperwork Reduction Act (PRA) that does not display a valid OMB control number.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Submit your PRA comments to Judith B. Herman, Federal Communications Commission, via the Internet at *Judith-b.herman@fcc.gov.* To

submit your PRA comments by email send them to: *PRA@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: Judith B. Herman, Office of Managing Director, (202) 418–0214.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0856.

Title: Universal Service—Schools and Libraries Universal Service Support Program Reimbursement Forms.

Form Numbers: FCC Forms 472, 473 and 474.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions and state, local or tribal government.

Number of Respondents and Responses: 25,925 respondents; 158,165 responses.

Estimated Time per Response: 1 hour per form.

Frequency of Response: On occasion and annual reporting requirements and third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in 47 U.S.C. sections 1, 4(i), 4(j), 201–205, 214, 254, 312(d), 312(f), 403 and 503(b).

Total Annual Burden: 158,165 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impacts.

Nature and Extent of Confidentiality: If the Commission requests applicants to submit information that the respondents believe is confidential, respondents may request confidential treatment of such information under section *47 CFR 0.459* of the Commission's rules.

Needs and Uses: The Commission will submit this information collection to OMB, which is a revision to a currently approved collection, to obtain a full three-year clearance from OMB. FCC Forms 472 and 474 include minor administrative revisions to improve clarity and to ensure consistency with the Commission's rules. FCC Form 473 also includes administrative revisions and three additional certifications aimed at ensuring compliance with the Commission's rules for the schools and libraries universal service support mechanism. The Commission requests a total hourly burden change for FCC Forms 472, 473 and 474 from 143,150 burden hours to 158,165 burden hours, which is an increase of 15,015 burden hours. The adjustment reflects updated information received from the Universal Service Administrative Company, the administrator of the schools and libraries universal service support program, and is based on actual participation in the program. Specifically, for the FCC Form 472, the Commission has increased the number of respondents from 15,000 to 18,000 based on the actual number of billed entity numbers for calendar year 2011. For the FCC Form 473, the Commission increased the number of respondents from 5,000 to 5,480 based on the actual number of service providers filing FCC Forms 473 in calendar year 2011. For the FCC Form 474, the Commission increased the number of respondents from 2,200 to 2,445 based on the actual number of service providers filing FCC Forms 474 in 2011. The annual burden hours and frequency of response has been updated for all three forms due to the participation changes and the availability of electronic filing.

The purpose of FCC Form 472 is to establish the process and procedure for an eligible entity to seek reimbursement from the service provider for the discounts on services paid in full. After receiving an invoice from the service provider, together with an FCC Form 472, USAC is able to verify the eligible service and approved amounts that should be reimbursed and can make the appropriate payment to the service provider. The FCC Form 472 is also used to ensure that each service provider has provided discounted services within the current funding year for which it submits an invoice to USAC and that invoices submitted from service providers for the costs of discounted eligible services do not exceed the amount that has been approved.

The purpose of FCC Form 473 is to establish that the participating service provider is eligible to participate in the E-rate program and to confirm that the invoice forms submitted by the service provide are in compliance with the Federal Communications Commission's E-rate rules. The FCC Form 473 is also used by USAC to assure that the dollars paid out by the universal service fund go to eligible providers.

The purpose of FCC Form 474 is to establish the process and procedure for a service provider to seek payment for the discounted costs of services it provided to billed entities for eligible services. After receiving an invoice from the service provider, together with an FCC Form 474, USAC is able to verify that the eligible and approved amounts can be paid. The FCC Form 474 is also used to ensure that each service provider has provided discounted services within the current funding year for which it submits an invoice to USAC and that invoices submitted from service providers for the costs of discounted eligible services do not exceed the amount that has been approved.

All of the requirements contained in this information collection are necessary to implement the congressional mandate for the schools and libraries universal service support program and reimbursement process.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02511 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: The Federal Communications Commission (FCC), as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act (PRA) of 1995. Comments are requested concerning whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

DATES: Written PRA comments should be submitted on or before April 8, 2013. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of

time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Cathy Williams at (202) 418–2918.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0609.

Title: Section 76.934(e), Petitions for Extension of Time.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities; and State, local, or tribal governments.

Number of Respondents and Responses: 20 respondents; 10 responses.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Estimated Time per Response: 4 hours.

Total Annual Burden: 80 hours.

Total Annual Costs: None.

Privacy Impact Assessment: No impact(s).

Obligation to Respond: Required to obtain or retain benefits. The statutory authority is contained in Sections 4(i) and 623 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: 47 CFR 76.934(e) states that small cable systems may obtain an extension of time to establish compliance with rate regulations provided that they can demonstrate that timely compliance would result in severe economic hardship. Requests for the extension of time should be addressed to the local franchising authorities (''LFAs'') concerning rates for basic service tiers.

OMB Control Number: 3060–1100.

Title: Section 15.117(k), TV Broadcast Receivers.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 1,000 respondents; 5,000 responses.

Frequency of Response: Third party disclosure requirement.

Estimated Time per Response: 0.25 (15 minutes).

Total Annual Burden: 1,250 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Obligation to Respond: Mandatory. The statutory authority for this information collection is contained in Sections 1, 2(a), 3(33), 3(52), 4(i), 4(j), 7, 301, 303(r), 303(s), 309, 336, 337 and 624 of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: No need for confidentiality required with this collection of information.

Needs and Uses: As of the June 12, 2009 statutory digital television (DTV) transition deadline, all full-power television stations stopped broadcasting in analog and are broadcasting only digital signals. Section 15.117(k) of the Commission's rules requires sellers of TV sets (and other TV receiver equipment) that do not contain a digital tuner to disclose to consumers at the point-of-sale that such devices include only an analog tuner and, therefore, are not able to receive over-the-air TV broadcasts. (Consumers with analog-only television equipment are not able to receive an over-the-air broadcast signal unless they get a digital TV or a box to convert the digital signals to analog or subscribe to pay TV service, such as cable or satellite.) The Commission adopted this labeling (disclosure) requirement in 2007 to protect consumers by ensuring that they are made aware at the point-of-sale about the limitations of analog-only television receivers. Note that, while the Commission's rules prohibit the manufacture or import of television receivers that do not contain a digital tuner, the rules do not prohibit the sale of analog-only television equipment from inventory. For this reason, the Commission decided it was necessary to impose this requirement. Although the DTV transition deadline has passed, analog-only TV equipment remains available in the marketplace and this disclosure requirement, therefore, remains necessary to continue to protect consumers.

OMB Control Number: 3060–1103.

Title: Section 76.41, Franchise Application Process.

Type of Review: Extension of a currently approved collection.

Form Number: N/A.

Respondents: Business or other for profit entities; State, local or tribal government.

Number of Respondents and Responses: 106 respondents; 300 responses.

Estimated Hours per Response: 0.5 to 4 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Total Annual Burden: 500 hours.

Total Annual Cost: None.

Privacy Impact Assessment: No impact(s).

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this information collection is contained in 47 U.S.C. 151, 152, 154(i), 157nt, 201, 531, 541 and 542.

Confidentiality: No need for confidentiality required with this collection of information.

Needs and Uses: The Commission adopted on December 20, 2006 a Report and Order In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (R&O), FCC 06–180, MB Docket 05–311. This R&O provided rules and guidance to implement Section 621 of the Communications Act of 1934, as amended.

Section 621 of the Communications Act prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. The Commission found that the current franchising process constitutes an unreasonable barrier to entry for competitive entrants that impede enhanced cable competition and accelerated broadband deployment. The information collection requirements are as follows:

47 CFR 76.41(b) requires a competitive franchise applicant to include the following information in writing in its franchise application, in addition to any information required by applicable state and local laws: (1) The applicant's name; (2) the names of the applicant's officers and directors; (3) the business address of the applicant; (4) the name and contact information of a designated contact for the applicant; (5) a description of the geographic area that the applicant proposes to serve; (6) the PEG channel capacity and capital support proposed by the applicant; (7) the term of the agreement proposed by the applicant; (8) whether the applicant holds an existing authorization to access the public rights-of-way in the subject franchise service area; (9) the amount of the franchise fee the applicant offers to pay; and (10) any additional information required by applicable state or local laws.

47 CFR 76.41(d) states when a competitive franchise applicant files a franchise application with a franchising authority and the applicant has existing authority to access public rights-of-way

in the geographic area that the applicant proposes to serve, the franchising authority grant or deny the application within 90 days of the date the application is received by the franchising authority. If a competitive franchise applicant does not have existing authority to access public rights-of-way in the geographic area that the applicant proposes to serve, the franchising authority must perform grant or deny the application within 180 days of the date the application is received by the franchising authority. A franchising authority and a competitive franchise applicant may agree in writing to extend the 90-day or 180-day deadline, whichever is applicable.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 2013–02512 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 13–103]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission released a public notice announcing the meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

DATES: Thursday February 21, 2013, 10:00 a.m.

ADDRESSES: Requests to make an oral statement or provide written comments to the NANC should be sent to Carmell Weathers, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 12th Street SW., Room 5–C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Carmell Weathers at (202) 418–2325 or *Carmell.Weathers@fcc.gov.* The fax number is: (202) 418–1413. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document in CC Docket No. 92–237, DA 13–103 released January 25, 2013. The complete text in this document is available for public inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The document my also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com.* It is available on the Commission's Web site at *http://www.fcc.gov.*

The North American Numbering Council (NANC) has scheduled a meeting to be held Thursday, February 21, 2013, from 10:00 a.m. until 2:00 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 12th Street SW., Room TW–C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Thursday, February 21, 2013, 10:00 a.m.*

1. Announcements and Recent News
2. Approval of Transcript
   —Meeting of December 13, 2012
3. Report of the North American Numbering Plan Administrator (NANPA)
4. Report of the National Thousands Block Pooling Administrator (PA)
5. Report of the Numbering Oversight Working Group (NOWG)
6. Report of the North American Numbering Plan Billing and Collection (NANP B&C) Agent
7. Report of the Billing and Collection Working Group (B&C WG)
8. Report of the North American Portability Management LLC (NAPM LLC)
9. Report of the LNPA Selection Working Group (SWG)
10. Report of the Local Number Portability Administration (LNPA) Working Group
11. Status of the Industry Numbering Committee (INC) activities
12. Report of the Future of Numbering Working Group (FoN WG)
13. Numbers and the PSTN Technology Transition: Updates from Henning Schulzrinne, FCC's Chief Technology Officer, based on the work of the FCC's Technological Advisory Council, the FCC's Technology Transitions Policy Task Force and the FTC–FCC caller ID spoofing prevention efforts
14. Summary of Action Items
15. Public Comments and Participation (5 minutes per speaker)
16. Other Business

Adjourn no later than 2:00 p.m.

* The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Marilyn Jones,

Attorney, Wireline Competition Bureau.

[FR Doc. 2013–02518 Filed 2–5–13; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[Notice 2013–03]

Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold

AGENCY: Federal Election Commission.

ACTION: Notice of adjustments to contribution and expenditure limitations and lobbyist bundling disclosure threshold.

SUMMARY: As mandated by provisions of the Federal Election Campaign Act of 1971, as amended (''FECA'' or ''the Act''), the Federal Election Commission (''FEC'' or ''the Commission'') is adjusting certain contribution and expenditure limitations and the lobbyist bundling disclosure threshold set forth in the Act, to index the amounts for inflation. Additional details appear in the supplemental information that follows.

DATES: *Effective Date:* The effective date for the limitation at 2 U.S.C. 441a(a)(1)(A) is November 7, 2012. The effective date for the limitations at 2 U.S.C. 434(i)(3)(A), 441a(a)(1)(B),

441a(a)(3), 441a(d) and 441a(h) is January 1, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Elizabeth S. Kurland, Information Division, 999 E Street NW., Washington, DC 20463; (202) 694–1100 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: Under the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.,* coordinated party expenditure limits (2 U.S.C. 441a(d)(2) and (3)(A), (B)), certain contribution limits (2 U.S.C. 441a(a)(1)(A) and (B), (a)(3) and (h)), and the disclosure threshold for contributions bundled by lobbyists (2 U.S.C. 434(i)(3)(A)) are adjusted periodically to reflect changes in the consumer price index. *See* 2 U.S.C. 434(i)(3) and 441a(c)(1), and 11 CFR 109.32 and 110.17(a), (f). The Commission is publishing this notice to announce the adjusted limits and disclosure threshold.

Coordinated Party Expenditure Limits for 2013

Under 2 U.S.C. 441a(c), the Commission must adjust the expenditure limitations established by 2 U.S.C. 441a(d) (the limits on expenditures by national party committees, state party committees, or their subordinate committees in connection with the general election campaign of candidates for Federal office) annually to account for inflation. This expenditure limitation is increased by the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 1974).

1. Expenditure Limitation for House of Representatives in States with More Than One Congressional District

Both the national and state party committees have an expenditure limitation for each general election held to fill a seat in the House of Representatives in states with more than one congressional district. This limitation also applies to those states and territories that elect individuals to the office of Delegate or Resident Commissioner.[1] The formula used to calculate the expenditure limitation in such states multiplies the base figure of $10,000 by the difference in the price index (4.65647), rounding to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(B), and 11 CFR 109.32(b) and 110.17. Based upon this formula, the expenditure limitation for 2013 general elections for House candidates in these states is $46,600.

2. Expenditure Limitation for Senate and for House of Representatives in States With Only One Congressional District

Both the national and state party committees have an expenditure limitation for a general election held to fill a seat in the Senate or in the House of Representatives in states with only one congressional district. The formula used to calculate this expenditure limitation considers not only the price index but also the voting age population (''VAP'') of the state. The VAP of each state is published annually in the **Federal Register** by the Department of Commerce. 11 CFR 110.18. The general election expenditure limitation is the greater of: The base figure ($20,000) multiplied by the difference in the price index, 4.65647 (which totals $93,100); or $0.02 multiplied by the VAP of the state, multiplied by 4.65647. Amounts are rounded to the nearest $100. *See* 2 U.S.C. 441a(c)(1)(B) and 441a(d)(3)(A), and 11 CFR 109.32(b) and 110.17. The chart below provides the state-by-state breakdown of the 2013 general election expenditure limitation for Senate elections. The expenditure limitation for 2013 House elections in states with only one congressional district[2] is $93,100.

SENATE GENERAL ELECTION EXPENDITURE LIMITS—2013 ELECTIONS

State	Voting age population (VAP)	VAP × .02 × the price index (4.65647)	Senate expenditure limit (the greater of the amount in column 3 or $93,100)
Alabama	3,697,617	$344,400	$344,400
Alaska	544,349	50,700	93,100
Arizona	4,932,361	459,300	459,300
Arkansas	2,238,250	208,400	208,400
California	28,801,211	2,682,200	2,682,200
Colorado	3,956,224	368,400	368,400
Connecticut	2,796,789	260,500	260,500
Delaware	712,042	66,300	93,100
Florida	15,315,088	1,426,300	1,426,300
Georgia	7,429,820	691,900	691,900
Hawaii	1,089,302	101,400	101,400
Idaho	1,169,075	108,900	108,900
Illinois	9,811,190	913,700	913,700
Indiana	4,945,857	460,600	460,600
Iowa	2,351,233	219,000	219,000
Kansas	2,161,601	201,300	201,300
Kentucky	3,362,177	313,100	313,100
Louisiana	3,484,090	324,500	324,500
Maine	1,063,274	99,000	99,000
Maryland	4,540,763	422,900	422,900
Massachusetts	5,244,729	488,400	488,400
Michigan	7,616,490	709,300	709,300

[1] Currently, these states are the District of Columbia, the Commonwealth of Puerto Rico, and the territories of American Samoa, Guam, the United States Virgin Islands and the Northern Mariana Islands. *See http://www.house.gov/representatives/.*

[2] Currently, these states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming. *See http://www.house.gov/representatives/.*

SENATE GENERAL ELECTION EXPENDITURE LIMITS—2013 ELECTIONS—Continued

State	Voting age population (VAP)	VAP × .02 × the price index (4.65647)	Senate expenditure limit (the greater of the amount in column 3 or $93,100)
Minnesota	4,102,991	382,100	382,100
Mississippi	2,239,593	208,600	208,600
Missouri	4,618,513	430,100	430,100
Montana	783,161	72,900	93,100
Nebraska	1,392,120	129,600	129,600
Nevada	2,095,348	195,100	195,100
New Hampshire	1,045,878	97,400	97,400
New Jersey	6,838,206	636,800	636,800
New Mexico	1,571,096	146,300	146,300
New York	15,307,107	1,425,500	1,425,500
North Carolina	7,465,545	695,300	695,300
North Dakota	545,020	50,800	93,100
Ohio	8,880,551	827,000	827,000
Oklahoma	2,877,457	268,000	268,000
Oregon	3,038,729	283,000	283,000
Pennsylvania	10,024,150	933,500	933,500
Rhode Island	833,818	77,700	93,100
South Carolina	3,643,633	339,300	339,300
South Dakota	629,185	58,600	93,100
Tennessee	4,962,227	462,100	462,100
Texas	19,073,564	1,776,300	1,776,300
Utah	1,967,315	183,200	183,200
Vermont	502,060	46,800	93,100
Virginia	6,329,130	589,400	589,400
Washington	5,312,045	494,700	494,700
West Virginia	1,471,372	137,000	137,000
Wisconsin	4,408,841	410,600	410,600
Wyoming	440,922	41,100	93,100

Limitations on Contributions by Individuals, Non-Multicandidate Committees and Certain Political Party Committees Giving to U.S. Senate Candidates for the 2013–2014 Election Cycle

The Act requires inflation indexing to: (1) The limitations on contributions made by persons under 2 U.S.C. 441a(a)(1)(A) (contributions to candidates) and 441a(a)(1)(B) (contributions to national party committees); (2) the biennial aggregate contribution limitations applicable to individuals under 2 U.S.C. 441a(a)(3); and (3) the limitation on contributions made to U.S. Senate candidates by certain political party committees at 2 U.S.C. 441a(h). *See* 2 U.S.C. 441a(c). These contribution limitations are increased by multiplying the respective statutory contribution amount by 1.29668, the percent difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2001). The resulting amount is rounded to the nearest multiple of $100. *See* 2 U.S.C. 441a(c) and 11 CFR 110.17(b). Contribution limitations shall be adjusted accordingly:

Statutory provision	Statutory amount	2013–2014 Limit
2 U.S.C. 441a(a)(1)(A)	$2,000	$2,600.
2 U.S.C. 441a(a)(1)(B)	$25,000	$32,400.
2 U.S.C. 441a(a)(3)(A)	$37,500	$48,600.
2 U.S.C. 441a(a)(3)(B)	$57,500 (of which no more than $37,500 may be attributable to contributions to political committees that are not political committees of national political parties).	$74,600 (of which no more than $48,600 may be attributable to contributions to political committees that are not political committees of national political parties).
2 U.S.C. 441a(h)	$35,000	$45,400.

The increased limitation at 2 U.S.C. 441a(a)(1)(A) is to be in effect for the two-year period beginning on the first day following the date of the general election in the preceding year and ending on the date of the next regularly scheduled election. Thus the $2,600 figure above is in effect from November 7, 2012, to November 4, 2014. The limitations under 2 U.S.C. 441a(a)(1)(B), 441a(a)(3)(A) and (B), and 441a(h), shall be in effect beginning January 1st of the odd-numbered year and ending on December 31st of the next even-numbered year. Thus the new contribution limitations under 2 U.S.C. 441a(a)(1)(B), 441a(a)(3)(A) and (B), and 441a(h) are in effect from January 1, 2013, to December 31, 2014. *See* 11 CFR 110.17(b)(1).

Lobbyist Bundling Disclosure Threshold for 2013

The Act requires certain political committees to disclose contributions bundled by lobbyists/registrants and lobbyist/registrant political action committees once the contributions exceed a specified threshold amount. The Commission must adjust this threshold amount annually to account for inflation. The disclosure threshold is increased by multiplying the $15,000 statutory disclosure threshold by 1.13887, the difference between the price index, as certified to the Commission by the Secretary of Labor, for the 12 months preceding the beginning of the calendar year and the price index for the base period (calendar year 2006). The resulting amount is rounded to the nearest multiple of $100. *See* 2 U.S.C. 434(i)(3)(A) and (B), 441a(c)(1)(B) and 11 CFR 104.22(g). Based upon this formula ($15,000 × 1.13887), the lobbyist bundling disclosure threshold for calendar year 2013 is $17,100.

On behalf of the Commission.

Dated: January 31, 2013.

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 2013–02520 Filed 2–5–13; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (www.fmc.gov) or by contacting the Office of Agreements at (202)-523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011790–002.

Title: Dole Ocean Cargo Express/King Ocean Services Limited Space Charter Agreement.

Parties: Dole Ocean Cargo Express, Inc., and King Ocean Services Limited.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW. Suite 1100; Washington, DC 20006.

Synopsis: The amendment would add Guatemala, Honduras and ports in Costa Rica other than Puerto Moin and Puerto Limon to the geographic scope of the agreement.

Agreement No.: 011842–001.

Title: Crowley/Dole Space Charter Agreement.

Parties: Crowley Latin America Services, LLC and Dole Ocean Cargo Express, Inc.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW. Suite 1100; Washington, DC 20006.

Synopsis: The amendment would expand the geographic scope of the agreement to include all of the U.S. Atlantic and Gulf Coasts and all ports and inland points in Costa Rica, Guatemala and Honduras. The amendment would also change Crowley's name and correct its address.

Agreement No.: 012067–009.

Title: U.S. Supplemental Agreement to HLC Agreement.

Parties: BBC Chartering & Logistics GmbH & Co. KG; Beluga Chartering GmbH; Chipolbrok; Clipper Project Ltd.; Hyundai Merchant Marine Co., Ltd.; Industrial Maritime Carriers, L.L.C.; Nordana Line A/S; and Rickmers-Linie GmbH & Cie. KG.

Filing Party: Wade S. Hooker, Esq.; 211 Central Park W; New York, NY 10024.

Synopsis: The amendment would delete Safmarine Container Lines N.V. and add Safmarine MPV N.V. as a party to the U.S. Agreement and to the worldwide Agreement of the Heavy Lift Club.

Agreement No.: 012135–003.

Title: EUKOR Car Carriers, Inc./FOML Space Charter.

Parties: EUKOR Car Carriers, Inc. and FESCO Ocean Management Limited

Filing Parties: Neal M Mayer, Esq.; Hoppel, Mayer & Coleman; 1050 Connecticut Avenue NW, 10th Floor; Washington, DC 20036

Synopsis: The amendment revises the geographic scope of the agreement to include ports in South Korea, and makes corresponding changes to the agreement.

Agreement No.: 012190–001.

Title: HSDG–GWF Space Charter Agreement.

Parties: Hamburg Sud and Great White Fleet Liner Services Ltd.

Filing Party: Wayne R. Rohde, Esq.; Cozen O'Connor; 1627 I Street, NW., Suite 1100; Washington, DC 20006–4007.

Synopsis: The amendment adds Mexico to the geographic scope of the agreement, clarifies language in the agreement, and makes technical corrections to the agreement.

Dated: February 1, 2013.

By Order of the Federal Maritime Commission.

Karen V. Gregory,

Secretary.

[FR Doc. 2013–02674 Filed 2–5–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

The Commission gives notice that the following Ocean Transportation Intermediary license has been reissued pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101) effective on the date shown.

License No.: 020252F.
Name: Sobe Enterprises, Inc.
Address: 150 NW 176th Street, Unit C, Miami Gardens, FL 33169.
Date Reissued: November 15, 2012.

Vern W. Hill,

Director, Bureau of Certification and Licensing.

[FR Doc. 2013–02675 Filed 2–5–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Commission gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101) effective on the date shown.

License No.: 4483NF.
Name: Hag International, L.L.C.
Address: 148 Deer Trail North, Ramsey, NJ 07446.
Date Revoked: December 31, 2012.
Reason: Voluntary Surrender of License.

License No.: 004580F.
Name: Express Lanes International, Inc.
Address: 401 Broadway, Suite 1208, New York, NY 10013.
Date Revoked: December 29, 2012.
Reason: Failed to maintain a valid bond.

License No.: 009799N.
Name: Cargo One Inc. dba Cargo One.
Address: 287 Northern Blvd., Suite 204, Great Neck, NY 11021.
Date Revoked: December 28, 2012.
Reason: Failed to maintain a valid bond.

License No.: 16841N.
Name: FRS Freight Services, Inc.
Address: 69–05 Roosevelt Avenue, Woodside, NY 11377.

Date Revoked: December 19, 2012.
Reason: Voluntary Surrender of License.

License No.: 017697F.
Name: Ireh Logistic Services Inc.
Address: 488 East Ocean Blvd., Suite 702, Long Beach, CA 90802.
Date Revoked: December 27, 2012.
Reason: Failed to maintain a valid bond.

License No.: 017719F.
Name: Sunjin Shipping (U.S.A.), Inc.
Address: 149–15 177th Street, Jamaica, NY 11434.
Date Revoked: January 6, 2013.
Reason: Failed to maintain a valid bond.

License No.: 019164N.
Name: TMMAA Line (USA), Inc.
Address: 2050 West 190th Street, Suite 105, Torrance, CA 90504.
Date Revoked: January 11, 2013.
Reason: Failed to maintain a valid bond.

License No.: 019308N.
Name: MMI Logistics, Inc.
Address: 12719 Chadron Avenue, Hawthorne, CA 90250.
Date Revoked: January 7, 2013.
Reason: Failed to maintain a valid bond.

License No.: 019744NF.
Name: Cargo Link Air Freight, Inc.
Address: Bldg. #75, Suite 237C, JFK Int'l Airport, Jamaica, NY 11430.
Date Revoked: December 30, 2012.
Reason: Failed to maintain valid bonds.

License No.: 022179N.
Name: Alnour Investments.
Address: 438 East Katella Avenue, Suite 227, Orange, CA 92867.
Date Revoked: January 2, 2013.
Reason: Failed to maintain a valid bond.

License No.: 022214N.
Name: Bernuth Express, LLC.
Address: 3201 24th Street, Miami, FL 33142.
Date Revoked: January 10, 2013.
Reason: Failed to maintain a valid bond.

License No.: 022581NF.
Name: Cargostream, LLC.
Address: 1223 Old Fort Road, Moncks Corner, SC 29461.
Date Revoked: January 6, 2013.
Reason: Failed to maintain valid bonds.

License No.: 022682NF.
Name: NC Cargo LLC.
Address: 6819 NW 84th Avenue, Miami, FL 33166.
Date Revoked: December 27, 2012.
Reason: Failed to maintain valid bonds.

License No.: 023476N.
Name: AV Logistics, L.L.C.
Address: 350 Corporate Way, Suite 250, Orange Park, FL 32073.
Date Revoked: October 29, 2012.
Reason: Voluntary Surrender of License.

License No.: 023656N.
Name: Ask-Ark, LLC.
Address: 808 Revelstore Terrace, Leesburg, VA 20176.
Date Revoked: January 2, 2013.
Reason: Failed to maintain a valid bond.

Vern W. Hill,
Director, Bureau of Certification and Licensing.

[FR Doc. 2013–02678 Filed 2–5–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov.*

Atlanta Customs Brokers & Intl Freight Forwarders Inc dba ACB Ocean Services (NVO & OFF), 650 Atlanta South Parkway, Suite 104, Atlanta, GA 30349, Officers: Kathy Williams, Vice President, Exports (QI), Deborah Torma, President, Application Type: New NVO & OFF License

AZ Freight Inc. (NVO & OFF), 6610 149th Street, Suite 6H, Flushing, NY 11367, Officers: Tingyi Jiang, President (QI), Yunzhi Gu, Treasurer, Application Type: New NVO & OFF License

Engineering & Trade, Inc. (OFF), 5701 NW 112th Court, Doral, FL 33178, Officer: Jairo E. Leon, President (QI), Application Type: New OFF License

Estes Forwarding Worldwide LLC (NVO & OFF), 1100 Commerce Road, Richmond, VA 23224, Officers: Glenn J. Calvino, Vice President (QI), Scott Fisher, President, Application Type: QI Change

Goldstar Global Logistic LLC (NVO & OFF), 154–09 146th Avenue, 3rd Floor, Jamaica, NY 11434, Officer: Kunj B. Kalra, President (QI), Application Type: Add OFF Service

Hercules Packing Shipping & Moving Co., Inc. (NVO), 34–23 31st Street, 1st Floor, Astoria, NY 11106, Officer: Gus Dourmas, President, Application Type: Name Change to Iraklis Packing Shipping & Moving Co., Inc.

Jumbo Transport International, Inc. (NVO & OFF), 1201 Corbin Street, Elizabeth, NJ 07201, Officers: Steven Cataldo, President (QI), Reinhard Eckhoff, Chairman, Application Type: QI Change

M E Dey Cargo Corporation dba Orient Grace Container Line (NVO & OFF), 510 Plaza Drive, Suite 1210, Atlanta, GA 30349, Officers: John Davis, Secretary (QI), Debra A. Watmore, President, Application Type: Name Change to Dey Cargo Corporation, dba Orient Grace Container Line and QI Change

McLimex, LLC (OFF), 502 N. Division Street, Carson City, NV 89703, Officers: Bernard Vo, Member (QI), Minh Nguyen, Member, Application Type: Name Change to Mbequip, LLC

Pole Star Shipping Inc (NVO & OFF), 65 Demarest Drive, Manalapan, NJ 07726, Officers: Angela Simeone, Secretary (QI), Ashwani Sharma, President, Application Type: New NVO & OFF License

Roadrunner Holdings, L.L.C. dba Roadrunner, Ltd. dba Roadrunner Moving & Storage (OFF), 12425 Chimney Rock Road, Houston, TX 77035, Officers: Benjamin Breedlove, Vice President (QI), Robert McGowen, Chairman, Application Type: QI Change

Dated: February 1, 2013.
By the Commission.

Karen V. Gregory,
Secretary.

[FR Doc. 2013–02679 Filed 2–5–13; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in or to Acquire Companies Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo,* or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y

(12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 22, 2013.

A. Federal Reserve Bank of Atlanta (Chapelle Davis, Assistant Vice President) 1000 Peachtree Street, NE., Atlanta, Georgia 30309:

1. HomeBancorp, Inc., Tampa, Florida; to acquire 100 percent of the voting shares of Mortgage Investors Corporation, St. Petersburg, Florida, and thereby engage in making, acquiring, brokering, or servicing loans or other extensions of credit, pursuant to sections 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, February 1, 2013.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2013–02600 Filed 2–5–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–5506–N]

Medicare Program: Comprehensive End-Stage Renal Disease Care Model Announcement

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice.

SUMMARY: This notice announces a request for applications from organizations to participate in the testing of the Comprehensive End-Stage Renal Disease (ESRD) Care Model, a new initiative from the Center for Medicare and Medicaid Innovation (Innovation Center), for a period beginning in 2013 and ending in 2016, with a possible extension into subsequent years.

DATES: *Letter of Intent Submission Deadline:* Interested organizations must submit a non-binding letter of intent on or before March 15, 2013.

Application Submission Deadline: Applications must be received on or before May 1, 2013.

FOR FURTHER INFORMATION CONTACT:

Daniel Farmer, (410) 786–5497 or Email *ESRD–CMMI@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Center for Medicare and Medicaid Innovation (Innovation Center), within the Centers for Medicare & Medicaid Services (CMS), was created to develop and test innovative health care payment and service delivery models that show promise of reducing program expenditures, while preserving or enhancing the quality of care for Medicare, Medicaid, and Children's Health Insurance Program (CHIP) beneficiaries.

We are interested in identifying models designed to improve care for specific populations. One population is beneficiaries with end-stage renal disease (ESRD). This population has complex health care needs, typically with comorbid conditions and disease complications, which require extensive care coordination services. To promote seamless and integrated care for beneficiaries with ESRD, a comprehensive care delivery model would emphasize coordination of a full-range of clinical and non-clinical services across providers, suppliers, and settings. This may be best achieved through the establishment of an interdisciplinary care team that is led by a nephrologist, comprised of dialysis facilities, health care professionals, paraprofessionals, and non-traditional health providers.

Through the Comprehensive ESRD Care Model, we seek to identify ways to improve the coordination and quality of care for this population, while lowering total per-capita expenditures to the Medicare program. We anticipate that the Comprehensive ESRD Care Model would result in improved health outcomes for beneficiaries with ESRD regarding the functional status, quality of life, and overall well-being, as well as increased beneficiary and caregiver engagement, and lower costs to Medicare through improved care coordination.

II. Provisions of the Notice

Section 1115A of the Social Security Act (the Act), as added by section 3021 of the Affordable Care Act, authorizes the Innovation Center to test innovative payment and service delivery models that reduce spending under Medicare, Medicaid or CHIP, while preserving or enhancing the quality of care. Under this authority, we seek to test whether establishing new incentives for dialysis facilities, nephrologists, and other healthcare providers and suppliers to improve the care delivered to Medicare beneficiaries living with ESRD will result in better outcomes through the implementation of the Comprehensive ESRD Care Model.

Under the Comprehensive ESRD Care Model, CMS will enter shared financial risk arrangements through ''Participation Agreements'' with organizations comprised of dialysis facilities, nephrologists, and other Medicare providers and suppliers. Participating organizations will be clinically and financially accountable for care provided to a group of beneficiaries with ESRD that will be attributed to these organizations based on the beneficiaries' historical and ongoing care patterns. Those organizations that are successful in improving beneficiary outcomes and lowering per capita Medicare Parts A and B expenditures will be able to share in Medicare savings generated. However, those organizations that do not improve outcomes and lower costs may be subject to losses. Final shared savings amounts and shared loss amounts will be based on the organization's performance on specified quality measures.

Organizations interested in applying to participate in the testing of the Comprehensive ESRD Care Model must submit a non-binding letter of intent and an application. Applications will not be accepted from organizations that did not submit a letter of intent. The letter of intent and application must be received by the dates specified in the **DATES** section of this notice.

For additional information on the Comprehensive ESRD Care Model and how to apply, click on the Request for Applications located on the Innovation Center Web site at: innovation.cms.gov/initiatives/comprehensive-ESRD-care.

III. Collection of Information Requirements

Section 1115A(d)(3) of the Act, as added by section 3021 of the Affordable Care Act, states that Chapter 35 of title 44, United States Code (the Paperwork Reduction Act of 1995), shall not apply to the testing and evaluation of models or expansion of such models under this section. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

(No. 93.773 Medicare—Hospital Insurance Program; and No. 93.774, Medicare-Supplementary Medical Insurance Program)

Dated: January 25, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–02194 Filed 2–4–13; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974; Report of New System of Records

AGENCY: Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, CMS is establishing a new system of records (SOR) titled, ''Long Term Care Hospitals Quality Reporting Program (LTCH QRP),'' System No. 09–70–0539. The new system will support a new quality reporting program for Long Term Care Hospitals (LTCH) created pursuant to Section 3004 of the Patient Protection and Affordable Care Act of 2010 (ACA) (Pub. L. 111–148), amending the Social Security Act (the Act) (42 U.S.C. 1886(m)).

DATES: *Effective Dates:* Effective 30 days after publication. Written comments should be submitted on or before the effective date. HHS/CMS/CCSQ may publish an amended SORN in light of any comments received.

ADDRESSES: The public should address comments to: CMS Privacy Officer, Privacy Policy Compliance Group, Office of E-Health Standards & Services, Office of Enterprise Management, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, MD 21244–1870, Mailstop: S2–24–25, Office: (410) 786–5357, Facsimile: (410) 786–1347, E-Mail: *walter.stone@cms.hhs.gov.* Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9:00 a.m.–3:00 p.m., Eastern Time zone.

FOR FURTHER INFORMATION CONTACT: Caroline Gallaher, Nurse Consultant, CMS, Centers for Clinical Standards and Quality, Quality Measurement & Health Assessment Group, Division of Chronic & Post-Acute Care, 7500 Security Boulevard, Mail Stop S3–02–01, Baltimore, MD 21244–1850. Office: 410–786–8705, Facsimile: (410) 786–8532, Email address: *caroline.gallaher@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the LTCH QRP System

The ACA directs the Secretary of HHS to compile, and eventually publish, quality measure data, measuring the quality of care provided to patients in LTCHs. The quality measure data is required to be valid, meaningful, and feasible to collect, and to address symptom management, patient preferences and avoidable adverse events. Although CMS administers the LTCH QRP, information is also collected on LTCH patients who may not be Medicare beneficiaries.

CMS created the LTCH QRP System (the System) to house the data sets needed for the Program. The first quality measure for which CMS has begun compiling data under the Program is ''the Percent of Patient Residents with Pressure Ulcers That Are New or Worsened.'' CMS developed the ''LTCH Continuity Assessment Record & Evaluation (CARE) Data Set'' (LTCH CARE Data Set) as the vehicle by which the System will collect pressure ulcer quality measure data from LTCH patients and LTCH providers, after determining that there were no existing suitable data sets that could be leveraged to supply quality measure data about pressure ulcers in the LTCH setting. As additional quality measures are added to the Program, data items will be added the LTCH CARE data set to compile quality measure data about other conditions.

II. Personally Identifiable Information in LTCH

Most of the personally identifiable information (PII) in LTCH will be about LTCH patients; however, certain information may be collected about providers who work in LTCHs that may be considered to be PII (i.e., National Provider Identifier (NPI), personal contact information, and Social Security Number (SSN), if used for business purposes). At this time, the LTCH CARE Data Set includes these components: (1) Condition (i.e., pressure ulcer) documentation; (2) selected covariates related to the condition; and (3) patient demographic information. The PII in LTCH, and how it may be used and disclosed, is more fully described in the System of Records Notice (SORN), below. LTCH data when published on the Internet will be in aggregate form and will not contain any personally identifiable data elements.

III. The Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the United States Government collects, maintains, and uses personally identifiable information (PII) in a system of records. A ''system of records'' is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a system of records notice (SORN) identifying and describing each system of records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individual record subjects can exercise their rights under the Privacy Act (e.g., to determine if the system contains information about them).

SYSTEM NUMBER:

09–70–0539

SYSTEM NAME:

''Long Term Care Hospitals Quality Reporting Program (LTCH QRP)'' HHS/CMS/CCSQ.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

CMS Data Center, 7500 Security Boulevard, North Building, First Floor, Baltimore, Maryland 21244–1850, and at various LTCHs and contractor sites.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system will contain personally identifiable information (PII) about the following categories of individuals who participate in or are involved with the LTCH QRP: LTCH patients and Medicare beneficiaries, who receive health care services coordinated and managed by LTCHs; any providers and or any contact persons for a LTCH who provide home or personal contact information.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system will include the following categories of records, containing, but not necessarily limited to, the following PII data elements: Patient/beneficiary condition, selected covariates about the condition, and patient/beneficiary demographic records containing the patient/beneficiary's name, gender, beneficiary's Health Insurance Claim Number (HICN) or

patient's SSN, address, and date of birth. LTCH provider records, containing the provider's name, address, and the Taxpayer Identification Number (TIN), which could be a Social Security Number (SSN); and National Provider Identifier (NPI).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 3004 of the Patient Protection and Affordable Care Act of 2010 (Pub. L. 111–148), amending the Social Security Act (42 U.S.C. 1886(m)).

PURPOSE(S) OF THE SYSTEM:

CMS will use this system to compile quality measure data, measuring the quality of care provided to patients in LTCHs. CMS will or may use personally identifiable information from this system to: (1) Support regulatory, reimbursement, and policy functions performed by Agency contractors, consultants, or CMS grantees; (2) assist federal and state agencies and their fiscal agents to perform the statutory functions of the LTCH QRP; (3) assist LTCHs with the statutory reporting requirements; (4) support research, evaluation, or epidemiological projects related to the prevention of disease or disability, or the restoration or maintenance of health, and for payment related projects; (5) support the functions of Quality Improvement Organizations; (6) support the functions of national accrediting organizations; (7) support litigation involving the agency; (8) combat fraud, waste, and abuse in certain health benefits programs, (9) assist agencies, entities, contractors, or persons tasked with the response and remedial efforts in the event of a breach of information, and (10) assist the U.S. Department of Homeland Security (DHS) cyber security personnel.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OR USERS AND THE PURPOSES OF SUCH USES:

A. Entities Who May Receive Disclosures Under Routine Use

These routine uses specify circumstances, in addition to those provided by statute in the Privacy Act of 1974, under which CMS may release information from LTCH without the consent of the individual to whom such information pertains. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including but not limited to ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected. We propose to establish the following routine use disclosures of information maintained in the system:

1. To support Agency contractors, consultants, or CMS grantees who have been engaged by the Agency to assist in accomplishment of a CMS function relating to the purposes for this collection and who need to have access to the records in order to assist CMS.

2. To assist another Federal, agency of a State government, an agency established by State law, or its fiscal agents with information that is necessary and/or required in order to perform the statutory functions of the LTCH QRP;

3. To provide LTCHs with information they need to meet any statutory requirements of the program, assist with other reports as required by CMS, and to assist in the implementation of quality standards.

4. To support an individual or organization for research, as well as evaluation or epidemiological projects related to the prevention of disease or disability, the restoration or maintenance of health, or for understanding and improving payment projects.

5. To support Quality Improvement Organizations (QIO) in connection with review of claims, or in connection with studies or other review activities conducted pursuant to Part B of Title XI of the Act, and in performing affirmative outreach activities to individuals for the purpose of establishing and maintaining their entitlement to Medicare benefits or health insurance plans.

6. To assist national accrediting organization(s) whose accredited facilities are presumed to meet certain Medicare requirements (e.g., the Joint Commission for the Accreditation of Healthcare Organizations, the American Osteopathic Association, or the Commission on Accreditation of Rehabilitation Facilities).

7. To provide information to the U.S. Department of Justice (DOJ), a court, or an adjudicatory body when (a) the Agency or any component thereof, or (b) any employee of the Agency in his or her official capacity, or (c) any employee of the Agency in his or her individual capacity where the DOJ has agreed to represent the employee, or (d) the United State Government, is a party to litigation or has an interest in such litigation, and by careful review, CMS determines that the records are both relevant and necessary to the litigation and that the use of such records by the DOJ, court, or adjudicatory body is compatible with the purpose for which the agency collected the records.

8. To assist a CMS contractor (including, but not limited to Medicare Administrative Contractors, fiscal intermediaries, and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such program.

9. To assist another Federal agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States (including any state or local governmental agency), that administers or that has the authority to investigate potential fraud, waste or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

10. To disclose records to appropriate Federal agencies and Department contractors that have a need to know the information for the purpose of assisting the Department's efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, and the information disclosed is relevant and necessary for that assistance.

11. To assist the U.S. Department of Homeland Security (DHS) cyber security personnel, if captured in an intrusion detection system used by HHS and DHS pursuant to the Einstein 2 program.

B. ADDITIONAL CIRCUMSTANCES AFFECTING DISCLOSURE OF PII DATA:

To the extent that the individual claims records in this system contain Protected Health Information (PHI) as defined by HHS regulation ''Standards for Privacy of Individually Identifiable Health Information'' (45 CFR Parts 160 and 164, Subparts A and E), disclosures of such PHI that are otherwise authorized by these routine uses may only be made if, and as, permitted or required by the ''Standards for Privacy of Individually Identifiable Health Information'' (see 45 CFR 164–512(a)(1)).

In addition, HHS policy will be to prohibit release even of data not directly identifiable with a particular individual, except pursuant to one of the routine uses or if required by law, if CMS determines there is a possibility that a particular individual can be identified through implicit deduction based on small cell sizes (instances where the

patient population is so small that individuals could, because of the small size, use this information to deduce the identity of a particular individual).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM—

STORAGE:

All records are stored on magnetic media.

RETRIEVABILITY:

Information may be retrieved by any of these personal identifiers: provider's TIN (which could be a SSN); National Provider Identifier (NPI); Patient's SSN or a Beneficiary's HICN; a patient's or beneficiary's name in combination with the patient's or beneficiary's date of birth.

SAFEGUARDS:

Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access. Access to records in the LTCH database system will be limited to CMS personnel and contractors through password security, encryption, firewalls, and secured operating system. Any electronic or hard copies of financial-related records containing PII at CMS and contractor locations will be kept in secure electronic files or in file folders locked in secure file cabinets during non-duty hours.

RETENTION AND DISPOSAL:

Records containing PII will be maintained for a period of up to 10 years after entry in the database. Any such records that are needed longer, such as to resolve claims and audit exceptions or to prosecute fraud, will be retained until such matters are resolved. Beneficiary claims records are currently subject to a document preservation order and will be preserved indefinitely pending further notice from the U.S. Department of Justice.

SYSTEM MANAGER AND ADDRESS:

Director, Division of Chronic & Post-Acute Care, Quality Measurement & Health Assessment Group, Center for Clinical Standards and Quality, Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Mail Stop S3–02–01, Baltimore, MD 21244–1850.

NOTIFICATION PROCEDURE:

An individual record subject who wishes to know if this system contains records about him or her should write to the system manager who will require the system name, HICN, and for verification purposes, the subject individual's name (woman's maiden name, if applicable), and SSN (furnishing the SSN is voluntary, but it may make searching for a record easier and prevent delay).

RECORD ACCESS PROCEDURE:

An individual seeking access to records about him or her in this system should use the same procedures outlined in Notification Procedures above. The requestor should also reasonably specify the record contents being sought. (These procedures are in accordance with Department regulation 45 CFR 5b.5(a)(2).)

CONTESTING RECORD PROCEDURES:

To contest a record, the subject individual should contact the system manager named above, and reasonably identify the record and specify the information to be contested. The individual should state the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7.)

RECORD SOURCE CATEGORIES:

Personally identifiable information in this database is collected by LTCH providers from and about LTCH patients and beneficiaries by means of the LTCH CARE Data Set. LTCH data is reported to CMS from LTCH providers through an on-line system known as LTCH Assessment Submission Entry and Reporting (LASER).

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

None.

Dated: January 10, 2013.

Michelle Snyder,

Deputy Chief Operating Officer, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–02669 Filed 2–5–13; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

Privacy Act of 1974

AGENCY: Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS).

ACTION: Notice to establish a new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, CMS is establishing a new system of records titled, ''Health Insurance Exchanges (HIX) Program,'' to support the CMS Health Insurance Exchanges Program established under provisions of the Affordable Care Act (PPACA) (Pub. L. 111–148), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152). The Health Insurance Exchanges (HIX) Program includes Federally-facilitated Exchanges operated by CMS, CMS support and services provided to all Exchanges and state agencies administering Medicaid, CHIP and the BHP, and CMS administration of advance payment of premium tax credits and cost-sharing reductions. The system of records will contain personally identifiable information (PII) about certain individuals who apply or on whose behalf an application is filed for eligibility determinations for enrollment in a qualified health plan (QHP) through an Exchange, and for insurance affordability programs. Exchange functions that will utilize PII include eligibility, enrollment, appeals, payment processes and consumer assistance. The system will also contain information about qualified employers seeking to obtain health insurance coverage for its qualified employees through a Small Business Health Options Program (SHOP). In addition, the system will include PII of marketplace assisters, Navigators and Agents/Brokers, their officers, employers and contractors; contact information for QHP Issuers seeking certification that may contain personally identifiable information of their officers, and employees or contractors; employees and contractors of the Exchange and CMS. The program and the system of records are more thoroughly described in the Supplementary Information section and System of Records Notice (SORN), below.

DATES: *Effective Dates:* Effective 30 days after publication. Written comments should be submitted on or before the effective date. HHS/CMS/CCIIO may publish an amended system of records notice (SORN) in light of any comments received.

ADDRESSES: The public should send comments to: CMS Privacy Officer, Division of Privacy Policy, Privacy Policy and Compliance Group, Office of E-Health Standards & Services, Office of Enterprise Management, CMS, Room S2–24–25, 7500 Security Boulevard,

Baltimore, Maryland 21244–1850. Comments received will be available for review at this location, by appointment, during regular business hours, Monday through Friday from 9:00 a.m.—3:00 p.m., Eastern Time zone.

For Information on Health Insurance Exchanges Contact: Karen Mandelbaum, JD, MHA, Office of Health Insurance Exchanges, Consumer Information and Insurance Systems Group, Center for Consumer Information and Insurance Oversight, 7210 Ambassador Road, Baltimore, MD 21244, Office Phone: (410) 786–1762, Facsimile: (301) 492–4353, E-Mail: *karen.mandelbaum@cms.hhs.gov*

SUPPLEMENTARY INFORMATION:

I. Health Insurance Exchanges Program

The Affordable Care Act (ACA) requires Exchanges to use a single, streamlined application for consumers to use in applying for eligibility determinations for enrollment in a QHP through the Exchange, for insurance affordability programs, and for certifications of exemption from the individual responsibility mandate and penalty. The insurance affordability programs that the Exchanges will determine eligibility for include: (a) The advance payment of the premium tax credits (APTC); (b) cost-sharing reductions (CSR); (c) Medicaid, (d) Children's Health Insurance Program (CHIP), and (e) Basic Health Plan (BHP), if a BHP is operating in the service area of the Exchange. The information requested on the application includes all of the information necessary for determining eligibility and enrolling individuals and qualified employees in a QHP through the Exchange or SHOP and for determining eligibility for insurance affordability programs. The applicant must be able to file this application online, by telephone, in person or by mail with the entity that is administering the eligibility and enrollment functions of the Exchange. This eligibility and enrollment process will be conducted in real-time through electronic data transfer.

The applicant/enrollee, the application filer on behalf of other applicants, or the authorized representative of the applicant/enrollee will be asked to provide the minimum amount of information necessary to support the eligibility and enrollment processes of the above listed programs. The categories of information requested on the application include personal, employment, financial, demographic, and pregnancy status and tobacco use. Section 1411 of the Affordable Care Act requires verification of the information received from applicants/enrollees. The information provided by an applicant/enrollee, or by an application filer on behalf of other applicants, on the application will be matched and verified against data provided by the Internal Revenue Service (IRS), Social Security Administration (SSA), Department of Homeland Security (DHS), Department of Veterans Affairs (VA),Department of Defense (DoD), Peace Corps, and Office of Personnel Management (OPM) that is maintained by the Federally-facilitated Exchange (FFE). State-based Exchanges (SBEs) will send requests for data matching through the Data Services Hub (Hub). Exchanges can also permit certain individuals and entities to assist applicants and enrollees. These include Navigators, Agents, Brokers and employees, agents and contractors of the Exchange (e.g. marketplace assisters).

Section 1943(b) of the Social Security Act (as amended by Section 2201 of the Affordable Care Act), as implemented through regulations adopted by the Secretary of HHS,[1] requires that Medicaid and CHIP agencies utilize the same streamlined enrollment system and secure electronic interface established in Section 1413 to verify information, including federal tax information, financial and quarters of coverage information held by the Social Security Administration, Social Security Number (SSN) and citizenship, needed to make an eligibility determination and facilitate a streamlined eligibility and enrollment system among all insurance affordability programs. This enrollment system and secure electronic interface is the same one developed by HHS to comply with sections 1411(c) and 1411(d) of the Affordable Care Act for purposes of determining eligibility to enroll in a qualified health plan (QHP) through an Exchange State Medicaid, Chip and BHP agencies will send requests for data matching through the Data Services Hub (Hub).

With respect to determinations of eligibility for Medicaid and CHIP, the FFE can make either an assessment of eligibility or a determination of eligibility. Unless the FFE assesses an applicant/enrollee as ineligible for a Medicaid, CHIP or BHP program and the applicant/enrollee requests to withdraw his/her application for Medicaid, CHIP or BHP, the FFE must notify the State Medicaid or CHIP agency and transmit all information obtained or verified by the CMS in operation of the FFE via secure electronic interface for that other agency to make a full determination of eligibility under those programs and provide the applicant with coverage.

When applicants/enrollees receive a determination that they are qualified to enroll in a QHP and have chosen a QHP to enroll in, the Exchange will notify the QHP Issuers of individual enrollment selections and transmit the information necessary to implement, discontinue or modify enrollment and/or the level of payments processed and received through the APTC and CSR programs and information regarding the premium payments due from the enrollees.

Enrollees are required to update information that would impact their eligibility status, and an Exchange will perform mid-year redeterminations using the same system used for initial determinations of eligibility when it receives updated information regarding an enrollee either directly from the enrollee or through a periodic examination of data sources. The Secretary along with the other appropriate agencies will establish an appeals process for individuals and employers when eligibility is denied as a result of inconsistencies between the information obtained from applicants/enrollees and employers and information and data verified through the Exchange. CMS will also process enrollment and payment transactions to facilitate APTC payments for all Exchanges; SBEs will send this information to CMS through the Hub. The FFE will store eligibility and enrollment records, system user records, appeals records, consumer services records and SHOP employer records for all Exchanges. The Hub will be a pass-through for SBEs for providing information from applicants/enrollees to CMS and for the FFE to share data with SBEs, Medicaid, CHIP and BHP agencies.

Each Exchange, including the FFE, will establish a SHOP to assist qualified employers and facilitate the enrollment of qualified employees into QHPs. Eligibility determinations are not made on the individual level in a SHOP; rather, the information that an employer is required to provide about employees includes, the name and address of the employer, number of employees, Employer Identification Number (EIN), and list of qualified employees and their tax ID numbers.

The FFE will be responsible for performing oversight functions with respect to issuer compliance with market-wide and Exchange specific standards in connection with QHPs certified by the FFE. The FFE will require QHP Issuers to submit, as requested by the FFE, certified financial information including information

[1] 42 CFR 435.948, 435.949.

related to ownership and control and information demonstrating that the issuer is fiscally sound, information that is necessary to administer and evaluate the program, including but not limited to, enrollee complaints against the QHP issuer and their disposition, enrollee appeals and their disposition, formal actions, reviews, findings or other similar actions by States, other regulatory bodies or any other certifying or accrediting organization, and any other information deemed necessary by the FFE for the administration of the FFE or certification of QHPs. In addition, the FFE will require qualified health plans to periodically report the activities that the health plan has implemented in order to improve health outcomes.

CMS will also administer the administration of advance payment of premium tax credits and cost-sharing reductions for all Exchanges. The PII that will be collected, disclosed and used as part of this administration includes QHP enrollment, premium payment information, and information about cost-sharing payments necessary to reconcile estimates of cost-sharing reductions with actual cost-sharing reductions.

II. The Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the United States Government collects, maintains, and uses PII in a system of records. A ''system of records'' is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a system of records notice (SORN) identifying and describing each system of records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individual record subjects can exercise their rights under the Privacy Act (e.g., to determine if the system contains information about them).

SYSTEM NUMBER:

09–70–0560

SYSTEM NAME:

Health Insurance Exchanges (HIX) Program, HHS/CMS/CCIIO

SECURITY CLASSIFICATION:

Unclassified

SYSTEM LOCATION:

CMS Data Center, 7500 Security Boulevard, North Building, First Floor, Baltimore, Maryland 21244–1850, Health Insurance Exchanges Program (HIX) locations, and at various contractor sites.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system will contain personally identifiable information (PII) about the following categories of individuals who participate in or are involved with the CMS Health Insurance Exchanges Program: (1) Any applicant/enrollee who applies, or on whose behalf an application is filed, for an eligibility determination for a qualified health plan (QHP) through an Exchange, insurance affordability program, or for a certification of exemption; (2) Navigators, Agents, Brokers, individuals or entities that are required to register with an Exchange prior to assisting qualified individuals to enroll in QHPs through the Exchange; (3) officers, employees and contractors of the Exchange; (4) employees and contractors of CMS (e.g. marketplace assisters, appeals staff); (5) contact information and business identifying information of QHPs seeking certification; (6) persons employed by or contracted with an Exchange organization who provide home or personal contact information; and (7) any qualified employer and the qualified employees whose enrollment in a QHP is facilitated through a Small Business Health Options Program (SHOP).

CATEGORIES OF RECORDS IN THE SYSTEM:

Information maintained in this system for individual applicant/enrollees includes, but may not be limited to, the applicant's first name, last name, middle initial, mailing address or permanent residential address (if different from the mailing address), date of birth, Social Security Number (if the applicant has one), taxpayer status, gender, ethnicity, residency, email address, and telephone number. The system will also maintain information that will verify the information provided by the individual/enrollee or by the application filer on behalf of other applicants that will enable a decision about an applicant's eligibility. The system will collect and maintain information that the applicant or the application filer on behalf of other applicants submits pertaining to (1) his or her citizenship or immigration status, because only individuals who are citizens or nationals of the U.S. or lawfully present are eligible to enroll; (2) enrollment in Federally funded minimum essential health coverage (e.g. Medicare, Medicaid, Federal Employees Health Benefit Program (FEHBP), Veterans Health Administration (Champ VA), Children's Health Insurance Program (CHIP), Department of Defense (TRICARE), Peace Corps); (3) incarceration status; (4) Indian status; (5) enrollment in employer-sponsored coverage; (6) requests for and accompanying documentation to justify receipt of individual responsibility exemptions, including membership in a certain type of recognized religious sect or health care sharing ministry; (7) employer information; (8) status as a veteran; (9) limited health status information (pregnancy status, blindness, disability status); and (10) household income, including tax return information from the IRS, income information from the Social Security Administration, and financial information from other third party sources. Information will also be maintained with respect to the applicant's enrollment in a QHP through the Exchange, the premium amounts and payment history.

With respect to qualified employers and the qualified employees utilizing SHOP, the information maintained in the system includes but may not be limited to the name and address of the employer, number of employees, Employer Identification Number (EIN), and list of qualified employees and their tax ID numbers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The HIX program implements recent health care reform provisions of the Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111–148) as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152) collectively the Affordable Care Act. Title 42 U.S.C. 18031, 18041, 18081—18083 and section 1414 of the Affordable Care Act.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system is to collect, create, use and disclose PII on individuals who apply for eligibility determinations for enrollment in a qualified health plan through the Exchange, for insurance affordability programs,[2] and for certifications of exemption from the individual responsibility requirement and; and as needed to perform the Exchange minimum functions in 45 CFR 155.200; and to maintain records used to support all Health Insurance Exchanges under

[2] The insurance affordability programs are: (a) The advance payment of the premium tax credits (APTC); (b) cost-sharing reductions (CSR); (c) Medicaid, (d) Children's Health Insurance Program (CHIP), and (e) Basic Health Plan (BHP), if a BHP is operating in the service area of the Exchange.

the HIX Program established by CMS. The system will collect, create, use and disclose PII that will enable HHS to perform oversight and enforcement activities of QHP Issuers offering qualified health plans through the FFE. In addition, HHS, and any contractors assisting HHS, will use PII from the system to assist in accomplishing CMS functions relating to the purposes of this collection and who need to have access to the records in order to assist CMS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM

A. ENTITIES WHO MAY RECEIVE DISCLOSURES UNDER ROUTINE USE

These routine uses specify circumstances, in addition to those provided by statute in the Privacy Act of 1974, under which CMS may release information from the HIX without the consent of the individual to whom such information pertains. Each proposed disclosure of information under these routine uses will be evaluated to ensure that the disclosure is legally permissible, including but not limited to ensuring that the purpose of the disclosure is compatible with the purpose for which the information was collected. We are establishing the following routine use disclosures of information maintained in the system:

1. To support Agency contractors, consultants, or CMS grantees who have been engaged by the Agency to assist in accomplishment of a CMS function relating to the purposes for this collection and who need to have access to the records in order to assist CMS.

2. To disclose information to another Federal agency, agency of a State government, a non-profit entity operating an Exchange for a State, an agency established by State law, or its fiscal agent to (A) make eligibility determinations for enrollment in a QHP through an Exchange, insurance affordability programs, and certifications of exemption from the individual responsibility requirement, (B) to carry out the HIX Program, and (C) to perform functions of an Exchange described in 45 CFR 155.200, including notices to employers under section 1411(f) of the Affordable Care Act.

3. To disclose information about applicants in order to obtain information from other Federal agencies that help CMS, pursuant to agreements with CMS, to determine the eligibility of applicants to enroll in QHPs through an Exchange, in insurance affordability programs, or for a certification of exemption from the individual responsibility requirement.

4. To assist a CMS contractor (including, but not limited to Medicare Administrative Contractors, fiscal intermediaries, and carriers) that assists in the administration of a CMS-administered health benefits program, or to a grantee of a CMS-administered grant program, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such program.

5. To assist another Federal agency or an instrumentality of any governmental jurisdiction within or under the control of the United States (including any state or local governmental agency), that administers, or that has the authority to investigate potential fraud, waste or abuse in a health benefits program funded in whole or in part by Federal funds, when disclosure is deemed reasonably necessary by CMS to prevent, deter, discover, detect, investigate, examine, prosecute, sue with respect to, defend against, correct, remedy, or otherwise combat fraud, waste or abuse in such programs.

6. To assist appropriate Federal agencies and CMS contractors and consultants that have a need to know the information for the purpose of assisting CMS' efforts to respond to a suspected or confirmed breach of the security or confidentiality of information maintained in this system of records, provided that the information disclosed is relevant and necessary for that assistance.

7. To assist the U.S. Department of Homeland Security (DHS) cyber security personnel, if captured in an intrusion detection system used by HHS and DHS pursuant to the Einstein 2 program.

8. To provide information about applicants to application filers, who are filing on behalf of those applicants, when relevant and necessary to determine eligibility to enroll in QHPs or in insurance affordability programs.

9. To QHP issuers for purposes of administering advance payment of premium tax credits and cost-sharing reductions.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM—

STORAGE:

Electronic records will be stored on both tape cartridges (magnetic storage media) and in a relational database management environment (DASD data storage media). Any hard copies of program related records containing PII at CMS and contractor locations will be kept in secure hard-copy file folders locked in secure file cabinets during non-duty hours.

RETRIEVABILITY:

The records will be retrieved electronically by a variety of fields, including but not limited to first name, last name, middle initial, date of birth, or Social Security Number (SSN).

SAFEGUARDS:

Personnel having access to the system have been trained in the Privacy Act and information security requirements. Employees who maintain records in this system are instructed not to release data until the intended recipient agrees to implement appropriate management, operational and technical safeguards sufficient to protect the confidentiality, integrity and availability of the information and information systems and to prevent unauthorized access.

Access to records in the HIX Database system will be limited to authorized CMS personnel and contractors through password security, encryption, firewalls, and secured operating system. Any electronic or hard copies of records containing PII at CMS, exchanges and contractor locations will be kept in secure electronic files or in hard-copy file folders locked in secure file cabinets during non-duty hours.

RETENTION AND DISPOSAL:

Records are maintained with identifiers for all transactions for a period of 10 years after they are entered into the system. Records are housed in both active and archival files in accordance with CMS data and document management policies and standards.

SYSTEM MANAGER AND ADDRESS:

Director, Consumer Information and Insurance Systems Group, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services, 7501 Wisconsin Ave, 9th Floor, Bethesda, MD 20814.

NOTIFICATION PROCEDURE:

An individual record subject who wishes to know if this system contains records about him or her should write to the system manager who will require the system name, and for verification purposes, the subject individual's name (woman's maiden name, if applicable), and SSN (furnishing the SSN is voluntary, but it may make searching for a record easier and prevent delay).

RECORD ACCESS PROCEDURE:

An individual seeking access to records about him or her in this system should use the same procedures outlined in Notification Procedures above. The requestor should also reasonably specify the record contents being sought. (These procedures are in

accordance with Department regulation 45 CFR 5b.5 (a) (2).)

CONTESTING RECORD PROCEDURES:

To contest a record, the subject individual should contact the system manager named above, and reasonably identify the record and specify the information being contested. The individual should state the corrective action sought and the reasons for the correction with supporting justification. (These procedures are in accordance with Department regulation 45 CFR 5b.7.)

RECORD SOURCE CATEGORIES:

Personally identifiable information in this database is obtained from the application submitted by or on behalf of individuals/applicants seeking eligibility determinations, from qualified employers and other employers who provide employer-sponsored coverage, from other Federal and state agencies needed to make eligibility determinations, from marketplace assisters facilitating the eligibility and enrollment processes, from QHPs, from State-based Exchanges that provide information to perform the statutory functions, from states participating in State Partnership Exchanges pursuant to the State Partnership Memorandum of Understanding, and from third party data sources to determine eligibility as described in this notice.

EXEMPTIONS CLAIMED FOR THIS SYSTEM:

None

Dated: January 31, 2013.

Michelle Snyder,

Deputy Chief Operating Officer, Centers for Medicare & Medicaid Services.

[FR Doc. 2013–02666 Filed 2–5–13; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0306]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Administrative Detention and Banned Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by March 8, 2013.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0114. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Administrative Detention and Banned Medical Devices—(OMB Control Number 0910–0114)—Extension

FDA has the statutory authority under section 304(g) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 334(g)) to detain during established inspections devices that are believed to be adulterated or misbranded. Section 800.55 (21 CFR 800.55), on administrative detention, includes among other things, certain reporting requirements and recordkeeping requirements. Under § 800.55(g), an applicant of a detention order must show documentation of ownership if devices are detained at a place other than that of the appellant. Under § 800.55(k), the owner or other responsible person must supply records about how the devices may have become adulterated or misbranded, in addition to records of distribution of the detained devices. These recordkeeping requirements for administrative detentions permit FDA to trace devices for which the detention period expired before a seizure is accomplished or injunctive relief is obtained.

FDA also has the statutory authority under section 516 of the FD&C Act (21 U.S.C. 360f) to ban devices that present substantial deception or an unreasonable and substantial risk of illness or injury. Section 895.21 (21 CFR 895.21), on banned devices, contains certain reporting requirements. Section 895.21(d) describes the procedures for banning a device when the Commissioner of Food and Drugs (the Commissioner) decides to initiate such a proceeding. Under 21 CFR 895.22, a manufacturer, distributor, or importer of a device may be required to submit to FDA all relevant and available data and information to enable the Commissioner to determine whether the device presents substantial deception, unreasonable and substantial risk of illness or injury, or unreasonable, direct, and substantial danger to the health of individuals.

During the past several years, there has been an average of less than one new administrative detention action per year. Each administrative detention will have varying amounts of data and information that must be maintained. FDA's estimate of the burden under the administrative detention provision is based on FDA's discussion with one of three firms whose devices had been detained.

In the **Federal Register** of April 10, 2012 (77 FR 21564), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
800.55(g)	1	1	1	25	25

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]—Continued

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
895.21(d)(8) and 895.22(a)	26	1	26	16	416
Total					441

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 2—ESTIMATED ANNUAL RECORDKEEPING BURDEN [1]

21 CFR section	Number of recordkeepers	Number of records per recordkeeper	Total annual records	Average burden per recordkeeping	Total hours
800.55(k)	1	1	1	20	20

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: January 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–02529 Filed 2–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0536]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Medical Device User Fee Cover Sheet, Form FDA 3601

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by March 8, 2013.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, FAX: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0511. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Medical Device User Fee Cover Sheet, Form FDA 3601—(OMB Control Number 0910–0511)—Extension

The Federal Food, Drug, and Cosmetic Act, as amended by the Medical Device User Fee and Modernization Act of 2002 (MDUFMA) (Pub. L. 107–250), and the Medical Device User Fee Amendments of 2007 (Title II of the Food and Drug Administration Amendments Act of 2007), authorizes FDA to collect user fees for certain medical device applications. Under this authority, companies pay a fee for certain new medical device applications or supplements submitted to the Agency for review. Because the submission of user fees concurrently with applications and supplements is required, the review of an application cannot begin until the fee is submitted. Form FDA 3601, the ''Medical Device User Fee Cover Sheet,'' is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to account for and track user fees. The form provides a cross-reference between the fees submitted for an application with the actual submitted application by using a unique number tracking system. The information collected is used by FDA's Center for Devices and Radiological Health and the Center for Biologics Evaluation and Research to initiate the administrative screening of new medical device applications and supplemental applications.

The total number of annual responses is based on the number of cover sheet submissions received by FDA in fiscal years 2009 through 2011. FDA received cover sheets for the following medical device submissions (average annual): 38 premarket approval applications (premarket approval application (PMA), product development protocol (PDP), postmarketng requirement (PMR), biologics license application (BLA)), 3,561 premarket notifications, 12 panel track supplements, 180 real-time supplements, 127 180-day supplements, 749 30-day notices, 84 513(g) requests, and 463 annual fees for periodic reporting. The number of received annual responses included the cover sheets for applications that were qualified for small businesses and fee waivers or reductions. The estimated hours per response are based on past FDA experience with the various cover sheet submissions, and range from 5 to 30 minutes. The hours per response are based on the average of these estimates (18 minutes).

In the **Federal Register** of June 6, 2012 (77 FR 33469), FDA published a 60-day notice requesting public comment on the proposed collection of information. FDA received one PRA related comment.

The comment states that the cover sheet ''can be obtained prior to payment of the fee and should not be available until payment of the fee has been confirmed.'' It is unclear whether the comment addresses the topics on which the 60-day notice invited comment. As stated earlier in this document, the User Fee Cover Sheet is designed to provide the minimum necessary information to determine whether a fee is required for review of an application, to determine the amount of the fee required, and to

account for and track user fees. MDUFMA requires the submission of the user fees concurrently with applications (21 U.S.C. 379j(a)(2)(C)). If the required fees are not submitted, the review of the application will not begin. The User Fee Cover Sheet provides the information necessary to either initiate or defer the application review.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

Form FDA No.	No. of Respondents	No. of Responses per Respondent	Total Annual Responses	Average Burden per Response	Total Hours
3601	5,214	1	5,214	0.30	1,564

Dated: February 1, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–02613 Filed 2–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2003–N–0453]

Training Program for Regulatory Project Managers; Information Available to Industry

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA's) Center for Drug Evaluation and Research (CDER) is announcing the continuation of the Regulatory Project Management Site Tours and Regulatory Interaction Program (the Site Tours Program). The purpose of this document is to invite pharmaceutical companies interested in participating in this program to contact CDER.

DATES: Pharmaceutical companies may submit proposed agendas to the Agency by April 8, 2013.

FOR FURTHER INFORMATION CONTACT: Dan Brum, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4160, Silver Spring, MD 20993–0002, 301–796–0578, *dan.brum@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

An important part of CDER's commitment to make safe and effective drugs available to all Americans is optimizing the efficiency and quality of the drug review process. To support this primary goal, CDER has initiated various training and development programs to promote high performance in its regulatory project management staff. CDER seeks to significantly enhance review efficiency and review quality by providing the staff with a better understanding of the pharmaceutical industry and its operations. To this end, CDER is continuing its training program to give regulatory project managers the opportunity to tour pharmaceutical facilities. The goals are to provide the following: (1) Firsthand exposure to industry's drug development processes and (2) a venue for sharing information about project management procedures (but not drug-specific information) with industry representatives.

II. The Site Tours Program

In this program, over a 2- to 3-day period, small groups (five or less) of regulatory project managers, including a senior level regulatory project manager, can observe operations of pharmaceutical manufacturing and/or packaging facilities, pathology/toxicology laboratories, and regulatory affairs operations. Neither this tour nor any part of the program is intended as a mechanism to inspect, assess, judge, or perform a regulatory function, but is meant rather to improve mutual understanding and to provide an avenue for open dialogue. During the Site Tours Program, regulatory project managers will also participate in daily workshops with their industry counterparts, focusing on selective regulatory issues important to both CDER staff and industry. The primary objective of the daily workshops is to learn about the team approach to drug development, including drug discovery, preclinical evaluation, tracking mechanisms, and regulatory submission operations. The overall benefit to regulatory project managers will be exposure to project management, team techniques, and processes employed by the pharmaceutical industry. By participating in this program, the regulatory project manager will grow professionally by gaining a better understanding of industry processes and procedures.

III. Site Selection

All travel expenses associated with the site tours will be the responsibility of CDER; therefore, selection will be based on the availability of funds and resources for each fiscal year. Selection will also be based on firms having a favorable facility status as determined by FDA's Office of Regulatory Affairs District Offices in the firms' respective regions. Firms interested in offering a site tour or learning more about this training opportunity should respond by submitting a proposed agenda to Dan Brum (see **DATES** and **FOR FURTHER INFORMATION CONTACT**).

Dated: January 31, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–02523 Filed 2–5–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences (NCATS): Cooperative Research and Development Agreement (CRADA) and Licensing Opportunity for Small Molecule Agonists of the Relaxin Hormone Receptor (RXFP1) for Treatment of Heart Failure and Fibrosis

SUMMARY: The National Center for Advancing Translational Sciences (NCATS), the National Institutes of Health (NIH), is seeking Cooperative Research and Development Agreement (CRADA) partners to collaborate in the final stages of lead optimization, in vitro and in vivo evaluation, and preclinical development of a novel series of potent, selective, and orally bioavailable small molecule agonists of the relaxin hormone receptor, RXFP1, for the treatment of heart failure and fibrosis. Interested potential CRADA collaborators will receive detailed information on the current status of the project after signing a confidentiality

disclosure agreement (CDA) with NCATS.

DATES: Interested candidate partners must submit a statement of interest and capability to the NCATS point of contact before March 8, 2013 for consideration. Guidelines for the preparation of a full CRADA proposal will be communicated shortly thereafter to all respondents with whom initial confidential discussions will have established sufficient mutual interest. CRADA applications submitted after the due date may be considered if a suitable CRADA collaborator has not been identified by NIH among the initial pool of respondents. Licensing of background technology related to this CRADA opportunity is also available to potential collaborators.

ADDRESSES: Questions about licensing opportunities of related background technology should be addressed to Lauren Nguyen-Antczak, Ph.D., Licensing and Patenting Manager, Office of Technology Transfer, NIH, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804, Telephone: (301) 435–4074; Email: lauren.nguyen-antczak@nih.gov. Respondents interested in licensing will be required to submit an ''Application for License to Public Health Service Inventions.'' An executed CDA will be required to receive copies of the patent applications.

FOR FURTHER INFORMATION CONTACT: Further details of this CRADA opportunity and statement of interest please contact Lili Portilla, M.P.A., Acting Director, Office of Policy, Communications and Strategic Alliances, National Center for Advancing Translational Sciences, NIH, 6701 Democracy Blvd., Suite 900, Bethesda, MD 20892–4874; Telephone: (301) 402–0304; E-Mail: lilip@nih.gov or Dr. Krishnan Balakrishnan, Technology Transfer Manager, NCATS, Telephone: (301) 217–2336; Email: *balakrik@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: NIH seeks to ensure that technologies developed by NIH are expeditiously commercialized and brought to practical use. The purpose of a CRADA is to find a partner to facilitate the development and commercialization of a technology or small molecule compounds that are in an early phase of development. Respondents interested in submitting a CRADA proposal should be aware that it may be necessary for them to secure a patent license to the above-mentioned patent in order to be able to commercialize products arising from a CRADA. CRADA partners are afforded an option to negotiate an exclusive license from the NIH for inventions arising from the performance of the CRADA research plan.

Recombinant relaxin hormone has been extensively investigated for the treatment of acute heart failure and is currently in phase III clinical trials for this indication. Related to its antifibrotic role in pregnancy, relaxin appears to be unique in promoting the active remodeling of heart lesions. However, this remodeling capacity of the natural hormone is difficult to study in chronic settings due to the short half-life and the need for intravenous administration of the recombinant hormone. The clinically observed physiological effects of relaxin are mediated through its interaction with a G protein-coupled receptor (RXFP1) leading to the modulation of several signal transduction pathways. Activation of RXFP1 by relaxin induces (1) up-regulation of the endothelin system which leads to vasodilation; (2) extracellular matrix remodeling through regulation of collagen deposition, MMPs and TIMPs expression, and overall tissue homeostasis; (3) a moderation of inflammation by reducing levels of inflammatory cytokines, such as TNF-β and TGF-β; and, (4) angiogenesis by activating transcription of VEGF. The development of small-molecule agonists of RXFP1 would have numerous benefits and will allow investigating additional therapeutic applications where chronic administration is required. NCATS has identified a series of small-molecule agonists of RXFP1 which are potent, highly selective, easy to synthesize, and with reasonable metabolic and physical properties. Our molecules display similar efficacy as the natural hormone in several functional assays. Mutagenesis studies have mapped the specific regions responsible for relaxin receptor activation by these compounds to an allosteric site on the receptor. Finally, these compounds display good in vivo pharmacokinetic properties and are currently being evaluated *in vivo.*

Under the CRADA, further *in vitro* and *in vivo* ADME and activity studies will be conducted on current and new small molecule leads, using rodent and non-rodent species. Pharmacokinetics and PEP image studies in monkey are on-going to better characterize compound tissue distribution. But further *in vivo* characterization of select compounds is needed and will be part of the CRADA program. Based on the results of these experiments and other data, the program will then develop a target product profile. The chemical series might be further improved to address specific aspects of this target product profile and, if necessary, to optimize its physical properties and formulation. The CRADA scope will also include studies beyond candidate selection including all aspects of pre-clinical studies such as toxicity studies, and chemistry GMP scale up of select compound(s) and manufacture of controls leading to a successful IND application. Collaborators should have experience in the pre-clinical development of small molecules and with the successful submission of IND applications to the FDA for cardiovascular and/or fibrotic diseases.

The full CRADA proposal should include a capability statement with a detailed description of (1) Collaborators' chemistry expertise in the area of modulation of small molecule physical properties and formulation of small molecules, and their ability to manufacture sufficient quantities of chemical compounds according to FDA guidelines and under GMP; (2) expertise with cardiovascular and/or fibrotic diseases; (3) expertise in regulatory affairs, particularly at the IND filing and early stage clinical trials stages; (4) collaborator's ability to support, directly or through contract mechanisms, and upon the successful completion of relevant milestones, the ongoing pharmacokinetics and biological studies, long term toxicity studies, process chemistry and other pre-clinical development studies needed to obtain regulatory approval of a given molecule so as to ensure a high probability of eventual successful commercialization; and, (5) collaborator's ability to provide adequate funding to support some pre-clinical studies of the project.

Publications

1. ''Identification of small molecule agonists of the relaxin 1 receptor by utilizing a homogenous cell-based cAMP assay,'' Chen CZ, Southall N, Xiao J, Marugan JJ, Ferrer M, Agoulnik A, Zheng W, *Journal Biomolecular Screening,* Accepted.

2. Identification and optimization of small molecule agonists of the relaxin hormone receptor RXFP1,'' Xiao J, Chen CZ, Huang Z, Agoulnik IU, Ferrer M, Southall N, Hu X, Zheng W, Agoulnik AI, and Marugan JJ, *Nature-Communications,* Submitted.

Patent Status:

''Modulators of the Relaxin receptor 1'', Marugan JJ, Xiao J, Ferrer M, Chen CZ, Southall N, Zheng W, Agoulnik A, Agoulnik IU, U.S. Patent Application # 61/642,986, NIH Reference # E–072–2012/0–US–1.

Dated: January 30, 2013.

Christopher P. Austin,

Director, National Center for Advancing Translational Sciences, National Institutes of Health.

[FR Doc. 2013–02611 Filed 2–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Advancing Translational Sciences (NCATS) and National Human Genome Research Institute (NHGRI): Cooperative Research and Development Agreement (''CRADA'') and Licensing Opportunity; Non-inhibitory Chaperones of Glucocerebrosidase for Treatment of Gaucher and Other Diseases

SUMMARY: The National Center for Advancing Translational Sciences (NCATS) and the National Human Genome Research Institute (NHGRI), the National Institutes of Health (NIH), are seeking Cooperative Research and Development Agreement (CRADA) partners to collaborate in the final stages of lead optimization, evaluation and preclinical development of a novel selective series of non-inhibitory chaperones of glucocerebrosidase (GCase) for the treatment of Gaucher and other diseases. Interested potential CRADA collaborators will receive detailed information about the project after signing a confidential disclosure agreement (CDA) with NCATS and NHGRI.

DATES: Interested candidate partners must submit a statement of interest and capability to the NCATS point of contact before March 8, 2013 for consideration. Guidelines for the preparation of a full CRADA proposal will be communicated shortly thereafter to all respondents with whom initial confidential discussions have established sufficient mutual interest. CRADA applications submitted after the due date may be considered if a suitable CRADA collaborator has not been identified by NIH among the initial pool of respondents. Licensing of background technology related to this CRADA opportunity is also available to potential collaborators.

ADDRESSES: Questions about licensing opportunities of related background technology should be addressed to Tara L. Kirby, Ph.D., Senior Licensing and Patenting Manager, Office of Technology Transfer, NIH, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804, Telephone: (301) 435–4426; Email: tarak@mail.nih.gov. Respondents interested in licensing will be required to submit an ''Application for License to Public Health Service Inventions.'' An executed CDA will be required to receive copies of the patent applications.

FOR FURTHER INFORMATION CONTACT: Further details of this CRADA opportunity and statement of interest please contact Lili Portilla, M.P.A., Acting Director, Office of Policy, Communications and Strategic Alliances, National Center for Advancing Translational Sciences, NIH, 6701 Democracy Blvd., Suite 900, Bethesda, MD 20892–4874; Telephone (301) 402–0304; E-Mail: Lilip@nih.gov or Dr. Krishnan Balakrishnan, Technology Transfer Manager, NCATS, Telephone: (301) 217–2336; Email: *balakrik@mail.nih.gov.*

SUPPLEMENTARY INFORMATION: NIH seeks to ensure that technologies developed by NIH are expeditiously commercialized and brought to practical use. The purpose of a CRADA is to find a partner to facilitate the development and commercialization of a technology; in this case, small molecule compounds that are early in the development cycle. Respondents interested in submitting a CRADA proposal should be aware that it may be necessary for them to secure a patent license to the patent rights listed below in order to be able to commercialize products arising from a CRADA. CRADA partners are afforded an option to negotiate an exclusive license from the NIH for inventions arising from the performance of the CRADA research plan.

Gaucher disease, the most common form of lipidosis, is a rare genetic lysosomal storage disease characterized by a loss of function in the GCase enzyme, which is responsible for hydrolyzing glucocerebroside (GC) in the lysosome. Phagocytic cells, such as macrophages, microglia (resident macrophages in the brain), and osteoclasts (resident macrophages in the bone) will clean up dead cells by a mechanism named efferocytosis. The macrophages use GCase to break down GC, a major constituent of cell walls. With deficient functional GCase, GC accumulates within the lysosome of resident macrophages, giving rise to lipid-engorged Gaucher cells, a hallmark of the disease. Many mutant forms of GCase are enzymatically active, but they never reach the lysosome after synthesis in the ribosome. Instead, they accumulate in the endoplasmic reticulum (ER) due to failure in their folding process, which eventually triggers ubiquitination and degradation via the proteasome pathway. One therapeutic strategy under consideration is to develop small molecule chaperones that can promote and accelerate the folding process and increase the transport of mutant protein to the lysosome, where it can then process GC. The main challenge in the development of molecular chaperones for Gaucher disease is that chaperones are inhibitors of the enzyme. This complicates their clinical development, because it is difficult to generate an appropriate *in vivo* exposure at which a compound exhibits chaperone activity, but does not inhibit the enzyme's function. Using high throughput screening, several small-molecule series were identified that do not inhibit the enzyme's action, and through medicinal chemistry optimization, these series were further optimized. These lead molecules were found to increase the specific activity of the enzyme, promote the translocation of GCase to the lysosome in Gaucher fibroblasts and macrophages, reduce the accumulated substrate, and restore efferocytosis of these cells. Further analogs are currently being synthesized to address some of the metabolic liabilities of specific series. Because these compounds can modulate the activity and chaperone the translocation of wild-type GCase as well as different GCase mutants, it is also possible that they might find application in additional settings outside of Gaucher disease. For example, clinical studies have recently shown a clear association between GCase mutants and Parkinson disease. Moreover, the compounds could potentially be used to enhance the efficacy of enzyme replacement therapy.

Under the CRADA, further *in vitro* and *in vivo* absorption, distribution, metabolism, and elimination (ADME) and activity studies will be conducted on current and new small molecule leads, using human macrophages differentiated from isolated Gaucher monocytes or Gaucher induced pluripotent stem cells (iPSCs) and in point mutation Gaucher animal models. Based on this and other data, the program will then develop a target product profile. The chemical series will be further improved to address specific aspects of this target product profile and, if necessary, to optimize its physical properties and formulation. The CRADA scope will also include studies beyond candidate selection including all aspects of pre-clinical studies such as toxicity studies and chemistry GMP scale up of select compound(s) and manufacture of

controls leading to a successful investigational new drug (IND) application. Collaborators should have experience in the pre-clinical development of small molecules and a track record of successful submission of IND applications to the FDA for rare and neglected diseases.

The full CRADA proposal should include a capability statement with a detailed description of (1) collaborator's chemistry expertise in the areas of modulation of small molecule physical properties and formulation of small molecules, and its ability to manufacture sufficient quantities of chemical compounds according to FDA guidelines and under Good Manufacturing Practice (GMP); (2) expertise with Gaucher disease and/or expertise with disorders such as Parkinson disease which might benefit from increases in GCase activity; (3) expertise in regulatory affairs, particularly at the IND filing and early clinical trials stages; (4) collaborator's ability to support, directly or through contract mechanisms, and ability, upon the successful completion of relevant milestones, to support the ongoing pharmacokinetics and biological studies, long term toxicity studies, process chemistry and other pre-clinical development studies needed to obtain regulatory approval of a given molecule so as to ensure a high probability of eventual successful commercialization; and, (5) collaborator's ability to provide adequate funding to support some of the project's pre-clinical studies.

Publications:

1. ''A High Throughput Glucocerebrosidase Assay Using the Natural Substrate Glucosylceramide,'' Motobar O, Goldin E, Leister W, Liu K, Southall N, Huang W, Marugan JJ, Sidransky E, Zheng W, *Anal Bioanal Chem,* 402(2), 731–9, 2012.

2. ''A Novel High Throughput Screening Assay for Small Molecule Therapy for Gaucher Disease Using N370S Mutant Glucocerebrosidase from Patient Tissue,'' Goldin E, Zheng W, Motabar O, Southall N, Marugan JJ, Austin CP and Sidransky E, *PLoS One,* 7(1), e29861, 2012

3. Discovery, SAR and Biological evaluation of Non Inhibitory Small Molecule Modulators of Glucocerebrosidase with Chaperone Activity,'' Patnaik, S, Zheng W, Choi J, Motabar O, Southall N, Westbroek W, Lea W, Velayati A, Goldin E, Sidransky E, Leister W, Marugan J, *J. Med. Chem,* 55(12), 5734–48, 2012.

4. ''A non-inhibitory chaperone reverses impaired function and lipid storage in a patient derived-Gaucher macrophage model,'' Aflaki E, Stubblefield B, Maniwang E, Lopez G, Goldin E, Westbroek W, Marugan JJ, Southall N, Patnaik S, Zheng W, Tayebi N, and Sidransky E, *Blood,* Submitted.

5. ''An induced pluripotent stem cell model that recapitulates the pathologic hallmarks of Gaucher disease,'' Panicker LM, Miller D, Park TS, Patel B, Azevedo JL, Awad O, Masood AM, Veenstra TM, Goldin E, Polumuri SK, Vogel SN, Sidransky E, Zambidis ET, Feldman RA, *Proc Nat Acad Sci USA,* 109(44):18054–9, 2012

Background Technology Available for Licensing:

1. ''Salicylic acid derivatives useful as glucocerebrosidase activators,'' Juan Jose Marugan et al., U.S. Provisional Patent Application No. 61/616,758, HHS Ref. No. E–144–2012/0–US–01.

2. ''Salicylic acid derivatives and additional compounds useful as glucocerebrosidase activators,'' Juan Jose Marugan et al., U.S. Provisional Patent Application No. 61/616,773, HHS Ref. No. E–144–2012/1–US–01.

Dated: January 30, 2013.

Christopher P. Austin,

Director, National Center for Advancing Translational Sciences, National Institutes of Health.

[FR Doc. 2013–02609 Filed 2–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, HHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

FOR FURTHER INFORMATION CONTACT: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301–496–7057; fax: 301–402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

SUPPLEMENTARY INFORMATION:

Mutations in the G Protein Coupled Receptor (GPCR) Gene Family in Melanoma

Description of Technology: Using exon capture and next generation sequencing approaches to analyze the entire G protein coupled receptor (GPCR) gene family in melanoma, the researchers at the NIH have identified several novel somatic (e.g., tumor-specific) alterations. GPCRs play an integral part in regulating physiological functions and the importance of these molecules is evident by the fact that approximately half of the current FDA approved therapeutics target GPCRs or their direct downstream signaling components.

Many of the GPCR gene mutations identified by the NIH researchers were mutated in a large portion of melanoma patients and already have inhibitors, the most notable being the Glutamate Receptor Metabotropic 3 (GRM3) mutation which could be functionally signification for melanoma tumorigenesis. Therefore, this technology could aid in the development of specific inhibitors of GRM3 as well as the pathway it activates, mitogen-activated protein kinase (MEK), for the treatment of melanoma patients with these mutations. To complement these findings, human melanoma metastatic cell lines harboring GRM3 mutations are also available for licensing.

Potential Commercial Applications:

- Diagnostic array for the detection of GRM3 mutations.
- Method of identifying GRM3 inhibitors as therapeutic agents to treat malignant melanoma patients.
- In vitro and in vivo cell model for the GRM3 mutation in melanoma. This is a useful tool for investigating GRM3 phenotype biology, including growth, motility, invasion, and metabolite production.

Competitive Advantages:

- GPCR mutations, GRM3 in particular, are frequent in melanomas.
- Several inhibitors to GPCR and MEK are already in clinical trials, thus this technology may prove useful for the development of novel diagnostic tests and therapeutics.
- Associated cell lines derived from melanoma patients are available.

Development Stage: Pre-clinical.

Inventors: Yardena Samuels (NHGRI), Todd Prickett (NHGRI), and Steven Rosenberg (NCI).

Publication: Prickett TD, et al. Exon capture analysis of G-protein coupled receptors reveals activating mutations in GRM3 in melanoma. Nat Genet. 2011 Sep 25;43(11):1119–26. [PMID 21946352].

Intellectual Property:

• HHS Reference No. E–244–2010/0—U.S. Provisional Application No. 61/462,471 filed 23 Sep 2010; PCT Application No. PCT/US2011/052032 filed 16 Sep 2011.

• HHS Reference No. E–029–2012/0—Research Tool. Patent protection is not being pursued for the GRM3 melanoma metastatic cell lines.

Related Technologies: HHS Reference Nos.—E–013–2011/0 (patent app: PCT); E–024–2012/0 (research tool); E–272–2008/0 (patent app: US, EP); E–229–2010/0 (research tool); E–232–2010/0 (research tool).

Licensing Contact: Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov.*

Collaborative Research Opportunity: The NHGRI is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Claire Driscoll, Director, NHGRI Technology Transfer Office, at *cdriscol@mail.nih.gov* or 301–594–2235.

Human Melanoma Metastasis Cell Lines Harboring GRM3 Mutations

Description of Technology: Using exon capture and next generation sequencing approaches to analyze the entire G protein coupled receptor (GPCR) gene family in melanoma, the researchers at the NIH have identified several novel somatic (e.g., tumor-specific) alterations. GPCRs play an integral part in regulating physiological functions and the importance of these molecules is evident by the fact that approximately half of the current FDA approved therapeutics target GPCRs or their direct downstream signaling components. Many of the GPCR gene mutations identified by the NIH researchers were mutated in a large portion of melanoma patients and already have inhibitors, the most notable being the Glutamate Receptor Metabotropic 3 (GRM3) mutation which could be functionally signification for melanoma tumorigenesis.

Available for licensing are several melanoma cell lines that harbor GRM3 mutations. These cell lines provide useful and efficient tools for studying melanoma and can be used in the development of specific inhibitors of GRM3 as well as the pathway it activates, mitogen-activated protein kinase (MEK), for the treatment of melanoma patients with these mutations.

Potential Commercial Applications:

• Diagnostic array for the detection of GRM3 mutations

• Method of identifying GRM3 inhibitors as therapeutic agents to treat malignant melanoma patients.

• In vitro and in vivo cell model for the GRM3 mutation in melanoma. This is a useful tool for investigating GRM3 phenotype biology, including growth, motility, invasion, and metabolite production.

• Tool for testing the activity of GRM3 inhibitors and generating GRM3 mutation knock-outs.

Competitive Advantages:

• Cell lines are derived from melanoma patients.

• GRM3 mutations are highly frequent and/or highly mutated in melanomas.

• Several inhibitors to GPCR and MEK are already in clinical trials, thus this technology may prove useful for the development of novel diagnostic tests and therapeutics.

Development Stage: Pre-clinical

Inventors: Yardena Samuels (NHGRI), Todd Prickett (NHGRI), and Steven Rosenberg (NCI)

Publication: Prickett TD, et al. Exon capture analysis of G-protein coupled receptors reveals activating mutations in GRM3 in melanoma. Nat Genet. 2011 Sep 25;43(11):1119–26. [PMID 21946352]

Intellectual Property: HHS Reference No. E–029–2012/0—Research Tool. Patent protection is not being pursued for the GRM3 melanoma metastatic cell lines.

Related Technologies: HHS Reference Nos.—E–244–2010/0 (patent app: PCT); E–013–2011/0 (patent app: PCT); E–024–2012/0 (research tool); E–272–2008/0 (patent app: US, EP); E–229–2010/0 (research tool); E–232–2010/0 (research tool)

Licensing Contact: Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov*

Collaborative Research Opportunity: The NHGRI is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Claire Driscoll, Director, NHGRI Technology Transfer Office, at *cdriscol@mail.nih.gov* or 301–594–2235.

Human Melanoma Metastasis Cell Lines Harboring MITF Mutations

Description of Technology: Researchers at the NIH have found recurrent somatic mutations in the microphthalmia-associated transcription factor (MITF). Previous studies have linked the MITF pathway to the progression of melanoma, however, little is known about somatic gene mutations in the MITF pathway that could contribute to this progression. The NIH researchers evaluated primary and metastatic melanoma samples for the presence of somatic mutations in two genes of the MITF pathway, MITF and SRY (sex determining region Y)-box 10 (SOX10). They identified 16 previously unidentified somatic mutations in these genes. These studies suggest that MITF and SOX10 genes could be used as diagnostic markers in human metastatic melanoma. Consequently, these cell lines could be used to further investigate the effects of MITF and SOX10 in melanoma and to develop therapeutics targeting this gene and protein.

Potential Commercial Applications:

• Diagnostic array for the detection of MITF mutations.

• In vitro and in vivo cell model for the MITF mutations in melanoma. This is a useful tool for investigating MITF phenotype biology, including growth, motility, invasion, and metabolite production.

Competitive Advantages:

• Cell lines are derived from melanoma patients.

• The MITF mutation is frequent in melanomas.

Development Stage: Pre-clinical

Inventors: Yardena Samuels (NHGRI) and Steven Rosenberg (NCI)

Publication: Cronin JC, et al. Frequent mutations in the MITF pathway in melanoma. Pigment Cell Melanoma Res. 2009 Aug;22(4):435–44. [PMID 19422606]

Intellectual Property: HHS Reference No. E–023–2012/0—Research Tool. Patent protection is not being pursued for the MITF melanoma metastatic cell lines.

Related Technologies: HHS Reference Nos.—E–029–2012/0 (research tool); E–013–2011/0 (patent app: PCT); E–024–2012/0 (research tool); E–272–2008/0 (patent app: US, EP); E–229–2010/0 (research tool); E–232–2010/0 (research tool)

Licensing Contact: Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov*

Collaborative Research Opportunity: The NHGRI is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Claire Driscoll, Director, NHGRI Technology Transfer Office, at *cdriscol@mail.nih.gov* or 301–594–2235.

Human Melanoma Metastasis Cell Lines Harboring TRRAP, GRIN2A, and PLCB4 Mutations

Description of Technology: Researchers at the NIH have identified

several novel somatic (e.g., tumor-specific) alterations, many of which have not previously been known to be genetically altered in tumors or linked to melanoma. In particular, the researchers identified a recurrent ''hotspot'' mutation in the transformation/transcription domain-associated protein (TRRAP) gene, identified the glutamate receptor ionotropic N-methyl D-aspartate 2A (GRIN2A) gene as a highly mutated in melanoma, and have shown that the majority of melanoma tumors have alternations in genes encoding members of the glutamate signaling pathway, such as phospholipase C, beta 4 (PLCB4). Therefore, this technology not only provides a comprehensive map of genetic alterations in melanoma, but has important diagnostic and therapeutic applications.

Available for licensing are several melanoma cell lines that harbor TRRAP, GRIN2A, and PLCB4 mutations. These cell lines provide useful and efficient tools for studying melanoma and can be used in the development of specific therapeutics for patients harboring these mutations. Specifically, these cell lines could be used to develop inhibitors to limit tumor growth and further understand melanoma and the biology of these genes.

Potential Commercial Applications:

- Diagnostic array for the detection of TRRAP, GRIN2A, and PLCB4 mutations.
- Method of identifying TRRAP, GRIN2A, and PLCB4 inhibitors as therapeutic agents to treat malignant melanoma patients.
- In vitro and in vivo cell model for understanding the biology of TRRAP, GRIN2A, and PLCB4, including growth, motility, invasion, and metabolite production.

Competitive Advantages:

- Cell lines are derived from melanoma patients.
- TRRAP, GRIN2A, and PLCB4 mutations are highly frequent and/or highly mutated in melanomas.
- Glutamate antagonists have already been shown to inhibit tumor growth. Thus, this technology may prove useful for the development of novel diagnostic tests and therapeutics.

Development Stage: Pre-clinical

Inventors: Yardena Samuels (NHGRI) and Steven Rosenberg (NCI)

Publication: Wei X, et al. Exome sequencing identifies GRIN2A as frequently mutated in melanoma. Nat Genet. 2011 May; 43(5):442–6. [PMID 21499247]

Intellectual Property: HHS Reference No. E–024–2012/0—Research Tool. Patent protection is not being pursued for the TRRAP, GRIN2A, PLCB4 melanoma metastatic cell lines.

Related Technologies: HHS Reference Nos.—E–013–2011/0 (patent apps. PCT); E–272–2008/0 (patent apps. US, EP); E–229–2010/0 (research tool); E–232–2010/0 (research tool); E–029–2012/0 (research tool); E–244–2012/0 (patent app: PCT)

Licensing Contact: Whitney Hastings; 301–451–7337; *hastingw@mail.nih.gov*

Collaborative Research Opportunity: The NHGRI is seeking statements of capability or interest from parties interested in collaborative research to further develop, evaluate or commercialize this technology. For collaboration opportunities, please contact Claire Driscoll, Director, NHGRI Technology Transfer Office, at *cdriscol@mail.nih.gov* or 301–594–2235.

Dated: January 31, 2013.

Richard U. Rodriguez,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 2013–02516 Filed 2–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Arthritis and Musculoskeletal and Skin Diseases Initial Review Group; Arthritis and Musculoskeletal and Skin Diseases Clinical Trials Review Committee.

Date: March 12–13, 2013.

Time: 8:00 a.m. to 4:00 PM.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Gaithersburg Washingtonian Ctr, 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Charles H Washabaugh, Ph.D., Scientific Review Officer, National Institute of Arthritis, Musculoskeletal and Skin Diseases, National Institutes of Health, 6701 Democracy Boulevard, Suite 800, Bethesda, MD 20892, (301) 496–9568, *washabac@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 30, 2013.

Carolyn Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02517 Filed 2–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Clinical Trial Cobre.

Date: February 27, 2013.

Time: 8:30 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Lisa A. Newman, SCD, Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3As.19K, Bethesda, MD 20892–4874, 301–594–2704, *newmanla2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: January 31, 2013.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–02515 Filed 2–5–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Relocation of Regulations and Rulings, Office of International Trade

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

ACTION: Notice of change in office location.

SUMMARY: Regulations and Rulings, in the Office of International Trade, of the U.S. Customs and Border Protection (CBP) is relocating its office from the U.S. Mint Annex Building at 799 9th Street NW., Washington, DC to 90 K Street NE., Washington, DC 20229–1177. All correspondence directed to the Regulations and Rulings, Office of International Trade, including mailed comments regarding section 1625 modifications or revocations, should be sent to the new address. The main office phone number remains the same.

DATES: *Effective Date:* February 6, 2013.

FOR FURTHER INFORMATION CONTACT: Joseph W. Clark, Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, (202) 325–0118.

SUPPLEMENTARY INFORMATION:

Background

Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection (CBP) is relocating its office from the U.S. Mint Annex Building at 799 9th Street NW., Washington, DC to 90 K Street NE., Washington, DC 20229–1177. All correspondence, including ruling requests and mailed comments regarding 19 U.S.C. 1625 modifications or revocations (*see* 19 CFR 177.12), should be directed to the new address, as follows: Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 90 K St. NE., (10th Floor), Washington, DC 20229–1177.

After February 4, 2013, anyone wishing to view the mailed comments that were submitted to Regulations and Rulings in response to a 1625 modification or revocation (19 CFR 177.12) published in the **Federal Register** should come to the new office location specified in the preceding paragraph. It is highly recommended that a person first call Mr. Joseph Clark at (202) 325–0118 to schedule an appointment in advance to view the comments. Please note that all office phone numbers remain the same. The main office phone number is 202–325–0100.

Dated: January 31, 2013.

Sandra L. Bell,

Executive Director, Regulations and Rulings, Office of International Trade.

[FR Doc. 2013–02546 Filed 2–5–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5683–N–12]

Notice of Submission of Proposed Information Collection to OMB HUD Lead Hazard Control Grantees Regarding Their Use of Healthy Homes Supplemental Funding

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Requirements for notification of lead based paint hazard in federally-owned residential properties and housing receiving Federal assistance, as codified in 24 CFR part 35.

DATES: *Comments Due Date: March 8, 2013.*

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2539-New) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806. Email: *OIRA_Submission@omb.eop.gov* fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard., Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410; email Colette Pollard at *Colette.Pollard@hud.gov.* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice Also Lists the Following Information

Title of Proposed: Collection of Information from HUD Lead Hazard Control Grantees Regarding Their Use of Healthy Homes Supplemental Funding.

OMB Approval Number: 2539-New.

Form Numbers: None.

Description of the need for the information and proposed use: Requirements for notification of leadbased paint hazard in federally-owned residential properties and housing receiving Federal assistance, as codified in 24 CFR part 35.

	Number of respondents	Annual responses	×	Hours per response	Burden hours
Reporting Burden	80	12		32.75	31,440

Total Estimated Burden Hours: 31,440.

Status: New collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: January 30, 2013.

Colette Pollard,

Department Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2013–02646 Filed 2–5–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5680–N–01]

Federal Housing Administration (FHA) Risk Management Initiatives: Changes to Maximum Loan-to-Value Financing Solicitation of Comment

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This proposed notice would make changes to the loan-to-value (LTV) financing available to qualified borrowers of FHA-insured loans. This notice proposes to set a 95 percent maximum LTV for FHA-insured loans over $625,500, with certain exemptions. FHA's annual Fiscal Year 2012 report to Congress on the financial status of the FHA Mutual Mortgage Insurance Fund (MMIF, or Fund), reported a decline from Fiscal Year 2011 in the Fund's statutorily mandated capital reserve ratio and cited FHA's decision to continue taking steps to improve the MMIF's short- and long-term outlook. HUD has determined that this proposed change to the LTV requirements is necessary to improve the health of the MMIF, while ensuring continued access to mortgage credit for American families.

DATES: *Comment Due Date:* March 8, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW., Room 10276, Washington, DC 20410–0500.

2. *Electronic Submission of Comments.* Interested persons may submit comments electronically through the Federal eRulemaking Portal at *www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule. *No Facsimile Comments.* Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Karin Hill, Director, Office of Single Family Program Development, Office of Housing, Department of Housing and Urban Development, 451 7th Street SW., Room 9278, Washington, DC, 20410; telephone number 202–708–4308 (this is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

During times of economic volatility, the FHA has maintained its countercyclical influence, supporting the private sector when access to housing finance capital is otherwise constrained. FHA played this role in the recent housing crisis, and the volume of FHA insurance increased rapidly during the housing crisis as private sources of mortgage finance retreated from the market. However, the growth of the MMIF portfolio over the period of time during the housing crisis has contributed significantly to the projected losses to, and a corresponding decrease in the financial soundness of, the Fund. Consistent with the Secretary's responsibility under the National Housing Act (12 U.S.C. 1701 *et seq.*) to ensure that the MMIF remains financially sound, FHA has taken a number of steps to improve the health of the Fund, while ensuring continued access to mortgage credit for American families.

FHA's annual Fiscal Year 2012 report to Congress on the financial status of the MMIF reported a decline in the Fund's statutory capital reserve ratio and cited FHA's plans to continue taking action to improve the Fund's financial soundness.[1] The report estimated that implementing a number of changes to FHA policy since 2009 has improved the economic value of the Fund by at least $20 billion.[2]

II. This Notice—Proposed Changes to Maximum LTV for Loans in Excess of $625,500

Although the steps taken since 2009 have had a positive effect on the financial soundness of the Fund, the projected levels of default, foreclosure, and claims within the existing MMIF portfolio and a number of predicted economic factors have resulted in a lower statutory capital reserve ratio for the MMIF for Fiscal Year 2012 compared to Fiscal Year 2011. In order to further protect the financial soundness of the MMIF, FHA must be vigilant in monitoring the performance of the portfolio, and adjust its standards to effectively manage financial risk. As a result, FHA has been continually evaluating its portfolio to identify and respond to risks in ways that benefit the Fund and, ultimately, consumers and taxpayers. During its evaluation, FHA has determined that the MMIF is subject to greater risk when FHA insures loan amounts in excess of $625,500. In response to this risk, the maximum LTV

[1] U.S. Department of Housing and Urban Development, Annual Report to Congress Regarding the Financial Status of the FHA Mutual Mortgage Insurance Fund, Fiscal Year 2012. (Fiscal 2012 Report) See *http://portal.hud.gov/hudportal/documents/huddoc?id=F12MMIFundRepCong111612.pdf*

[2] *Id.* at 52.

will be limited to 95 percent for loans in excess of $625,500.[3] LTV limits do not include the addition of the Up-Front Mortgage Insurance Premium (UFMIP).[4]

Certain FHA-insured loans will be exempted from this notice. Loans made pursuant to the FHA Streamline Refinance without an appraisal program, which has no LTV calculation, and the 203(k) Rehabilitation Mortgage Insurance Program, which utilizes two different LTV calculations in addition to the cost of improvements, are exempted. The Secretary may, as he deems necessary, exempt from this notice loans from other programs by publishing a **Federal Register** notice for comment.

III. Solicitation of Public Comments

FHA welcomes comments on the proposals set forth in this notice, including whether there may be additional FHA programs that should be exempted from this notice, for a period of 30 calendar days. FHA also welcomes comments on the economic effects in the proposals set forth in this notice. All comments will be considered in the development of the **Federal Register** notice that will follow this proposed notice and that will establish the maximum LTV for loans over a specified amount. The final notice will address any significant issues raised by the public comments, and may include changes to the LTV requirements proposed in this notice. The final notice will also announce the effective date for the LTV requirements.

IV. Environmental Review

This notice involves discretionary establishment and review of loan limits which do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Dated: January 30, 2013.

Carol J. Galante,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2013–02667 Filed 2–5–13; 8:45 am]

BILLING CODE 4210–67–P

[3] *Id.* at 17. The FHA Actuarial Report advises that the majority of FHA endorsements have historically had LTV ratios above 95 percent.

[4] HUD Handbook 4.155.2, (Lender's Guide to the Single Family Mortgage Insurance Process) at Chapter 7, pertaining to Mortgage Insurance Premiums, notes that in most of the FHA mortgage insurance programs, FHA collects an UFMIP and an annual insurance premium, which is collected in monthly installments. The total FHA-insured first mortgage on a property is limited to 100 percent of the appraised value and the UFMIP is required to be included within that limit. However, the UFMIP is otherwise not considered when determining compliance with statutory loan limits or LTV limits in accordance with Section 203(d) of the National Housing Act. See *http://portal.hud.gov/FHA-Handbooks/collections/current/print/4155–2_7.pdf*

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5500–FA–18]

Announcement of Funding Awards, HOPE VI Main Street Grant Program, Fiscal Year (FY) 2011 and 2012

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Announcement of funding awards.

SUMMARY: In accordance with Section 102(a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989, this announcement notifies the public of funding decisions made by the Department in a competition for funding under the FY 2011 and FY 2012 (FY 2011–12) Notice of Funding Availability (NOFA) for the HOPE VI Main Street Program. This announcement contains the consolidated names and addresses of the award recipients under said NOFA.

FOR FURTHER INFORMATION CONTACT: For questions concerning the HOPE VI Main Street Program awards, contact Lawrence Gnessin, HOPE VI Main Street Program Manager, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 2010, email *lawrence.gnessin@hud.gov,* and telephone (202) 402–2676. Hearing or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The purpose of the HOPE VI Main Street program is to provide grants to small communities to assist in the rejuvenation of an historic or traditional central business district or ''Main Street'' area by replacing unused commercial space in buildings with affordable housing units. The objectives of the program are to redevelop Main Street areas; preserve historic or traditional architecture or design features in Main Street areas; enhance economic development efforts in Main Street areas; and provide affordable housing in Main Street areas.

The FY 2011–12 awards announced in this Notice were selected for funding in a NOFA competition posted on the *http://www.grants.gov* Web site on June 24, 2011. Applicants to this Notice were eligible for awards in both FY2011 and FY2012. Applications were scored and selected for funding based on the selection criteria in that notice.

The amount allotted to fund the HOPE VI Main Street grants were from appropriations for Section 24 of the Housing Act of 1937, as amended. The amount allotted for FY2011 was $500,000 and the amount allotted for FY 2012 was $500,000, for a total of $1 million. The HOPE VI Main Street grantee information is as follows:

City of El Dorado, KS, 220 East First Street, P.O. Box 792, El Dorado, KS 67042–2003	$500,000
Town of Mayesville, SC, 24 South Main Street, P.O. Box 459, Mayesville, SC 29104–9520	$500,000

In accordance with Section 102 (a)(4)(C) of the Department of Housing and Urban Development Reform Act of 1989 (103 Stat.1987, 42 U.S.C. 3545), the Department is publishing the names, addresses, and amounts of the 2 awards made under FY 2011–12 HOPE VI Main Street NOFA.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 2013–02665 Filed 2–5–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5693–N–02]

Implementation of the Privacy Act of 1974, as Amended; Republication to Delete and Update Privacy Act System of Records Notifications

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice Republications.

SUMMARY: Pursuant to the Privacy Act of 1974 (U.S.C. 552a(e)(4)), as amended, and Office of Management and Budget (OMB), Circular No. A–130, notice is hereby given that the Department of Housing and Urban Development (HUD), Office of the Chief Information Officer (OCIO) republishes in the **Federal Register**, after a comprehensive review, actions for 27 of its program component systems of records. The revisions implemented under this republication are corrective and administrative changes that refine previously published details for each system of records in a clear and cohesive format. This republication does not meet the threshold criteria

established by the Office of Management and Budget (OMB) for a modified system of records report. A more detail descriptions of the present systems are republished under this notice. This notice supersedes the previously published notices.

DATES: *Effective Date:* All revisions included in this republication are complete and accurate as of December 14, 2012.

FOR FURTHER INFORMATION CONTACT: Donna Robinson-Staton, Chief Privacy Officer, 451 Seventh Street SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor), telephone number: (202) 402–8073. [The above telephone number is not a toll free numbers.] A telecommunications device for hearing- and speech-impaired persons (TTY) is available by calling the Federal Information Relay Service's toll-free telephone number (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Republication To Delete and Update Privacy Act Systems of Records

Subsequent reviews for 27 systems of records resulted in an update to 17 systems of records and deletion of 10 systems of records. Final analysis concluded with implementing new coding schemes for each systems of records; in an effort to streamline and present each system of records in a coding structure that easily differentiate program specific systems of records. These notices were last published in the **Federal Register** under separate citations. The **Federal Register** publications and citations associated with each notice can be viewed by going to the Department's Privacy Web site.[1]

Deleted Systems—The 10 systems deleted by this republication, and their existing coding structure are listed as follows:

1. HUD/CPD–1 Rehabilitation Loans Delinquent/Default (Authority Delegated)
2. HUD/DEPT–15 Equal Opportunity Housing Complaints (Data Migrated)
3. HUD/DEPT–29 Rehabilitation Grants and Loans Files (Authority Delegated)
4. HUD/DEPT–42 Rent Subsidy Program Files (Revoked)
5. HUD/H–8 Integrated Disbursement and Information System (Revoked)
6. HUD/H–14 Interstate Land Sales Registration (Authority Delegated)
7. HUD/PIH–07 Disaster Information System (Data Migrated)
8. HUD/OIG–3 Name Indices System (Revoked)
9. HUD/REAC–1 Tenant Eligibility Verification Files (Revoked)
10. HUD/REAC–3 Quality Assurance/Quality Control Administrative Files (Revoked)

Updated Systems—This following notices supersede the previously published notices. The 17 systems modified by this republication and their new coding structure is listed as follows:

1. CFO/FY.01 HUD Central Accounting and Program System (Previously HUD/CFO–01)
2. CFO/FY.02 Audit Resolution and Corrective Action Tracking System (Previously HUD/CFO–02)
3. CFO/FY.03 Line of Credit Control Systems (Previously HUD/CFO–03)
4. CFO/FY.04 Integrated Automated Travel System (Previously HUD/CFO–04)
5. CFO/FY.05 Personal Services Cost Subsystem (Previously HUD/CFO–05)
6. CFO/FY.06 Financial Data Mart (Previously HUD/CFO–03)
7. CPD/DGHR.01 Relocation Assistance Files (Previously HUD/CPD–44)
8. FHEO/EGID.01 Title Eight Automated Paperless Office Tracking System (Previously HUD/FHEO–06)
9. ODEEO/U.01 Equal Employment Opportunity Management Information System (Previously ODEEO–1)
10. OIG/GA.01 Independent Auditor Monitoring Files of the Office of Inspector (HUD/OIG–03)
11. OIG/GAP.01 Auto Audit of the Office of Inspector General (HUD/OIG–05)
12. OIG/GFB.01 Hotline Information Sub System (Previously HUD/OIG–2)
13. OIG/GIP.01 Investigative Files of the Office of Inspector General (Previously HUD/OIG–1)
14. OIG/GIP.02 Auto Investigation and Case Management Information Subsystem (Previously HUD/OIG–6)
15. PD&R/RPT.09 HUD USER File for Research Products, Services and Publications (Previously PD&R–9)
16. REAC/PE.01 Tracking-at-a-Glance® (Previously HUD/PIH–06)
17. REAC/PE.02 Efforts to Outcome Case Management Tracking System for DHAP-Ike (Previously HUD/PIH–08)

These systems are those maintained by HUD that includes personally identifiable information provided by individuals from which information is retrieved by a name of unique identifier. The system revisions encompass a wider range of programs and services in order to provide notification of a comprehensive view of the Department's data collection and management practices. Under this republication, the Department proposes to update 17 Privacy Act systems of records, delete 10 obsolete systems of records, and implement a new coding structure for it systems of records.

This republication allows HUD to organize and re-publish up-to-date information for these systems of records in a more useful format. The system modifications and deletions incorporate Federal privacy requirements, and HUD policy requirements. The Privacy Act provides certain safeguards for an individual against and invasion of personal privacy by requiring Federal agencies to protect records contained in an agency system of records from unauthorized disclosure, ensure that information is current for its intended use, and that adequate safeguards are provided to prevent misuse of such information. Additionally, the updates reflect the Department's focus on industry best practices in protecting the personal privacy of the individuals covered by each system notification. This notice for each system of records state the name and location of the record system, the authority for and manner of it operations, the categories of individuals that it covers, the type of records that it contain, the sources of the information for those records, the routines uses of each systems of records, and the system of records exemption types. In addition, each notice include the business address of the HUD officials who will inform interested persons of the procedures whereby they may gain access to and/or request amendments to records pertaining to them. The routine uses that apply to this publication are reiterated based on past publication to clearly communicate the ways in which HUD continues to conducts some of its business practices.

Since the republication of system of records notices does not meet the threshold requirements for new or amended system a report was not submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform as instructed by Paragraph 4c of Appendix l to OMB Circular No. A–130, ''Federal Agencies Responsibilities for Maintaining Records About Individuals,'' July 25, 1994 (59 FR 37914).

Prefatory Statement of General Routine Uses

The following routine uses apply to each system of records notice set forth below under case specific circumstances. The Privacy Act allows

[1] *http://portal.hud.gov/hudportal/HUD?src=/program_offices/cio/privacy/pia/fednotice/SORNs_LoB*

HUD to disclose its Privacy Act records in the following manner to appropriate agencies, entities, and persons below to the extent such disclosures are compatible with the purpose for which the record was collected, as set forth in the attached system of records notifications, provided that no routine use specified herein shall be construed to limit or waive any other routine use or exemption specified either herein or in the text of the individual system of records notice. In addition to providing that approval is obtained from the system manager, only after satisfactory justification has been provided to the system manager, records may be disclosed as follows:

1. To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable.

2. To the National Archives and Records Administration (NARA) and the General Services Administration (GSA) for records having sufficient historical or other value to warrant its continued preservation by the United States Government, or for inspection under authority of Title 44, Chapter 29, of the United States.

3. To a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

4. To appropriate Federal, state, local government, or person pursuant to a showing of compelling circumstances affecting the health or safety or vital interest of an individual or data subject, including assisting such agency(ies) or organizations in preventing the exposure to or transmission of a communicable or quarantinable disease or to combat other significant public health threats; if upon such disclosure appropriate notice is transmitted to the last known address of such individual identify the health threat or risk.

5. To a consumer reporting agency, when trying to collect a claim of the Government, in accordance with 31 U.S.C. 3711(e).

6. To appropriate agencies, entities, and persons when: (a) HUD suspects or has confirmed that the security or confidentiality of information in a system of records has been compromised; (b) HUD has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of systems or programs (whether maintained by HUD or another agency or entity) that rely upon the compromised information; and c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm for purposes of facilitating responses and remediation efforts in the event of a data breach.

Case Specific Actions, In addition to the disclosures permitted under subsection (b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine uses provided that approval is obtained from the system manager only after satisfactory justification has been provided to the system manager: HUD may disclosure records compatible to one of its system of records notices during case specific circumstances, when appropriate, as follows:

7. To appropriate Federal, state, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws.

8. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

9. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena or to a prosecution request when such records to be released are specifically approved by a court provided order.

10. To appropriate Federal, state, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws.

11. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure.

12. To the Department of Justice (DOJ) when seeking legal advice for a HUD initiative or in response to DOJ's request for the information, after either HUD or DOJ determine that such information is relevant to DOJ's representatives of the United States or any other components in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that disclosure of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which HUD collected the records. HUD on its own may disclose records in this system of records in legal proceeding before a court or administrative body after determining that the disclosure of the records to the court of administrative body is a use of the information contained in the records that is compatible with the purpose for which HUD collected the records.

13. To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

14. To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities including but not limited to state and local governments, with whom HUD has a contract, service agreement, grant, cooperative agreement with the Department of Housing and Urban Development for statistical analysis to advance the goals of the nation's federal strategic plan to prevent and end veterans homelessness. The records may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals, or providers of services with respect to homeless veteran's efforts.

15. To HUD-paid experts or consultants, and those under contract with HUD on a ''need-to-know'' basis for a purpose within the scope of the pertinent HUD task related to these systems of records. This access will be granted to an HUD-paid expert, or consultants of contractor and their employees by a system manager only after satisfactory justification has been

provided to the system manager. Access shall be restricted and limited to only those data elements and disclosures considered relevant to accomplishing an agency function.

16. To other Federal agencies or non-Federal entities with whom HUD has an approved computer matching effort, limited to only those data elements considered relevant to determine eligibility under a particular benefit programs administered by those agencies or entities or by HUD or any component thereof, to improve program integrity, and to collect debts and other monies owed under those programs.

17. To contractors, experts, consultants with whom HUD has a contract, service agreement or other assignment of the Department, when necessary to utilize relevant data for purposes of testing new technology and systems designed to enhance program operations and performance.

18. To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities including but not limited to state and local governments, and other research institutions or their parties entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement with HUD, when necessary to accomplish an agency function related to a system of records for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form.

19. To other Federal agencies or non-Federal entities, including but not limited to state and local government entities with whom HUD has a contract, service agreement, grant, cooperative agreement, or computer matching agreement to assist such agencies with preventing and detecting improper payments, or fraud, or abuse in major programs administered by the Federal government, or abuse by individuals in their operations and programs, but only to the extent that the information is necessary and relevant to preventing improper payments for services rendered under a particular Federal or non-federal benefits programs of HUD or any of their components to verify pre-award and pre-payment requirements prior to the release of Federal Funds.

Authority: 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: January 25, 2013.

Kevin R. Cooke,

Deputy Chief Information Officer.

The Department republishes the following systems of records updates.

SYSTEM OF RECORDS NO:

CFO/FY.01

SYSTEM NAME:

HUD Central Accounting and Program System (HUDCAPS, A75).

SYSTEM LOCATION:

HUD Headquarters, Washington, DC 20410 and Hewlett-Packard Data Center, South Charleston, WV 25303.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Grant, subsidy, project, and loan recipients; HUD personnel; vendors; brokers; bidders; managers; individuals within Disaster Assistance Programs: Builders, developers, contractors, and appraisers; subjects of audits.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains the following employee/vendor (non-employee) information: Name, social security number, address, and financial data. Also included are funds control records, accounts receivable records, purchase order and contract records, travel records including orders, vouchers, and advances, payment voucher records, deposit and receipt records, disbursement and cancelled check records, and financial records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784); Chief Financial Officers Act of 1990; Federal Financial Management Improvement Act of 1996; Housing and Community Development Act of 1987, 42 U.S.C. 3543 authorizes HUD to collect the SSN.

PURPOSE(S):

These records are an integral part of HUDCAPS, which provides an integrated general ledger and core accounting for the Department's grant, subsidy, and loan programs. The general ledger posts and maintains account balances for all financial transactions recorded in the subsidiary systems. HUDCAPS performs core accounting functions, which includes but is not limited to keeping track of all payments to individuals, supporting and documenting expenses incurred in the performance of official agency duties, accounting for goods and services received, accounting for funds paid and received, and processing travel authorizations and claims.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine uses:

1. To U.S. Treasury—for transactions such as disbursements of funds and related adjustments;

2. To Internal Revenue Service—for reporting payments for goods and services and for reporting of discharge indebtedness;

3. To any other Federal agency including, but not limited to the Internal Revenue Service (IRS) pursuant to 31 U.S.C. 3720A, for the purpose of effecting an administrative offset against the debtor for a delinquent debt owed to the U.S. Government by the debtor;

4. To Federal Agencies—for the purpose of debt collection to comply with statutory reporting requirements;

5. To the General Service Administration's Federal Procurement Data System, a central repository for statistical information on Government contracting, for purposes of providing public access to Government-wide data about agency contract actions;

6. To consumer reporting agencies: Disclosures pursuant to 5 U.S.C. 552a(b)(12). Disclosures may be made from the system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966, 31 U.S.C. 3701(a)(3)). The disclosure is limited to information necessary to establish the identity of the individual, including name, social security number, and address; the amount, status, and history of the claim, and the agency or program under which the claim arose for the sole purpose of allowing the consumer reporting agency to prepare a credit report.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on magnetic tape/disc/drum. There are no paper records that are maintained for this system.

RETRIEVABILITY:

Records are retrieved by name, social security number, schedule number, receipt number, voucher number, and contract number.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule as specified in HUD Handbook 2225.6 Records Disposition Schedule Appendix 14, HUD Handbook 2228.1 Records Disposition Schedule Management Chapter 9, and HUD Handbook 2228.2 General Records.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), DC 20410;

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records, current and former HUD employees seeking reimbursement from HUD for travel expenses personally incurred financial institutions, private corporations or other business partners, and Federal agencies.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None

SYSTEM OF RECORDS NO.:

CFO/FY.02

SYSTEM NAME:

Audit Resolution and Corrective Action Tracking System (ARCATS, P136)

SYSTEM LOCATION:

HUD Headquarters, Washington, DC 20410 and South Charleston, WV 25303.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

HUD Headquarters, Office of the Inspector General (OIG) and Field Office Personnel; subjects of audits.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains the following client information: Name, social security number, date of birth, home address, home telephone number, personal email address, race/ethnicity, gender, marital status, spouse name, number of children, income/financial data, employment history, education level, medical history, and disability information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Federal Managers Financial Integrity Act of 1982(Pub. L. 97–255, HR 1526); Sec. 113 of the Accounting and Auditing Act of 1950 (31 U.S.C. 66a). ARCATS has been designed to conform with the requirements of the Inspector General Act of 1978 as amended (5 USC APP. 3), Office of Management and Budget (OMB) Circular A–50 revised ''Audit Follow-up'' and OMB Circular A–133 ''Audits of States, Local Governments, and Non-Profit Organizations.''

PURPOSE(S):

To provide an improved tool for management planning and oversight of corrective actions needed to address audit recommendations in a timely manner. ARCATS tracks HUD's audit resolution process.

ROUTINE USES ARE AS FOLLOWS:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual in accordance with its discretionary disclosures, when such disclosure is compatible with the purpose for which the record was collected. Refer to this notice ''Prefatory Statements of General Routine Uses'' section for a description of these disclosures.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on electronic files or magnetic tape/disc/drum. Paper printouts or original input documents may be stored in locked file cabinets at HUD or as imaged documents on magnetic media.

RETRIEVABILITY:

Records are retrieved only by those who have the authority to view a specific document which may contain personally identifiable information. Lotus Notes security is based on roles and determines if a person is authorized to view a document.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule. Other materials, including hard copy printouts derived from

electronic records created on an ad hoc basis for reference purposes or to meet day-to-day business needs, are burned when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purposes.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410 (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i.) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), (202) 402–8073Washington, DC 20410;

(ii.) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records, the OIG, and HUD personnel who have access to Lotus Notes and have a specifically defined role in the system.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None

SYSTEM OF RECORD CO.:

CFO/FY.03

NAME:

Line of Credit Control Systems (LOCCS, A67).

SYSTEM LOCATION:

HUD Headquarters, Washington, DC 20410 and South Charleston, WV 25303. Refer to Appendix II for complete listing of addresses.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: GRANTEES, SUBSIDY RECIPIENTS, PROJECT RECIPIENTS, COMMERCIAL VENDORS, BUILDERS, DEVELOPERS, CONTRACTORS, AND APPRAISERS.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains the following employee/vendor information: name, social security number, bank routing number, and deposit account number. Also included are funds control records, receivable records, contract records, payment voucher records, deposit and receipt records, disbursement and cancelled check records, and subsidiary ledger records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784). The Housing and Community Development Act of 1987, 42 U.S.C.3543 authorizes HUD to collect the SSN.

PURPOSE(S):

The purpose of the system of records is to process and make grant, loan, and subsidy disbursements. LOCCS ensures that payments are made in a timely manner thus achieving efficient cash management practices. Its function is to create accounting transactions with the appropriate accounting classification elements to correctly record disbursements and collections to the grant/project level subsidiary.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES: IN ADDITION TO THOSE DISCLOSURES GENERALLY PERMITTED UNDER 5 U.S.C. 552A(B) OF THE PRIVACY ACT, HUD MAY DISCLOSE INFORMATION CONTAINED IN THIS SYSTEM OF RECORDS WITHOUT THE CONSENT OF THE SUBJECT INDIVIDUAL IF THE DISCLOSURE IS COMPATIBLE WITH THE PURPOSE FOR WHICH THE RECORD WAS COLLECTED UNDER THE FOLLOWING ROUTINE USES:

1. To U.S. Treasury—for transactions such as disbursements of funds and related adjustments;

2. To Internal Revenue Service—for reporting payments for goods and services and for reporting of discharge indebtedness;

3. To consumer reporting agencies: Disclosures pursuant to 5 U.S.C. 552a(b)(12). Disclosures may be made from the system to consumer reporting agencies as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f) or the Federal Claims Collection Act of 1966, 31 U.S.C. 3701(a)(3)). The disclosure is limited to information necessary to establish the identity of the individual, including name, social security number, and address; the amount, status, history of the claim, and the agency or program under which the claim arose for the sole purpose of allowing the consumer reporting agency to prepare a credit report.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on servers. Paper printouts or original input documents are stored in locked file cabinets at HUD or as imaged documents on magnetic media.

RETRIEVABILITY:

Records are retrieved by name, social security number, schedule number, receipt number, voucher number, and contract number.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule as specified in HUD Handbook 2225.6 Records Disposition Schedule Appendix 14, HUD Handbook 2228.1 Records Disposition Schedule Management Chapter 9, and HUD Handbook 2228.2 General Records. Other materials, including hard copy printouts derived from electronic records created on an ad hoc basis for reference purposes or to meet day-to-day business needs, are burned when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purposes.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and

Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410 (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410;

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records, current and former HUD personnel, financial institutions, private corporations or business partners, and Federal agencies.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

SYSTEM OF RECORDS NO.:

CFO/FY.04

NAME:

Integrated Automated Travel System (IATS, H18).

SYSTEM LOCATION:

CFO Accounting Center in Fort Worth, Texas 76102.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

HUD relocating employees, HUD System Administrators, HUD System Examiners.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains the following employee information: name (as it appears on government-issued driver's license or passport), social security number, home address, marital status, spouse name, and number of children. The records in this system include: vendor ID or other unique 9-digit numbers, disbursements, travel authorizations (origin and destination of relocation, authorized entitlements, dependent's names and dates of birth), and payments made to individual (amount approved, taxes deducted, amount paid to employee, date of payment).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784); 31 USC 3511, 3512 and 3523; 5 U.S.C. Chapter 57. The personally identifiable information associated with IATS is needed to compute entitlements based on 41CFR Chapter 302. These entitlements are considered to be taxable by IRS; W–2's must be prepared and mailed to employees at year end. The Housing and Community Development Act of 1987, 42 U.S.C.3543 authorizes HUD to collect the SSN.

PURPOSE(S):

The purpose of the system of records is to plan, authorize, arrange, process and manage official HUD relocation, to maintain records on current HUD employees who are relocating to another office location within HUD and have been approved for relocation entitlements, and to record relocation disbursements in order to compute and record taxes and W–2s.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES.

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine uses:

1. To IRS and the SSA to generate quarterly 941's and annual W–2's to fulfill its statutory reporting of wage and income reporting requirements to IRS and SSA.

2. To GSA in the form of invoices to enable the GSA to perform post audit of the invoices paid by HUD directly to the Household Good Shippers.

3. To an authorized appeal or grievance examiner, formal complaints examiner, equal employment opportunity investigator, arbitrator, or other duly authorized official engaged in investigation or settlement of a grievance, complaint, or appeal filed by an employee to whom the information pertains. If HUD denies claims, HUD employees can appeal to the GSA Civilian Board of Contract Appeals.

4. To Officials of labor organizations recognized under 5 U.S.C. Chapter 71 when relevant and necessary to their duties of exclusive representation concerning personnel policies, practices, and matters affecting working conditions.

5. To a travel services provider for billing and refund purposes.

6. To a carrier or an insurer for settlement of an employee claim for loss of or damage to personal property incident to service under 31 U.S.C. 3721, or to a party involved in a tort claim against the Federal government resulting from an accident involving a traveler.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Each individual relocatee has a folder with hard copies of these documents which are stored in secure cabinets in the file room under lock and key within the Travel and Relocation Branch Office in Fort Worth, Texas. Electronic files are supported by the HITS contract on a server physically located in Charleston, WV.

RETRIEVABILITY:

Records are retrieved by name and social security number.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule as specified in HUD Handbook 2225.6 Records Disposition Schedule Appendix 14, HUD Handbook

2228.1 Records Disposition Schedule Management Chapter 9, and HUD Handbook 2228.2 General Records. Other materials, including hard copy printouts derived from electronic records created on an ad hoc basis for reference purposes or to meet day-to-day business needs, are burned when the agency determines that they are no longer needed for administrative, legal, audit, or other operational purposes.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4178, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

1. In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410;

2. In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records, the documents created from this information to facilitate the relocation, household goods carriers, and document information from HUDCAPS.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

SYSTEM OF RECORDS CO.:

CFO/FY.05

SYSTEM NAME:

Personal Services Cost Subsystem (PSCS, A75I).

SYSTEM LOCATION:

HUD Headquarters in Washington, DC 20410.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former HUD employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains the following employee information: name, social security number, and payroll costs. Also included are HUD organizational code, pay rate, grade, pay and leave records, health benefits, debts owed to the government as a result of overpayment, refunds owed, and time and attendance records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784). Public Law 97–255, Financial Integrity Act, 31 U.S.C. 3512, authorizes the Department of Housing and Urban Development (HUD) to collect all the information that will be used by HUD to protect data from fraudulent actions. The Housing and Community Development Act of 1987, 42 U.S.C.3543 authorizes HUD to collect the SSN.

PURPOSE(S):

To obtain payroll costs from NFC, a bureau of the Department of Agriculture. Additionally, PSCS converts the NFC codes to HUD organizational codes and transits the converted codes and payroll costs to HUD's Central Accounting and Program System (HUDCAPS) for accounting of the payroll. PSCS is necessary since it sends HUD's payroll costs to HUDCAPS and impacts HUD's financial reporting to the Office of Management and Budget (OMB). There is no public access to this system. This is for internal use only. The system has 8 users with update privileges.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual in accordance with its discretionary disclosures, when such disclosure is compatible with the purpose for which the record was collected. Refer to this notice ''Prefatory Statements of General Routine Uses'' section for a description of these disclosures.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on servers. There are no paper records that are maintained for this system.

RETRIEVABILITY:

Records are retrieved by name, social security number, and HUD organizational code.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule as specified in HUD Handbook 2225.6 Records Disposition Schedule Appendix 14, HUD Handbook 2228.1 Records Disposition Schedule Management Chapter 9, and HUD Handbook 2228.2 General Records.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4178, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original

signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410;

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from official personnel records of employees.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT: NONE

SYSTEM OF RECORD CO.:

CFO/FY.06

SYSTEM NAME:

Financial Data Mart (FDM, A75R).

SYSTEM LOCATION:

HUD Headquarters, Washington, DC 20410 and Hewlett-Packard Data Center, South Charleston, WV 25303.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Grant, subsidy, project, and loan recipients; HUD personnel; vendors; brokers; bidders; managers; individuals within Disaster Assistance Programs: builders, developers, contractors, and appraisers; subjects of audits.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains the following employee/vendor (non-employee) information: name, social security number, address, and financial data. Also included are funds control records, accounts receivable records, purchase order and contract records, travel records including orders, vouchers, and advances, payment voucher records, deposit and receipt records, disbursement and cancelled check records, and financial records.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784); Chief Financial Officers Act of 1990; The Housing and Community Development Act of 1987, 42 U.S.C.3543 authorizes HUD to collect the SSN.

PURPOSE(S):

To allow the Department decision makers to view financial data in desired report format. Financial Data Mart (FDM) is a warehouse of data extracted from a variety of the Department's financial systems and supported by a number of query tools for the purpose of improved financial and program data reporting. FDM is the primary reporting tool used to generate internal ad-hoc reports, scheduled event driven reports, and queries. This system supports program area managers, budget officers, and management staff by providing centralized, uniform financial information, event driven reports, and an ad-hoc financial analysis tool.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual in accordance with its discretionary disclosures, when such disclosure is compatible with the purpose for which the record was collected. Refer to this notice ''Prefatory Statements of General Routine Uses'' section for a description of these disclosures.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on servers. There are no paper records that are maintained for this system.

RETRIEVABILITY:

Records are retrieved by name, social security number, home address, user-id, deposit account number, and bank routing number.

SAFEGUARDS EMPLOYED:

All HUD employees have undergone background investigations. HUD buildings are guarded and monitored by security personnel, cameras, ID checks, and other physical security measures. Access is restricted to authorized personnel or contractors whose responsibilities require access. System users must take the mandatory security awareness training annually as mandated by the Federal Information Security Management Act (FISMA). Users must also sign a Rules of Behavior form certifying that they agree to comply with the requirements before they are granted access to the system.

RETENTION AND DISPOSAL:

The electronic records are maintained indefinitely and destroyed in accordance with schedule 20 of the National Archives and Records Administration General Records Schedule as specified in HUD Handbook 2225.6 Records Disposition Schedule Appendix 14, HUD Handbook 2228.1 Records Disposition Schedule Management Chapter 9, and HUD Handbook 2228.2 General Records.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Chief Financial Officer for Systems, Office of the Chief Financial Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 3100, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i.) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410;

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

These records contain information obtained from the individual who is the subject of these records and Federal agencies.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None

SYSTEM OF RECORD NO.:

FHEO/EGID.01

SYSTEM NAME:

Title Eight Automated Paperless Office Tracking System (TEAPOTs)

SYSTEM LOCATIONS:

Electronic Records reside on HUD Network servers. Location is 2020 Union Carbide Drive South Charleston West Virginia 25303–2734. The Paper Records are located at the office where the investigation originated and may also be transferred to associated area and/or Regional Offices, or the Headquarters Office. In addition to HUD's headquarters building located at 451 Seventh Street SW., Washington, DC 20715, HUD also operates Regional and Field Offices locations where TEAPOTs Privacy Act records may in some cases be maintained or accessed, including: Baltimore MD; Boston, MA; Pittsburgh, PA; Hartford, CT; Richmond, VA; New York, NY; Newark, NJ; Atlanta, GA; Buffalo, NY; San Juan, Puerto Rico; Philadelphia, PA; Louisville, KY; Miami, FL; Birmingham, AL; Knoxville, TN; Greensboro, SC; Chicago, IL; Columbus, OH; Detroit, MI; Minneapolis, MN; Milwaukee, WI; Indianapolis, IN; Cleveland, OH; Jackson MS; Jacksonville, FL; Albuquerque, NM; Little Rock, AR; Houston, TX; Houston, TX; Kansas City, KS; St. Louis, MO; Omaha, NE; Denver, CO; Fort Worth, TX; New Orleans; Oklahoma City, OK; Honolulu, HI; Seattle, WA; San Francisco, CA; Los Angeles, CA; Portland, OR; Anchorage, AK. Refer to Appendix II for complete address listings.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988 (42 U.S.C. 3601 et seq.), Title VI of the Civil Rights Act of 1964 (42 U.S.C. Sections 2000d-2000d-7), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791 et seq.), Section 109 of Title I of the Housing and Community Development Act of 1974 (42 U.S.C. 5301–5321), Title II of the American Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), Age Discrimination Act of 1975 (42 U.S.C. Sections 6101–107), Title IX of the Education Amendments Act of 1972(Title 20 U.S.C. Sections 1681–1688), and the Architectural Barriers Act of 1968 (42 U.S.C. 4151 et seq.).

PURPOSES:

FHEO TEAPOTS is the system that maintains case file data when further investigation is warranted, under a filed housing discrimination complaint. This is where the housing discrimination complaint inquiries and case files are documented and stored during the investigation process. Information on the complainants is collected on a case-by-case basis only if relevant to the particular case. The origination of a compliant begins with the origination of the HUD Form 903. The HUD Form 903 is used for filing discrimination complaints over unfair housing practices. This form is available in paper and on-line. The public may submit a HUD Form 903 (a housing discrimination complaint form) via the internet or by mail. HUD Form 903 collects initial potential case information for assessment and turns the information over to the appropriate regional office jurisdiction. Information gathered through the HUD Form 903 system opens an inquiry with FHEO that is explored through further discussion between FHEO staff and the complainant. These discussions gather additional data that establish jurisdiction and determine whether or not to launch an investigation. HUD's FHEO also use these records within TEAPOT's to monitor the quality of the investigations performed by authorized non-Federal agencies, and to determine the amount these agencies should be paid for performing the investigating. A paper case file that includes the information tracked in TEAPOTS, as well as additional information, is maintained outside of TEAPOTS.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All persons filing a housing discrimination complaint (known as Complainants) and their representatives; all persons and/or organizations identified by Complainants as having committed housing discrimination (known as Respondents) and their representatives; all those investigating and reviewing the housing discrimination complaint

CATEGORIES OF RECORDS IN THE SYSTEM:

All persons filing a housing discrimination complaint (known as Complainants) and their representatives; All persons and/or organizations identified by Complainants as having committed housing discrimination (known as Respondents) and their representatives; All those investigating and reviewing the housing discrimination complaint. Personal information which is generally maintained in TEAPOTS include: Name of Complainant, Respondent, Respondent Organization, Witnesses, and Complainant's or Respondent's Representative (if applicable); Home and work address of Complainant, Respondent Organization, and Representative; Contact number for Complainant, Respondent/Respondent Organization, Witnesses, and Representative. Because TEAPOTS is the fair housing complaints database, it normally maintains the following personal information of the Complainant, other aggrieved parties information, the Respondent, and/or witnesses based on the issues and bases of what is alleged in the complaint cases. Also included is race, national origin, disability (mental/physical); family status (pregnancy, families with children under 18); religion types of personal information, documents that may be maintained and found in TEAPOTS; Letters from physicians/medical records (in disability-based/reasonable accommodation claims); Rental lease agreements; Financial and loan information (in fair lending cases); Name, age/date of birth of minor children, and number of dependents (in family status cases, which includes families with children under the age of 18.)

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine uses:

1. To individuals under contract to HUD or under contract to another agency with funds provided by HUD for the purpose of conducting oversight and monitoring of program operations to determine compliance with applicable laws and regulations, and FHEO reporting requirements (individuals provided information under this routine use is subject to Privacy Act requirements and limitation on disclosures as are applicable to HUD officials and employees);

2. To State and local agencies Once certified by HUD to investigate and adjudicate Title VIII housing discrimination complaints, State and local agencies also use TEAPOTS to record investigation information;

3. To authorized requestors requesting release from records under the Freedom of Information Act (FOIA) and the Privacy Act request; and

POLICIES AND PRACTICES FOR STORING, RETRIEVING, SAFEGUARDING, AND DISPOSING OF SYSTEM RECORDS

STORAGE:

The data is stored on the TEAPOTS production server, and the reporting server. The data is backed up every night to tape and is stored at the National Archives and Record Administration on a CD for permanent storage, when applicable. Manual

records are stored in lockable file cabinets.

RETRIEVABILITY:

Records are retrieved by file number, Complaint name, or respondent name.

SAFEGUARDS:

A User ID and password are required for authentication, Files Rules of Behavior form prior to being granted system access. These rules emphasize privacy protections of the personally identifiable information in TEAPOTS. Permission restrictions prevent unsolicited and illicit access to another region's data. Manual records are stored in lockable file cabinets; computer facilities are secured and accessible only by authorized personnel, and all files are stored in a secured area. Technical restraints are employed with regard to accessing the computer and data files.

RETENTION AND DISPOSAL:

The retention period for the information in TEAPOTs is maintained for the life of the case to support the activity and other enforcement activities that may become related to the case. When the life of the case is closed (the case is no longer needed for administrative or reference use, or to satisfy preservation requirements), and a final determination has been made of the case records, records in the system are maintained in accordance with the approved records schedule, HUD's Records and Disposition Schedule Handbook 2225.6, Appendix 50.[2] Historic or significant investigation files are PERMANENT, pending appraisal by NARA. Files Transfers are made to the National Archives and Records Administration every 5 years, when applicable (Including a listing of restricted data fields, which remain in place 30 years after which a final appraisal is conducted.

SYSTEM MANAGERS AND ADDRESSES:

Nina B. Aten, Director, Office of Information Services and Communications, Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 5118, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether this system of records contains information about them, or those seeking access to such records, should address inquiries to Donna Robinson-Staton Chief Privacy Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor). Provide verification of your identity by providing two proofs of identification. Your verification of identity must include your original signature and must be notarized.

CONTESTING RECORD PROCEDURES:

The Department's rules for contesting the contents of records and appealing initial denials, by the individual concerned, appear in 24 CFR Part 16. If additional information or assistance is needed, it may be obtained by contacting:

(i) CONTESTING CONTENTS OF RECORDS: Department of Housing and Urban Development, Chief Privacy Officer, 451 Seventh Street, SW., Washington, DC 20410 (Attention: Capitol View Building, 4th Floor);

(ii) APPEALS OF INITIAL HUD DETERMINATIONS: In relation to contesting contents of records, the HUD Departmental Privacy Appeals Officers, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

Information is obtained from the record subject.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

The records in TEAPOTs are maintained for use in civil rather than criminal actions and are prohibited from disclosure pursuant to exemption 5 U.S.C. 552a (d)(5) of the Privacy Act.

SYSTEM OF RECORDS NO.:

ODEEO/U.01

SYSTEM NAME:

Equal Employment Opportunity Management Information System (EEOMIS)

SYSTEM LOCATION:

Department of Housing and Urban Development, HUD 451 Seventh Street SW., Room 2112, Washington, DC 20410; the Washington National Records Center, 4205 Suitland Road, Suitland, MD 20746–8001; and MicroPact, 12901 Worldgate Drive, Suite 800, Herndon, VA 20170.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: PERSONAL AND EMPLOYMENT RELATED DATA ITEMS ON EACH HUD EMPLOYEE, AND INFORMATION ON EEO DISCRIMINATION COMPLAINT PROCESSING COVERING BOTH HUD EMPLOYEES AND APPLICANTS FOR EMPLOYMENT.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system contains ''selected'' personal information on each employee, depending on the employee's type of appointment with the Department, including the employee's: Full Name, Unique Identifier (system generated), Address, Date of Birth, Race, Sex, Disability Status, Pay Plan, Grade and Step, Annual Salary, Occupational Series, Position Title, Organization Code, GSA Location Code, Duty Station, Veteran Preference, Type of Appointment, Tenure Group, Work Schedule, Type of Employment, FLSA, Bargaining Unit Status, Occupational Category, Type of Position, Supervisory Status, Position Sensitivity, Education Level, Academic Discipline, Year of Degree, Special Employee Code, Special Program Code Performance Rating, Performance Year, Enter on Duty Date w/HUD, Date last Grade Promotion, Target Grade, and Date entered Present Position. The EEO Discrimination Complaint processing portion of the system contains information on complaints, both formal and informal, filed by HUD employees and applicants for employment. The information in EEOMIS includes, but is not limited to: Complainant's Name, Complaint Type, Alleged Discriminating Official, Basis/Issues, Witnesses, Related Correspondence, Step-by-Step Processing Record, Final Disposition, and Summary of Complaint

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The legal bases for maintaining the system are: Section 717 of Title VII of the Civil Rights Act of 1964, as amended, to ensure enforcement of Federal equal employment opportunity policy requires Federal agencies to maintain Affirmative Employment Programs apply the same legal standards to prohibit discrimination established for private employers; and to eliminate discrimination that Congress found existing throughout the Federal employment system. The Rehabilitation Act of 1973, as amended, required the same for persons with disabilities; the Uniform Guidelines on Employee Selection Procedures, dated 8/78 requires records to be maintained which allow determinations to be made of the impact of selection procedures on members of various race, sex and ethnic groups. The Civil Service Reform Act of 1978, requires Federal agencies to conduct affirmative recruitment for

[2] http://portal.hud.gov/hudportal/documents/huddoc?id=22256x50ADMH.pdf

those occupations and grades within their work force in which underrepresentation of women and minorities exists. Equal Employment Opportunity Commission (EEOC) Management Directive (MD) 702, dated 12/79 required that Federal agencies develop and implement information systems that provide periodical status reports on a statistical work force profiles and on affirmative employment objectives. Federal Personnel Manual (FPM) Letters 720–4, dated 1/80 and 720–6 dated 10/80 established broad instructions and procedures for the collection of race, sex, and ethnic origin data on job applicants.

PURPOSE:

EEOMIS is an internal management information system used to monitor, evaluate, and report the effectiveness of the Department's EEO/AE Program. However, all EEOMIS Users, excluding those in the Office of Departmental Equal Employment Opportunity, have restricted access. Those users cannot retrieve individually identified personal privacy information. Annually, ODEEO process EEO Counseling, and pre- and formal complaints. This information must be reported annually to the EEOC and must be processed in compliance with: EEOC Form 462 format; EEOC Management Directives 110 & 715; 29 CFR 1614; the Notification & Federal Employee Anti-discrimination and Retaliation (NO FEAR) Act of 2002, and HUD policies. Additionally, data must be maintained to provide workforce profile analyses as key Departmental indicators for improving utilization of human capital; EEO barrier identification and elimination; tracking; management and reporting under Title VII, and obligations under the Rehabilitation Act. Specific maintenance requirements are necessary to keep current with various mandates from the EEOC and other Federal regulations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine use:

1. To another federal agency, to a court, or to a party in litigation before a court or in an administrative proceeding being conducted by a federal agency when the government is a party to the judicial or administrative proceeding.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Limited information is stored in a computerized database. Hard copy records are maintained in a secured area, in locked file cabinets to which only authorized ODEEO personnel have access. Any hard copy reports, not in statistical format, generated from the database are stored in a secured office with restricted access. Inactive records are transfer to the HUD Records Management Center.

RETRIEVABILITY:

The data is retrievable by any of the data items listed under ''Categories of Records in the System.'' The records are retrievable by charging party name, employer name and charge number.

SAFEGUARDS:

EEOMIS is a LAN based computerized system and only authorized users have the EEOMIS icon on their computers. In addition to the icon, only those users who have been entered into EEOMIS as ''authorized'' and gain access through an assigned a password. EEOMIS access passwords are assigned and entered by the designated System Administrators in ODEEO. Limited information is stored in a computerized database. All Paper records are maintained in a secured area to which only authorized personnel have access. Access to and use of these records is limited to those persons whose official duties require such access. The premises are locked when authorized personnel are not on duty. Access to computerized records is limited, through use of access codes and entry logs, to those whose official duties require access. Any hard copy reports, not in statistical format, generated from the database are stored in a secured office with restricted access.

RETENTION AND DISPOSAL:

All records (paper-based and electronic) are disposed in accordance with HUD's Records Disposition Schedule 51, 2225.6 REV–1,CHG–42. All paper-based records and reports are held for a six year period then destroyed by shredding. Inactive records are transfer to the HUD Records Management Center and destroyed after the retention has been met. Electronic records that meet their full retention period will be disposed of in accordance with the HUD's IT Security Handbook (2400.25), pursuant to NIST SP 800–88, Media Sanitation procedures.

SYSTEM MANAGER AND ADDRESS:

Michelle A. Cottom, Acting Director, Office of Departmental Equal Employment Opportunity, 451 Seventh Street, SW Room #3124, Washington, DC 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURE:

For information, assistance, or inquiry about the existence of records, contact the Privacy Act Officer at the Department of Housing and Urban Development, 451 7th Street SW., Room P8202, Washington, DC 20410, in accordance with procedures in 24 CFR part 16.

CONTESTING RECORD PROCEDURES:

The Department's rules for contesting the contents of records and appealing initial denials, by the individual concerned, appears in 24 CFR part 16. If additional information or assistance is needed, it may be obtained by contacting:

(i) In relation to contesting contests of records, the Privacy Act Officer at the appropriate location, the Department of Housing and Urban Development, 451 Seventh Street SW., (Attention: Capitol View Building, 4th Floor), Washington, DC 20410, or

(ii) in relation to appeals of initial denials, the Department of Housing and Urban Development, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

Initial employee personal information is collected when first appointed as HUD employees (i.e. full name, date of birth, disability status, etc.). Initial position/employment related information for each employee is derived from the type of appointment and specific position (title, series, grade, organization, duty station, etc.) under/for which they were hired. Updates to information on current employees are the results of personnel actions affecting employees (i.e. promotions, reassignments, etc.) and those self-initiated by employees (i.e. changes in disability status/medical condition). Information on EEO Discrimination Complaint processing is collected and entered directly into EEOMIS by ODEEO staff as complaints are filed and processed.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

SYSTEM OF RECORD NO.:

OIG–GA.01

SYSTEM NAME:

Independent Auditor Monitoring Files of the Office of Inspector General.

SYSTEM LOCATION:

HUD OIG Headquarters, 451 7th Street SW; Washington DC and field office in Cherry Hill, New Jersey. Refer to Appendix II for complete address listings.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: INDIVIDUALS COVERED ARE NON-FEDERAL INDEPENDENT AUDITORS WHO HAVE CONDUCTED AUDITS OF RECIPIENTS OF FEDERAL FUNDS RECEIVED UNDER HUD'S PROGRAMS. AN INDEPENDENT AUDITOR IS: (A) A LICENSED CERTIFIED PUBLIC ACCOUNTANT OR A PERSON WORKING FOR A LICENSED CERTIFIED PUBLIC ACCOUNTING FIRM, OR (B) A PUBLIC ACCOUNTANT LICENSED ON OR BEFORE DECEMBER 31, 1970, OR A PERSON WORKING FOR A PUBLIC ACCOUNTING FIRM LICENSED ON OR BEFORE DECEMBER 31, 1970.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of materials generated in connection with quality control reviews of the working papers of independent auditors, including standardized checklists for evaluating an independent auditor's work performance. Elements collected will include the name of the independent auditor and his or her contact information and name of the entity audited. The remaining information collected generally consists of pdfs or copies of audit work papers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978, 5 U.S.C. App., requires the Inspector General to assure that any work performed by non-federal auditors complies with the auditing standards established by the Comptroller General of the United States for audits of federal establishments, organizations, programs, activities and functions.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), records may also be disclosed routinely to other users under the following circumstances:

1. In the event that records indicate a violation or potential violation of law, whether criminal, civil or regulatory in nature, the relevant records may be disclosed to the appropriate federal, State or local agency charged with the responsibility for investigating or prosecuting such violation or enforcing or implementing such statute, rule or regulation.

2. Records may be disclosed to a congressional office in response to an inquiry from that congressional office made at the request of the individual who is the subject of the records.

3. Records may be disclosed to HUD contractors, Public Housing Authorities or management agents of HUD-assisted housing projects, in order to assist such entities in taking or defending actions to recover money or property, or take personnel actions based on an OIG investigation or audit, where such recovery or personnel action serves to promote the integrity of the programs or operations of HUD.

4. Records may be disclosed during the course of an administrative proceeding where HUD is a party to the litigation and the disclosure is relevant and reasonably necessary to adjudicate the matter.

5. Records may be disclosed to any source, either private or governmental, to the extent necessary to elicit information relevant to an OIG investigation.

6. Records may be disclosed to appropriate State boards of accountancy for possible administrative or disciplinary sanctions such as license revocation. These referrals will be made only after the independent auditor has been notified that the OIG is contemplating disclosure of its findings to an appropriate State board of accountancy, and the independent auditor has been provided with an opportunity to respond in writing to the OIG's findings.

7. Records may be disclosed to DOJ for litigation purposes associated with the representation of OIG and/or HUD before the courts.

8. Records may be disclosed to persons engaged in conducting and reviewing internal and external peer reviews of OIG to ensure adequate internal safeguards and management procedures exist within any office that had received law enforcement authorization.

9. In the event that these records respond to an audit, investigation or review, which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the PCIE pursuant to Executive Order 12993, the records may be disclosed to the PCIE and other federal agencies, as necessary.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored manually in file jackets and electronically in office automation equipment.

RETRIEVABILITY:

Records are retrieved by manual or computer search of indices containing the name of the individual to whom the record pertains or the name of the entity.

SAFEGUARDS:

Records are maintained in locked file cabinets or in metal file cabinets in secured rooms or premises with access limited to those persons whose official duties require access. Computer terminals are secured in controlled areas which are locked when unoccupied. Access to automated records is limited to authorized personnel who must use a password system to gain access.

RETENTION AND DISPOSAL:

Retention and disposal: Retention and disposal is in accordance with Records Disposition Schedule 3, Item 79, Appendix 3, HUD Handbook 2225.6, Rev. 1. Data is to be retained for 10 years. Paper records shall be shredded or burned. Back up media may be overwritten until such time as the media is no longer of use; then it shall be purged. All other electronic media shall be purged at the end of its retention.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General, Office of Management and Policy, Office of the Inspector General, Department of Housing and Urban Development, 451 Seventh Street SW., Room Number 5254, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

These records are generally exempt from Privacy Act access. The System Manager will give consideration to a request from an individual for notification of whether the system contains records pertaining to that individual. Requests may be made to the OIG Office of Audit, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting access to records are publicized in 24 CFR part 2003.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. The records are generally exempt from Privacy Act amendment or correction. However, the System Manager will give

consideration to a request from an individual for amendment or correction of records pertaining to that individual that are indexed and retrieved by reference to that individual's name. Requests may be made to the OIG Office of Audit, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting amendment or correction of records are publicized in 24 CFR part 2003.

RECORD SOURCE CATEGORIES:

The OIG collects information from the subject independent auditor, HUD, auditees, program participants, complainants and other nongovernment sources.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

This system of records, to the extent that it consists of information compiled for the purpose of criminal investigations, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2), (e)(1), (e)(2) and (e)(3) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, this system of records, to the extent that it consists of other investigatory material compiled for law enforcement purposes, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2) and (e)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Finally, this system of records, to the extent that it consists of investigatory material compiled for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, has been exempted from the requirements of subsection (d)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(5). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**.

SYSTEM OF RECORDS NO.:

OIG/GAP.01

SYSTEM NAME:

Auto Audit of the Office of Inspector General.

SYSTEM LOCATION:

HUD OIG Headquarters, 451 Seventh Street SW; Washington DC, District Offices, and Field Offices have access to the database. (Boston, MA; New York City, NY; Philadelphia, PA; Atlanta, GA; Tampa, FL; New Orleans, LA; Kansas City, KS; Chicago, IL; Fort Worth, TX; Los Angeles, CA; Seattle, WA.) Refer to Appendix II for complete address listings.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered consist of: (1) HUD program participants and HUD employees who are associated with an activity that OIG is auditing or reviewing; (2) requesters of an OIG audit or other activity; and (3) persons and entities performing some other role of significance to the OIG's efforts, such as relatives or business associates of HUD program participants or employees, potential witnesses, or persons who represent legal entities that are connected to an OIG audit or other activity. The system also tracks information pertaining to OIG staff handling the audit or other activity, and may contain contact names for relevant staff in other agencies.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of materials compiled and/or generated in connection with audits and other activities performed by OIG staff. These materials include information regarding the planning, conduct and resolution of audits and reviews of HUD programs and participants in those programs, internal legal assistance requests, information requests, responses to such requests, reports of findings, etc. The information consists of audit work papers which are pdf files located within the Auto Audit database. The documents are filed according to their purpose and sequence, not by personal identifiers.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978 (5 U.S.C. App. 3) authorizes the Inspector General to conduct, supervise and coordinate audits and investigations relating to the programs and operations of HUD, to engage in other activities that promote economy and efficiency in the programs and operations of HUD, and to receive and investigate complaints concerning possible violations of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial or specific danger to the public health or safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), records may also be disclosed routinely to other users under the following circumstances:

1. In the event that records indicate a violation or potential violation of law, whether criminal, civil or regulatory in nature, the relevant records may be disclosed to the appropriate federal, state, or local agency charged with the responsibility for investigating or prosecuting such violation or enforcing or implementing such statute, rule or regulation.

2. Records may be disclosed to a congressional office in response to an inquiry from that congressional office made at the request of the individual who is the subject of the records.

3. Records may be disclosed to HUD contractors, Public Housing Authorities or management agents of HUD-assisted housing projects, in order to assist such entities in taking or defending actions to recover money or property, or take personnel actions based on an OIG investigation or audit, where such recovery or personnel action serves to promote the integrity of the programs or operations of HUD.

4. Records may be disclosed during the course of an administrative proceeding where HUD is a party to the litigation and the disclosure is relevant and reasonably necessary to adjudicate the matter.

5. Records may be disclosed to any source, either private or governmental, to the extent necessary to elicit information relevant to an OIG investigation.

6. Records may be disclosed to appropriate state boards of accountancy for possible administrative or disciplinary sanctions such as license revocation. These referrals will be made only after the independent auditor has been notified that the OIG is contemplating disclosure of its findings to an appropriate state board of accountancy, and the independent auditor has been provided with an opportunity to respond in writing to the OIG's findings.

7. Records may be disclosed to DOJ for litigation purposes associated with the representation of OIG and/or HUD before the courts.

8. Records may be disclosed to persons engaged in conducting and reviewing internal and external peer reviews of OIG to ensure auditing standards applicable to Government audits by the Comptroller General of the United States are applied and followed.

9. In the event that these records respond to an audit, investigation or review, which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the PCIE pursuant to

Executive Order 12993, the records may be disclosed to the PCIE and other federal agencies, as necessary.

10. Records may be disclosed to private, state or Federal licensing authorities or boards regulating professional services, such as appraisers, attorneys, insurers, or mortgage brokers, when the records reveal conduct related to activities associated with a HUD program that is appropriate for possible administrative or disciplinary sanctions, such as license revocation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored electronically in office automation equipment and manually in file jackets.

RETRIEVABILITY:

Records are retrieved by computer search of the Auto Audit software by reference to a particular file number.

SAFEGUARDS:

Records are maintained in a secure computer network, and in locked file cabinets or in metal file cabinets in rooms with controlled access.

RETENTION AND DISPOSAL:

Retention and disposal: Retention and disposal is in accordance with Records Disposition Schedule 3, Item 79, Appendix 3, HUD Handbook 2225.6, Rev. 1. Historic or significant audit files are PERMANENT, pending appraisal by NARA. All other case files are to be destroyed 10 years after the audit is closed. Records shall be shredded or burned. Electronic media may be overwritten until such time as the media is no longer of use; then it shall be purged. All other electronic media shall be purged at the end of its retention.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General for Audit, Office of Audit, Office of the Inspector General, Department of Housing and Urban Development, 451 Seventh Street SW., Room Number 5254, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

These records are generally exempt from Privacy Act access. The System Manager will give consideration to a request from an individual for notification of whether the system contains records pertaining to that individual. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting access to records are publicized in 24 CFR part 2003.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. The records are generally exempt from Privacy Act amendment or correction. However, the System Manager will give consideration to a request from an individual for amendment or correction of records pertaining to that individual that are indexed and retrieved by reference to that individual's name. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting amendment or correction of records are publicized in 24 CFR part 2003.

RECORD SOURCE CATEGORIES:

The OIG collects information from a wide variety of sources, including from HUD, other federal agencies, the General Accounting Office (GAO), law enforcement agencies, program participants, subject individuals, complainants, witnesses and other non-governmental sources.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

This system of records, to the extent that it consists of information compiled for the purpose of criminal investigations, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2), (e)(1), (e)(2) and (e)(3) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, this system of records, to the extent that it consists of other investigatory material compiled for law enforcement purposes, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2) and (e)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Finally, this system of records, to the extent that it consists of investigatory material compiled for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, has been exempted from the requirements of subsection (d)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(5). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**.

SYSTEM OF RECORDS NO.:

OIG/GFB.01

SYSTEM NAME:

Hotline Information Sub System.

SYSTEM LOCATION: HUD OIG HEADQUARTERS, WASHINGTON, DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered consist of: (1) HUD program participants and HUD employees who are subjects of hotline complaints alleging possible violations of law, rules or regulations, mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety; and (2) HUD employees and members of the general public who are complainants.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of all forms and documentation generated by the complaint, including recommended and final disposition of the matter. Information collected depends on the nature of the complaint but may consist of Names, Addresses, Telephone Numbers, Place of Employment, Types of Vehicles, Income, and Dates of Birth.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978, 5 U.S.C. App., authorizes the Inspector General to conduct, supervise and coordinate activities that promote economy and efficiency in the programs and operations of HUD, and to receive and investigate complaints concerning possible violations of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health or safety.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), records may also be disclosed routinely to other users under the following circumstances:

1. In the event that records indicate a violation or potential violation of law, whether criminal, civil or regulatory in nature, the relevant records may be disclosed to the appropriate federal, state, or local agency charged with the responsibility for investigating or prosecuting such violation or enforcing or implementing such statute, rule or regulation.

2. Records may be disclosed to HUD contractors, Public Housing Authorities or management agents of HUD-assisted

housing projects, in order to assist such entities in taking or defending actions to recover money or property, or take personnel actions based on an OIG investigation or audit, where such recovery or personnel action serves to promote the integrity of the programs or operations of HUD.

3. Records may be disclosed during the course of an administrative proceeding where HUD is a party to the litigation and the disclosure is relevant and reasonably necessary to adjudicate the matter.

4. Records may be disclosed to any source, either private or governmental, to the extent necessary to elicit information relevant to an OIG investigation.

5. Records may be disclosed to appropriate state boards of accountancy for possible administrative or disciplinary sanctions such as license revocation. These referrals will be made only after the independent auditor has been notified that the OIG is contemplating disclosure of its findings to an appropriate state board of accountancy, and the independent auditor has been provided with an opportunity to respond in writing to the OIG's findings.

6. Records may be disclosed to DOJ for litigation purposes associated with the representation of OIG and/or HUD before the courts.

7. Records may be disclosed to persons engaged in conducting and reviewing internal and external peer reviews of OIG to ensure adequate internal safeguards and management procedures exist within any office that had received law enforcement authorization.

8. In the event that these records respond to an audit, investigation or review, which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the PCIE pursuant to Executive Order 12993, the records may be disclosed to the PCIE and other federal agencies, as necessary.

9. Records may be disclosed to private, state or Federal licensing authorities or boards regulating professional services, such as appraisers, attorneys, insurers, or mortgage brokers, when the records reveal conduct related to activities associated with a HUD program that is appropriate for possible administrative or disciplinary sanctions, such as license revocation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored electronically in office automation equipment.

RETRIEVABILITY:

Records are retrieved by a computer search of indices containing the name, home address, home telephone number, and identification number assigned to the individual to whom the record pertains.

SAFEGUARDS:

Records are maintained in secured rooms or premises with access limited to those persons whose official duties require access. Computer terminals are secured in controlled areas which are locked when unoccupied. Access to automated records is limited to authorized personnel who must use a password system to gain access.

RETENTION AND DISPOSAL:

Retention and disposal: Retention and disposal is in accordance with Records Disposition Schedule 3, Item 81, Appendix 3, HUD Handbook 2225.6, Rev. 1. Historic or significant investigation files are PERMANENT, pending appraisal by NARA. All other case files are to be destroyed 10 years after the case is closed. Records shall be shredded or burned. Electronic media may be overwritten until such time as the media is no longer of use; then it shall be purged. All other electronic media shall be purged at the end of its retention period.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General, Office of Management and Policy, Office of the Inspector General, Department of Housing and Urban Development, 451 Seventh Street SW., Room Number 5254, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

Records are generally exempt from Privacy Act access. The System Manager will give consideration to a request from an individual for notification of whether the system contains records pertaining to that individual. Requests may be made to the OIG Office of Management and Policy, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting access to records are publicized in 24 CFR part 2003.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. The records are generally exempt from Privacy Act amendment or correction. However, the System Manager will give consideration to a request from an individual for amendment or correction of records pertaining to that individual that are indexed and retrieved by reference to that individual's name. Requests may be made to the OIG Office of Management and Policy, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting amendment or correction of records are publicized in 24 CFR part 2003.

RECORD SOURCE CATEGORIES:

The OIG collects information from a wide variety of sources, including from HUD, the General Accounting Office, other federal agencies, program participants, subject individuals, complaints, witnesses and other nongovernmental sources.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

This system of records, to the extent that it consists of information compiled for the purpose of criminal investigations, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2), (e)(1), (e)(2) and (e)(3) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, this system of records, to the extent that it consists of other investigatory material compiled for law enforcement purposes, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2) and (e)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Finally, this system of records, to the extent that it consists of investigatory material compiled for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, has been exempted from the requirements of subsection (d)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(5). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**.

SYSTEM OF RECORDS NO.:

OIG/GIP.01

SYSTEM NAME:

Investigative Files of the Office of Inspector General.

SYSTEM LOCATION:

HUD OIG Headquarters, Washington DC and OIG Office of Investigations field offices.[3]

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered consist of: (1) HUD program participants and HUD employees who are associated with an activity that OIG is investigating or evaluating; (2) requesters of an OIG investigative or other activity; and (3) persons and entities performing some other role of significance to the OIG's efforts, such as relatives or business associates of HUD program participants or employees, potential witnesses, or persons who represent legal entities that are connected to an OIG investigation or other activity. The system also tracks information pertaining to OIG staff handling the investigation or other activity, and may contain contact names for relevant staff in other agencies.

CATEGORIES OF RECORDS IN THE SYSTEM:

These materials include information regarding the planning, conduct and prosecution of investigations of HUD program participants and employees, legal assistance requests, information requests, responses to such requests, reports of investigations, etc. Data resources include the individual's name, Social Security Number, date of birth, home address, home telephone number, personal email address, Employee Identification Number, Tax Identification, Driver License Number and name, passport information, State Identification, Narcotics and Dangerous Drugs Information System, Federal Bureau Investigation Number ; Race/ethnicity, Gender, Employment History, Education, Income, and Financial information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978, 5 U.S.C. Appx. authorizes the Inspector General to conduct, supervise and coordinate investigations relating to the programs and operations of HUD.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), records may also be disclosed routinely to other users under the following circumstances:

1. In the event that records indicate a violation or potential violation of law, whether criminal, civil or regulatory in nature, the relevant records may be disclosed to the appropriate federal, state, or local agency charged with the responsibility for investigating or prosecuting such violation or enforcing or implementing such statute, rule or regulation.

2. Records may be disclosed to HUD contractors, Public Housing Authorities or management agents of HUD-assisted housing projects, in order to assist such entities in taking or defending actions to recover money or property, or take personnel actions based on an OIG investigation or audit, where such recovery or personnel action serves to promote the integrity of the programs or operations of HUD.

3. Records may be disclosed during the course of an administrative proceeding where HUD is a party to the litigation and the disclosure is relevant and reasonably necessary to adjudicate the matter.

4. Records may be disclosed to any source, either private or governmental, to the extent necessary to elicit information relevant to an OIG investigation.

5. Records may be disclosed to appropriate state boards of accountancy for possible administrative or disciplinary sanctions such as license revocation. These referrals will be made only after the independent auditor has been notified that the OIG is contemplating disclosure of its findings to an appropriate state board of accountancy, and the independent auditor has been provided with an opportunity to respond in writing to the OIG's findings.

6. Records may be disclosed to DOJ for litigation purposes associated with the representation of OIG and/or HUD before the courts.

7. Records may be disclosed to persons engaged in conducting and reviewing internal and external peer reviews of OIG to ensure adequate internal safeguards and management procedures exist within any office that had received law enforcement authorization.

8. In the event that these records respond to an audit, investigation or review, which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the CIGIE pursuant to Executive Order 12993, the records may be disclosed to the CIGIE and other federal agencies, as necessary.

9. Records may be disclosed to private, state or Federal licensing authorities or boards regulating professional services, such as appraisers, attorneys, insurers, or mortgage brokers, when the records reveal conduct related to activities associated with a HUD program that is appropriate for possible administrative or disciplinary sanctions, such as license revocation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored manually in file jackets in an office file system.

RETRIEVABILITY:

Records are retrieved by manual search of indices containing the name of the individual to whom the record pertains or by the case number.

SAFEGUARDS:

Records are maintained in locked file cabinets or in metal file cabinets in secured rooms or premises with access limited to those persons whose official duties require access. The public does not access to these spaces.

RETENTION AND DISPOSAL:

Retention and disposal: Retention and disposal is in accordance with Records Disposition Schedule 3, Item 81, Appendix 3, HUD Handbook 2225.6, Rev. 1. Historic or significant investigation files are PERMANENT, pending appraisal by NARA. All other case files are to be destroyed 10 years after the case is closed. Records shall be shredded or burned.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General, Office of Investigations, Office of the Inspector General, Department of Housing and Urban Development, 451 Seventh Street, SW., Room Number 5254, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

These records are generally exempt from Privacy Act access. The System Manager will give consideration to a request from an individual for notification of whether the system contains records pertaining to that individual. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting access to records are publicized in 24 CFR part 2003.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. The records are generally exempt from Privacy Act amendment or correction. However, the System Manager will give consideration to a request from an individual for amendment or correction

[3] *http://csfintraweb.hudoig.gov/offices.html.*

of records pertaining to that individual, that are indexed and retrieved by reference to that individual's name. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting amendment or correction of records are publicized in 24 CFR part 2003.

RECORD SOURCE CATEGORIES:

The OIG collects information from a wide variety of sources, including from HUD, law enforcement agencies, program participants, subject individuals, complainants witnesses and other nongovernmental sources.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

This system of records, to the extent that it consists of information compiled for the purpose of criminal investigations, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2), (e)(1), (e)(2) and (e)(3) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, this system of records, to the extent that it consists of other investigatory material compiled for law enforcement purposes, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2) and (e)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Finally, this system of records, to the extent that it consists of investigatory material compiled for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, has been exempted from the requirements of subsection (d)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(5). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**.

SYSTEM OF RECORDS NO.:

OIG/GIP.02

SYSTEM NAME:

Auto Investigation and Case Management Information Subsystem (AI/CMISS).

SYSTEM LOCATION:

HUD OIG Headquarters, 451 Seventh Street SW., Washington DC.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered consist of: (1) HUD program participants and HUD employees who are associated with an activity that OIG is investigating or evaluating; (2) requesters of an OIG investigative or other activity; and (3) persons and entities performing some other role of significance to the OIG's efforts, such as relatives or business associates of HUD program participants or employees, potential witnesses, or persons who represent legal entities that are connected to an OIG investigation or other activity. The system also tracks information pertaining to OIG staff handling the investigation or other activity, and may contain contact names for relevant staff in other agencies.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of investigatory material compiled and/or generated for law enforcement purposes in connection with investigations and other activities performed by OIG staff. These materials include information regarding the planning, conduct and prosecution of investigations of HUD program participants and employees, legal assistance requests, information requests, responses to such requests, reports of investigations, etc. Data resources include the individual's name, Social Security Number, date of birth, home address, home telephone number, personal email address, Employee Identification Number, Tax Identification, Driver License Number and name, passport information, State Identification, Narcotics and Dangerous Drugs Information System, Federal Bureau Investigation Number ; Race/ethnicity, Gender, Employment History, Education, Income, and Financial information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Inspector General Act of 1978 authorizes the Inspector General to conduct, supervise and coordinate audits and investigations relating to the programs and operations of HUD, to engage in other activities that promote economy and efficiency in the programs and operations of HUD, and to receive and investigate complaints concerning possible violations of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority, or a substantial or specific danger to the public health or safety.

PURPOSES:

AI/CMISS provides HUD OIG Investigations with an automated system which manages cases under investigation from their inception to their closing through a centralized data repository of case information. AI/CMISS and its environment is a secure environment where access to information is controlled through a formal process of checks and authorizations involving a hierarchical supervisory structure. Special Agents in Charge (SAC), Assistant Special Agents in Charge (ASAC), Supervisory Forensic Auditors (SFA), Forensic Auditors (FA), Special Agents (SA) and support staff, document all steps in their assigned activities. Additionally, due to judicial involvement in some of the cases, the files kept and maintained by HUD OIG may be made available to the courts under discovery. AI/CMISS provides data that is currently available through the intranet to the investigators and auditors. This provides a method for remote HUD OIG users and traveling employees to access the AI/CMISS systems from their laptops regardless of whether or not they are located within a HUD OIG office. Both Systems support the HUD OIG requirement to maintain a detailed audit trail of cases to closure. This requires a system, which will be capable of capturing and maintaining data integrity during the complete case cycle while ensuring data privacy and confidentiality.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), records may also be disclosed routinely to other users under the following circumstances:

1. In the event that records indicate a violation or potential violation of law, whether criminal, civil or regulatory in nature, the relevant records may be disclosed to the appropriate federal, state, or local agency charged with the responsibility for investigating or prosecuting such violation or enforcing or implementing such statute, rule, or regulation.

2. Records may be disclosed to a congressional office in response to an inquiry from that congressional office made at the request of the individual who is the subject of the records.

3. Records may be disclosed to HUD contractors, Public Housing Authorities or management agents of HUD-assisted housing projects, in order to assist such entities in taking or defending actions to recover money or property, or take personnel actions based on an OIG investigation or audit, where such recovery or personnel action serves to promote the integrity of the programs or operations of HUD.

4. Records may be disclosed during the course of an administrative proceeding where HUD is a party to the litigation and the disclosure is relevant and reasonably necessary to adjudicate the matter.

5. Records may be disclosed to any source, either private or governmental, to the extent necessary to elicit information relevant to an OIG investigation.

6. Records may be disclosed to appropriate state boards of accountancy for possible administrative or disciplinary sanctions such as license revocation. These referrals will be made only after the independent auditor has been notified that the OIG is contemplating disclosure of its findings to an appropriate state board of accountancy, and the independent auditor has been provided it an opportunity to respond in writing to the OIG's findings.

7. Records may be disclosed to DOJ for litigation purposes associated with the representation of OIG and/or HUD before the courts.

8. Records may be disclosed to persons engaged in conducting and reviewing internal and external peer reviews of OIG to ensure adequate internal safeguards and management procedures exist within any office that had received law enforcement authorization.

9. In the event that these records respond to an audit, investigation or review, which is conducted pursuant to an authorizing law, rule or regulation, and in particular those conducted at the request of the PCIE pursuant to Executive Order 12993, the records may be disclosed to the PCIE and other federal agencies, as necessary.

10. Additional Disclosure for Purposes of Facilitating Responses and Remediation Efforts in the Event of a Data Breach. A record from a system of records maintained by this Department may be disclosed to appropriate agencies, entities, and persons when:

a. The Department suspects or has confirmed that the security or confidentiality of information in a system of records has been compromised;

b. The Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of systems or programs (whether maintained by the Department or another agency or entity) that rely upon the compromised information; and,

c. The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

11. Records may be disclosed to private, state or Federal licensing authorities or boards regulating professional services, such as appraisers, attorneys, insurers, or mortgage brokers, when the records reveal conduct related to activities associated with a HUD program that is appropriate for possible administrative or disciplinary sanctions, such as license revocation.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored electronically in office automation equipment.

RETRIEVABILITY:

Records are retrieved by computer search of the CMISS software by reference to individual's name, Social Security Number, Employee Identification Number, Tax Identification, Driver License Number and name, passport information, State Identification, Narcotics and Dangerous Drugs Information System, or Federal Bureau Investigation Number, and/or by reference to a particular file number.

SAFEGUARDS:

Records are maintained in a secure computer network.

RETENTION AND DISPOSAL:

Retention and disposal: Retention and disposal is in accordance with Records Disposition Schedule 3, Item 81, Appendix 3, HUD Handbook 2225.6, Rev. 1. Historic or significant investigation files are PERMANENT, pending appraisal by NARA. All other case files are to be destroyed 10 years after the case is closed. Records shall be shredded or burned. Electronic media may be overwritten until such time as the media is no longer of use; then it shall be purged. All other electronic media shall be purged at the end of its retention.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General for Investigation, Office of the Inspector General, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

These records are generally exempt from Privacy Act access. The System Manager will give consideration to a request from an individual for notification of whether the system contains records pertaining to that individual. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting access to records are publicized in 24 CFR part 2003.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. The records are generally exempt from Privacy Act amendment or correction. However, the System Manager will give consideration to a request from an individual for amendment or correction of records pertaining to that individual that are indexed and retrieved by reference to that individual's name. Requests may be made to the OIG Office of Investigations, Attn: FOIA/Privacy Act Office; 451 Seventh Street SW., Room 8260, Washington, DC 20410. The procedures for requesting amendment or correction of records are publicized in 24 CFR part 2003.

RECORD SOURCE CATEGORIES:

The OIG collects information from a wide variety of sources, including from HUD, other federal agencies, GAO, law enforcement agencies, program participants, subject individuals, complainants, witnesses and other non-governmental sources.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

This system of records, to the extent that it consists of information compiled for the purpose of criminal investigations, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2), (e)(1), (e)(2) and (e)(3) of the Privacy Act pursuant to 5 U.S.C. 552a(j)(2). In addition, this system of records, to the extent that it consists of other investigatory material compiled or generated for law enforcement purposes, has been exempted from the requirements of subsections (c)(3), (d)(1), (d)(2) and (e)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(2). Finally, this system of records, to the extent that it consists of investigatory material compiled or generated for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or Federal contracts, the release of which would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence, has been exempted from the requirements of subsection

(d)(1) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(5). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register**.

SYSTEM OF RECORDS NO.:

CPD/DGHR.01

SYSTEM NAME:

Relocation Assistance Files.

SYSTEM LOCATION:

HUD Headquarters and field offices. The storage facility for Relocation Assistance Files is the Washington National Records Center (WNRC), 4205 Suitland Road, Suitland, MD 20746–8001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Persons (individuals, families, partnerships, corporations, associations) who have been, or will be, displaced or moved temporarily from a HUD-assisted program or project, and relocation claimants who have filed grievances.

CATEGORIES OF RECORDS IN THE SYSTEM:

For relocation complaints and appeals: Names of relocation claimants; documentation of relocation needs and problems; relocation claims; documentation and evaluation of relocation claims; recommendations concerning amounts of assistance; inquiries and grievances; responses to grievances; audits. For persons displaced from residential units only, records may contain information on household occupants including gender, age, income, assets, certain deductible expenses, housing costs, utility costs and information related to mobility and other special needs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91–646), 42 U.S.C. 4601, and Section 104(d) of the Housing and Community Development Act of 1974, 42 U.S.C. 5304(d)).

PURPOSE:

To demonstrate that relocation assistance provided to displaced persons or temporarily relocated persons is in compliance with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and, where applicable, Section 104(d) of the Housing and Community Development Act of 1974. HUD uses the information in the Relocation Assistance Files to determine a person's eligibility to receive relocation assistance and to determine the type of assistance and the monetary amounts of assistance, if any, a person is eligible to receive. CPD analyzes the information, makes a determination and conveys its determination to (1) the program participant that administers the HUD-assisted program or project which has affected the displaced or relocated person and (2) the complainant. The information in the Relocation Assistance Files is maintained by HUD.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine use:

1. Other routine uses: To local public agencies—for processing, training and monitoring purposes to assure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and/or Section 104(d) of the Housing and Community Development Act of 1974.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

In file folders. No electronic records are maintained by the system of records.

RETRIEVABILITY:

By name and case file number of subject individual.

SAFEGUARDS:

Stored in lockable file cabinets; access limited to authorized personnel. No electronic records are maintained by the system of records.

RETENTION AND DISPOSAL:

Files are active. Disposition: Temporary.

Records are retained in CPD for at least 3 years after each person displaced or temporarily relocated for a HUD-assisted program or project receives the final payment to which he or she is entitled under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, or Section 104(d) of the Housing and Community Development Act. After 3 years, these records become inactive and are boxed and sent to the Washington National Records Center (WNRC), 4205 Suitland Road, Suitland, MD 20746–8001. WNRC holds inactive files for 6 years and 30 days, after which they are shredded or burned as appropriate, in accordance with WNRC policy.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Relocation and Real Estate Division, Office of Affordable Housing Programs, Community Planning and Development, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

RECORD ACCESS PROCEDURES:

The Department's rules for providing access to records to the individual concerned appear in 24 CFR part 16. If additional information or assistance is required, contact the Privacy Act Officer at the appropriate location. A list of all locations is given in appendix A.

CONTESTING RECORD PROCEDURES:

The Department's rules for contesting the contents of records and appealing initial denials, by the individual concerned, appear in 24 CFR part 16. If additional informational or assistance is needed, it may be obtained by contacting:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410; or

(ii) In relation to appeals of initial denials, the HUD Department at Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

Subject and other individuals; current and previous employers; credit bureaus and financial institutions; firms federal and non-federal agencies.

SYSTEM OF RECORDS NO.:

PD&R/RPT.09

SYSTEM NAME:

HUD USER File for Research Products, Services and Publications.

SYSTEM LOCATION:

HUD USER Warehouse located at 44077 Mercure Circle, Sterling, VA 20166 and HUD USER Clearinghouse System located at 11491 Sunset Hills Road, Suite 350, Reston VA 20190.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system contains information on those individuals who have expressed an interest in receiving research products and services publications.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system provides a record of individuals who request research

products which includes name, title and address; telephone and fax numbers; emails; organizations affiliation and areas of interest; publications of interest; and order information including what was ordered and when.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title V of the Housing and Urban Development Act of 1970, section 501.

PURPOSE: THE INFORMATION IS COLLECTED FOR THE PURPOSE OF FULFILLING ORDER REQUESTS FROM INDIVIDUALS TO RECEIVE PD&R RESEARCH PRODUCTS INCLUDING PUBLICATIONS, DATA SETS, BROCHURES, AND OTHER MATERIALS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act. HUD may disclose information contained in this system of records without the consent of the subject individual in accordance with its discretionary disclosures, when such disclosure is compatible with the purpose for which the record was collected. Refer to this notice ''Prefatory Statements of General Routine Uses'' section for a description of these disclosures that may apply this this system of records.

1. Records from the system are provided to the contractor providing service on behalf of PD&R, with funds provided by PDR for the purpose of disseminating PD&R research products.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard copy files are stored at the HUD User Information Center and electronically on office automation equipment.

RETRIEVABILITY: RECORDS ARE RETRIEVED BY THE NAME OF THE INDIVIDUAL.

SAFEGUARDS:

These records are available only to those persons whose official duties require such access. Hard copy records are stored in locked file cabinets. Access to electronic records are restricted and granted by User ID and password.

RETENTION AND DISPOSAL:

Written and electronic records are maintained in accordance with the HUD's Records Disposition Schedules, Handbook 2225.6, Appendix 9. Hard copy records are held for a period of three years, and then destroyed by shredding. Hard copy files of an historical value are converted to electronic format after a (3) month period and destroyed afterwards by shredding. All electronic files are of historical value and are stored for an indefinite period at the HUD User Information Center as part of the HUD User Order Processing System.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Research Utilization Division, 451 Seventh Street, SW., Room 8110, Washington, DC 20410.

NOTIFICATION AND ACCESS PROCEDURE:

Individuals seeking to determine whether this system of records contains information about them, or those seeking access to such records, should address inquiries to Donna Staton-Robinson, Chief Privacy Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4156, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor). Record access requestors must provide identity verification by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized. The procedures for requesting access to records appear in 24 CFR parts 16 and 2003.

CONTESTING RECORD PROCEDURES:

The rules for contesting the contents of records and appealing initial denials, by the individual concerned, appear in 24 CFR part 16. The procedures for requesting amendment or correction of records appear in 24 CFR parts 16 and 2003. Individuals seeking to contest records contained in this system are as follows:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410; or

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

Information in this system of records is obtained from requests for information made from HUD User or individuals identified to receive notification of new products or initiatives. The requests for information or printed material may come through the Internet, phone, fax, mail, or a site visit.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

SYSTEM OF RECORDS NO.:

PIH–REAC/PE.01

SYSTEM NAME:

Tracking-at-a-Glance® (TAAG)

SYSTEM LOCATION:

Department of Housing and Urban Development, 451 Seventh Street SW., Washington DC 20410

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DHAP participants who were displaced by Hurricanes Katrina or Rita, who received rental subsidy through the DHAP and agreed to all program requirements including case management.

CATEGORIES OF RECORD IN THE SYSTEM:

Files contain identifying information about program participants: and their household members at the time of program implementation: such as name, social security number, FEMA ID number of the eligible head of household member, birth date, current telephone number, and current address. The files hold sensitive information about education level, criminal records, income/financial data, employment and training, disability status, medical history information, and information that were used to assess any barriers to permanent housing attainment and/or increased self- sufficiency.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Legal authority for the data maintained in DHAP is based on the Department of Homeland Security's general grant authority under section 102(b)(2) of the Homeland Security Act, 6 U.S.C. 112, and sections 408(b)(1), 426 and 306(a) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5174(b)(1), 5189d and 5149(a), respectively.

PURPOSE:

The data was collected to support DHAP grantees in their case management efforts and HUD staff in their program monitoring activities in order to provide required reports to FEMA in fulfillment of its responsibilities outlined within the Inter Agency Agreement. The case management and program monitoring activities for DHAP ended February 28, 2009. Subsequently, the DHAP data still requires further analysis and evaluation by the Department's Office of Policy Development and Research (PD&R), Program Management and Research Division to conduct research and evaluation of national program

outcomes. In such cases, PD&R and its approved researchers will further evaluate the data presented by DHAP to produce research reports that will include aggregate level data based on higher level demographic variables that will not disclose information that can be used to identify any individual represented in the system. The records stored hold pertinent data relating to family self-sufficiency, permanent housing status and service needs. The system was procured through contract number: C–DEN–02199 and allowed DHAP grantees to implement and report case management services for FEMA's DHAP- Ike program, for which HUD was the servicing agent. This system and grantee data inputs assisted with the implementation and administration of rental housing assistance and case management services to individuals and families whose residence was rendered uninhabitable as a result of the disaster caused by Hurricanes Katrina and Rita.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine use:

1. To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities including but not limited to state and local governments, and other research institutions or their parties entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement with HUD, when necessary to accomplish an agency function related to a system of records for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form. Any data presented will be provided at the aggregate level.

POLICIES AND PROCEDURES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on the hard drive of a desktop computer. At the HUD level, no manual records are retained. At the grantee level, hard copy files are locked, secured, and reviewed by limited agency staff.

RETRIEVABILITY:

Records are retrieved by PHA name, participant's name, city, zip code, or general demographic characteristics. Clients cannot be searched through the use of a social security number. The data is located on the hard drive of a desktop computer that resides in a locked cabinet, within a locked office. The desktop computer requires a user id and password to log on to the machine. In order to access the data, a user name and password must be utilized to enter the site where the data is housed.

SAFEGUARDS:

Data is housed on a desktop computer hard drive located within a locked cabinet that resides in a locked office. Access to data records are limited to staff who work with the data. Hard copy files retained by grantees are stored by the PHA in locations that are locked and secured, with access granted only to a limited number of authorized agency users in accordance with HUD's approved retention schedule.

RETENTION AND DISPOSAL:

Data is archived and stored via hard drive. Records will be retained and disposed of in accordance with the General Records Schedule included in HUD Handbook 2228.2, appendix 14, items 21–26 and HUD Record Schedule 8 [4]: Departmental Grant Financial Assistance Records. System records are retained and disposed of in accordance with the HUD Record Schedule 8. Records will be retired to a record center within a sufficient amount of time as appropriate to meet program business needs. Inactive records shall be retained for a minimum of six years, and then destroyed (shredded (or burned) at the end of their retention schedule of lifecycle) when no longer needed for reference or 20 years after cutoff, whichever is sooner. (NARA Job No. NI–207–04–3, item Sb).

SYSTEM MANAGER AND ADDRESS:

Iyabo Morrison, Office of Public Housing and Voucher Programs, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4232, Washington, DC, 20410.

NOTIFICATION AND RECORD ACCESS PROCEDURES:

The Department's rules for providing access to records to the individual concerned are in accordance with 24 CFR Part 16—Implementation of the Privacy Act of 1974. Individuals seeking information, assistance, or inquiry about the existence of records should contact the Departmental Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2256, Washington, DC 20410. Written requests must include the full name, current address, and telephone number of the individual making the request, as well as proof of identity, including a description of the requester's relationship to the information in question.

CONTESTING RECORD PROCEDURES:

The procedures for contesting the contents of records and appealing initial denials appear in 24 CFR part 16—Implementation of the Privacy Act of 1974. If additional information or assistance is required, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410; or

(ii) The Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC, 20410, for appeals of initial denials.

RECORD SOURCE CATEGORIES:

Basic participant information was initially transmitted electronically to the TAAG system through an upload from the HUD Disaster Information System in December 2007. Housing assistance information about program participants was uploaded to TAAG on a weekly basis from December 2007 until February 2009.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

SYSTEM OF RECORDS NO.:

PIH–REAC/PE.02

SYSTEM NAME:

Efforts to Outcome Case Management Tracking System for DHAP-Ike.

SYSTEM LOCATION:

Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410.

[4] *http://portal.hud.gov/hudportal/documents/huddoc?id=22256x8ADMH.pdf.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

DHAP- Ike participants displaced by hurricanes Gustav and Ike. All family members who were deemed eligible to participate in the DHAP- Ike program by the Federal Emergency Management Agency (FEMA).

CATEGORIES OF RECORDS IN THE SYSTEM:

Files contain identifying information about program participants and their household members at program implementation including: name, social security number, FEMA ID number of the eligible head of household member, birth date, current telephone number and current address. The files hold sensitive information about education level, race/ethnicity, gender/sex, employment and training needs, elderly and disabled status, social service needs and service referrals. Information regarding education level, criminal records, income/financial data, employment and training, disability status, medical history information, and social service needs as information that were used to assess any barriers to permanent housing attainment and/or increased self-sufficiency.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Legal authority for DHAP is based on the Department of Homeland Security's general grant authority under section 102(b)(2) of the Homeland Security Act, 6 U.S.C. 112, and sections 408(b)(1), 426 and 306(a) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C.5174(b)(1), § 5189d and § 5149(a), and HUD's 2009 Appropriations Act modified Section 904 of the Stewart B. McKinney Act of 1988, as amended, to include Disaster Housing Assistance Program Ike (DHAP-Ike) as a ''program'' of HUD, respectively.

PURPOSES:

ETO captured pertinent data relating to family self-sufficiency, permanent housing status and service needs. The data for ETO was collected to support DHAP-Ike grantees in their case management efforts and HUD staff in their program monitoring activities and providing required reports to FEMA in fulfillment of its responsibilities outlined within the Inter Agency Agreement (IAA). The case manager used this information to identify appropriate service referrals, to help prepare clients for the end of DHAP- Ike case management which occurred on September 30, 2011. As such, the DHAP-Ike still requires further analysis and evaluation by the Department's Office of Policy Development and Research (PD&R), Program Management and Research Division to allow research and evaluation of the national program outcomes. In such cases, PD&R and its approved researchers will further evaluate the data presented by DHAP-Ike to produce research reports. These reports will include aggregate level data based on higher level demographic variables that will not disclose information that can be used to identify any individual represented in the data retained by HUD. The records stored hold pertinent data records relating to family self-sufficiency, permanent housing status and service needs. The system was procured through contract number: C–DEN–02332 which allowed grantees to implement and report case management services for FEMA's DHAP- Ike program, for which HUD was the servicing agent. The system and data input by grantees assisted with the administration of rental housing assistance and case management services to individuals and families whose residences were rendered uninhabitable as a result of Hurricanes Gustav and Ike. The data stored in this system of record may be used for research and statistical purposes. In such cases, data presented in any research report will be aggregated to a level that does not disclose information that can be used to identify any individual represented in the system.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, HUD may disclose information contained in this system of records without the consent of the subject individual if the disclosure is compatible with the purpose for which the record was collected under the following routine use:

1. To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities including but not limited to state and local governments, and other research institutions or their parties entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement with HUD, when necessary to accomplish an agency function related to a system of records for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form. Any data presented will be provided at the aggregate level.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored on an individual hard drive. At the HUD level, no manual records are retained. At the grantee level, hard copy files are locked, secured, and reviewed at the PHA by limited agency staff.

RETRIEVABILITY:

Records are retrieved by PHA name, participant name, Social Security Number, FEMA Number, city, zip code, or general demographic characteristics. However, the general search method is by last name. The data is located on an individual hard drive that resides in a locked cabinet, within a locked office. In order to access the data, an employee must retrieve the hard drive from its locked location and attach the drive to a computer via a USB port. The files on the hard drive must be opened in an Excel Spreadsheet or SQL Server database.

SAFEGUARDS:

Data is housed on an individual hard drive located within a locked cabinet that resides in a locked office. In order to review the data, the hard drive must be attached to a computer. Access to data records are limited to agency staff who work with the data. Hard copy files are also retained by grantees are stored by PHA in locations that are locked and secured, with access granted only to a limited number of authorized grantee users in accordance with HUD's approved retention schedule.

RETENTION AND DISPOSAL:

Data are archived and stored via hard drive. Records will be retained and disposed of in accordance with the General Records Schedule included in HUD Handbook 2228.2, appendix 14, items 21–26 and HUD Record Schedule 8: Departmental Grant Financial Assistance Records. System records are retained and disposed of in accordance with the HUD Record Schedule 8. Records will be retired to record center within a sufficient amount of time as appropriate to meet program business needs. Inactive records shall be retained for a minimum of six years, and then destroyed (shredded or burned) at the end of their retention schedule of lifecycle) when no longer needed for reference or 20 years after cutoff,

whichever is sooner. (NARA Job No. NI–207–04–3, item Sb).

SYSTEM MANAGER(S) AND ADDRESS:

Iyabo Morrison, Public and Indian Housing, Office of Public Housing and Voucher Programs, Department of Housing and Urban Development, 451 Seventh Street SW., Room 4232, Washington, DC 20410.

NOTIFICATION AND RECORDS ACCESS PROCEDURES:

The Department's rules for providing access to records to the individual concerned are in accordance with 24 CFR part 16—Implementation of the Privacy Act of 1974. Individuals seeking information, assistance, or inquiry about the existence of records should contact the Departmental Privacy Act Officer, Department of Housing and Urban Development, 451 Seventh Street SW., Room 2256, Washington, DC 20410. Written requests must include the full name, current address, and telephone number of the individual making the request, as well as proof of identity, including a description of the requester's relationship to the information in question.

CONTESTING RECORDS PROCEDURES:

The procedures for contesting the contents of records and appealing initial denials appear in 24 CFR part 16—Implementation of the Privacy Act of 1974. If additional information or assistance is required, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street SW., Room 4178 (Attention: Capitol View Building, 4th Floor), Washington, DC 20410; or

(ii) The Departmental Privacy Appeals Officer, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW., Washington, DC 20410, for appeals of initial denials.

RECORD SOURCE CATEGORIES:

Basic participant information was initially transmitted electronically to the ETO system through an upload from the HUD Disaster Information System in November 2008. Housing rental assistance information about program participants was uploaded to ETO on a weekly basis from November 2008 until September 2011.

EXEMPTION(S):

None.

[FR Doc. 2013–02672 Filed 2–5–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Ocean Energy Safety Advisory Committee

AGENCY: Bureau of Safety and Environmental Enforcement (BSEE), Interior.

ACTION: Notice of Renewal of the Ocean Energy Safety Advisory Committee.

SUMMARY: Following consultation with the General Services Administration, notice is hereby given that the Secretary of the Interior is renewing the Ocean Energy Safety Advisory Committee.

The Ocean Energy Safety Advisory Committee provides recommendations to the Secretary of the Interior through the Director of the Bureau of Safety and Environmental Enforcement on matters and actions relating to offshore energy safety, including but not limited to, drilling and workplace safety, well intervention and containment, and oil spill response. The Committee will also facilitate collaborative research and development, training, and execution in these and other areas relating to offshore energy safety.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph R. Levine at the Bureau of Safety and Environmental Enforcement, 381 Elden Street, Herndon, Virginia 20170–4187. He can be reached by telephone at (703) 787–1033 or by electronic mail at *joseph.levine@bsee.gov.*

Certification

I hereby certify that the renewal of the Ocean Energy Safety Advisory Committee is in the public interest in connection with the performance of duties imposed on the Department of the Interior by 43 U.S.C. 1331 *et. seq.*

Dated: January 30, 2013.

Ken Salazar,

Secretary of the Interior.

[FR Doc. 2013–02524 Filed 2–5–13; 8:45 am]

BILLING CODE 4310–MR–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R6–ES–2013–N011; FXES11130600000D2–123–FF06E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Application

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following application to conduct certain activities with endangered or threatened species. The Endangered Species Act of 1973, as amended (Act), prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing these permits.

DATES: To ensure consideration, please send your written comments by March 8, 2013.

ADDRESSES: You may submit comments or requests for copies or more information by any of the following methods. Alternatively, you may use one of the following methods to request hard copies or a CD–ROM of the documents. Please specify the permit you are interested in by number (e.g., Permit No. TE–123456).

- *Email: permitsR6ES@fws.gov.* Please refer to the respective permit number (e.g., Permit No. TE–123456) in the subject line of the message.
- *U.S. Mail:* Kathy Konishi, Permit Coordinator, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486–DFC, Denver, CO 80225.
- *In-Person Drop-off, Viewing, or Pickup:* Call (303) 236–4256 to make an appointment during regular business hours at 134 Union Blvd., Suite 645, Lakewood, CO 80228.

FOR FURTHER INFORMATION CONTACT: Kathy Konishi, Permit Coordinator Ecological Services, (303) 236–4212 (phone); *permitsR6ES@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 et seq.) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. Along with our implementing regulations in the Code of Federal Regulations (CFR) at 50 CFR part 17, the Act provides for permits, and requires that we invite public comment before issuing these permits.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes applicants to conduct activities with U.S. endangered or threatened species for scientific purposes, enhancement of propagation or survival, or interstate commerce (the latter only in the event that it facilitates scientific purposes or enhancement of propagation or survival). Our regulations implementing section 10(a)(1)(A) for these permits are found at 50 CFR 17.22 for endangered wildlife species, 50 CFR 17.32 for threatened wildlife species, 50 CFR 17.62 for endangered plant species, and

50 CFR 17.72 for threatened plant species.

Applications Available for Review and Comment

We invite local, State, and Federal agencies, and the public to comment on the following applications. Please refer to the appropriate permit number (e.g., Permit No. TE–123456) for the application when submitting comments.

Documents and other information the applicant has submitted with this application is available for review, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Application Number: TE–94926A

Applicant: Glenn Dunmire, Dunmire Consulting, Cohone, Colorado.

The applicant requests a new permit to take (harass by survey) Mexican spotted owl *(Strix occidentalis lucida)* and Southwestern willow flycatcher *(Empidonax traillii extimus)* in conjunction with surveys and population monitoring activities in Utah for the purpose of enhancing the species' survival.

National Environmental Policy Act (NEPA)

In compliance with NEPA (42 U.S.C. 4321 *et seq.*), we have made an initial determination that the proposed activities in these permits are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement (516 DM 6 Appendix 1, 1.4C(1)).

Public Availability of Comments

All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

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.

Authority

We provide this notice under section 10 of the Act (16 U.S.C. 1531 *et seq.*)

Dated: January 31, 2013.

Mike Thabault,

Assistant Regional Director, Mountain-Prairie Region.

[FR Doc. 2013–02579 Filed 2–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2013–N004; FXES11130100000C4–123–FF01E00000]

Endangered and Threatened Wildlife and Plants; 5-Year Status Reviews of Ocelot and Mexican Spotted Owl in the Southwest Region

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of initiation of reviews; request for information.

SUMMARY: We, the U.S. Fish and Wildlife Service, are initiating 5-year status reviews under the Endangered Species Act of 1973, as amended (Act), of the endangered ocelot (*Leopardus* [=*Felis*] *pardalis*) and the threatened Mexican spotted owl (*Strix occidentalis lucida*). A 5-year review is based on the best scientific and commercial data available at the time of the review; therefore, we are requesting submission of any such information that has become available since our original listing of these two species.

DATES: To ensure consideration, we are requesting submission of new information no later than April 8, 2013. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: For how to submit information, see Request for Information and ''How Do I Ask Questions or Provide Information?'' in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: For information on a particular species, contact the appropriate person or office listed in the table in the **SUPPLEMENTARY INFORMATION** section.

SUPPLEMENTARY INFORMATION:

Why do we conduct a 5-year review?

Under the Act (16 U.S.C. 1531 *et seq.*), we maintain Lists of Endangered and Threatened Wildlife and Plants (which we collectively refer to as the List) in the Code of Federal Regulations (CFR) at 50 CFR 17.11 (for animals) and 17.12 (for plants). Section 4(c)(2)(A) of the Act requires us to review each listed species' status at least once every 5 years. Our regulations at 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing those species under active review. For additional information about 5-year reviews, refer to our factsheet at *http://www.fws.gov/endangered/what-we-do/recovery-overview.html.*

What information do we consider in our review?

A 5-year review considers all new information available at the time of the review. In conducting these reviews, we consider the best scientific and commercial data that have become available since the listing determination or most recent status review, such as:

(A) Species biology, including but not limited to population trends, distribution, abundance, demographics, and genetics;

(B) Habitat conditions, including but not limited to amount, distribution, and suitability;

(C) Conservation measures that have been implemented that benefit the species;

(D) Threat status and trends in relation to the five listing factors (as defined in section 4(a)(1) of the Act); and

(E) Other new information, data, or corrections, including but not limited to taxonomic or nomenclatural changes, identification of erroneous information contained in the List, and improved analytical methods.

Any new information will be considered during the 5-year review and will also be useful in evaluating the ongoing recovery programs for the species.

Which species are under review?

This notice announces our active review of the species listed in the table below.

Common name	Scientific name	Listing status	Where listed	Final listing rule (**Federal Register** citation and publication date)	Contact person, phone, email	Contact person's U.S. mail address
Ocelot	*Leopardus [=Felis] pardalis.*	Endangered	U.S.A. (AZ, TX) to Central and South America.	47 FR 31670 July 21, 1982.	Mitch Sternberg, Biologist, 956–784–7500 (phone); *Mitch_Sternberg@fws.gov* (email).	South Texas Refuges Complex Headquarters, Attention 5-Year Review, 3325 Green Jay Road, Alamo, TX 78516.
Owl, Mexican Spotted.	*Strix occidentalis lucida.*	Threatened ...	U.S.A. (AZ, CO, NM, TX, UT); Mexico.	58 FR 14248 March 16, 1993.	Field Supervisor, 602–242–0210 (phone); *Steve_Spangle@fws.gov* (email).	U.S. Fish and Wildlife Service, Arizona Ecological Services Field Office, Attention 5-Year Review, 2321 West Royal Palm Road, Suite 103, Phoenix, AZ 85021.

Request for Information

To ensure that a 5-year review is complete and based on the best available scientific and commercial information, we request new information from all sources. See ''What Information Do We Consider in Our Review?'' for specific criteria. If you submit information, please support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, and/or copies of any pertinent publications, reports, or letters by knowledgeable sources.

How do I ask questions or provide information?

If you wish to provide information for any species listed above, please submit your comments and materials to the appropriate contact in the table above. You may also direct questions to those contacts. Individuals who are hearing impaired or speech impaired may call the Federal Relay Service at 800–877–8339 for TTY assistance.

Public Availability of Comments

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Comments and materials received will be available for public inspection, by appointment, during normal business hours at the offices where the comments are submitted.

Completed and Active Reviews

A list of all completed and currently active 5-year reviews addressing species for which the Southwest Region of the Service has lead responsibility is available at *http://www.fws.gov/southwest/es/ElectronicLibrary_Main.cfm* (under Select a Document Category, select 5-Year Review).

Authority

This document is published under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 30, 2013.

Joy E. Nicholopoulos,

Acting Regional Director, Southwest Region, Fish and Wildlife Service.

[FR Doc. 2013–02576 Filed 2–5–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R7–R–2012–N206; FXRS12650700000–134–FF07R06000]

Final Environmental Impact Statement; Izembek National Wildlife Refuge Proposed Land Exchange/Road Corridor, Cold Bay, AK

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final environmental impact statement (EIS) for a proposed land exchange/road corridor on the Izembek National Wildlife Refuge (Refuge), Alaska. We prepared this final EIS pursuant to the National Environmental Policy Act of 1969 (NEPA) and its implementing regulations. The Service is furnishing this notice to advise the public and other agencies of availability of the final EIS.

DATES: The review period will end March 8, 2013. We are not soliciting comments on the final EIS during this review period.

ADDRESSES: You may submit questions or requests for more information by any one of the following methods:

Email: izembek_eis@fws.gov; include ''Izembek National Wildlife Refuge final EIS'' in the subject line of the message.

Fax: Attn: Stephanie Brady, Project Team Leader, (907) 786–3965.

U.S. Mail: Stephanie Brady, Project Team Leader, U.S. Fish and Wildlife Service, 1011 East Tudor Rd., MS–231, Anchorage, AK 99503.

In-Person Pickup or Drop-off: You may pick up a copy of the EIS or drop off questions during regular business hours at the address listed above.

You will find the final EIS, as well as information about the process and a summary of the final EIS, on the Izembek refuge web site: http://izembek.fws.gov/eis.htm.

FOR FURTHER INFORMATION CONTACT: Stephanie Brady, (907) 306–7448, or at the addresses above.

SUPPLEMENTARY INFORMATION:

Introduction

In 2009 the Omnibus Public Land Management Act of 2009 (Act), Public Law 111–11; 123 Stat. 991, was enacted. Subject to complying with the requirements of the Act, it authorized the Secretary of the Interior to enter into a land exchange between the Service

and State of Alaska and between the Service and the King Cove Corporation for the purpose of constructing a single-lane gravel road between the communities of King Cove and Cold Bay, Alaska, through Izembek National Wildlife Refuge. The land exchange would involve the removal of approximately 200 acres within the Izembek National Wildlife Refuge, including lands within the Izembek Wilderness, for the road corridor, and approximately 1,600 acres of Federal land within the Alaska Maritime National Wildlife Refuge on Sitkinak Island. In exchange, the Service would receive approximately 43,093 acres of land owned by the State of Alaska and approximately 13,300 acres of land owned by the King Cove Corporation. The lands from the State of Alaska would be designated wilderness, as would the approximately 2,565 acres of lands from the King Cove Corporation. These lands are located around Cold Bay and adjacent to the North Creek Unit of Alaska Peninsula National Wildlife Refuge.

With this notice, we continue the EIS process for the Izembek National Wildlife Refuge land exchange/road corridor proposal. We started this process with notices of intent in the **Federal Register** (74 FR 39336; August 6, 2009; 75 FR 8396; February 24, 2010), indicating the beginning of the scoping period and publishing the dates and locations of the scoping meetings. We also published a notice of availability, announcing the release of the Draft EIS and the opening of the public comment period (77 FR 16059; March 19, 2012)

The Izembek National Wildlife Refuge (417,533 acres) and the North Creek (8,452 acres) and Pavlof (1,447,264 acres) units of the Alaska Peninsula National Wildlife Refuge are located at the westernmost tip of the Alaska Peninsula. To the north of the Izembek Refuge is the Bering Sea; to the south is the Pacific Ocean. The Alaska Peninsula is dominated by the rugged Aleutian Range, part of the Aleutian arc chain of volcanoes. Landforms include mountains, active volcanoes, U-shaped valleys, glacial moraines, low tundra wetlands, lakes, sand dunes, and lagoons. Elevations range from sea level to the 9,372-foot Shishaldin Volcano. Shishaldin Volcano is a designated National Natural Landmark. Alaska Maritime National Wildlife Refuge stretches from the Arctic Ocean to the southeast panhandle of Alaska and protects breeding habitat for seabirds, marine mammals, and other wildlife on more than 2,500 islands, spires, rocks, and coastal headlands.

Background

On December 6, 1960, Public Land Order 2216 established the 498,000-acre Izembek National Wildlife Range, which included Izembek Lagoon and its entire watershed near the tip of the Alaska Peninsula, as ''a refuge, breeding ground and management area for all forms of wildlife.'' Eighty-four thousand, two hundred acres of this national wildlife range, including Izembek Lagoon, are State lands under the Submerged Lands Act, 43 U.S.C. 1312. The State of Alaska established the Izembek State Game Refuge to continue protecting the rare resources of Izembek Lagoon in 1972. In December 1980, the Alaska National Interest Lands Conservation Act (ANILCA; Pub. L. 96–487) was enacted. Section 303(3) redesignated the existing Izembek National Wildlife Range, containing the 417,533-acre watershed surrounding Izembek Lagoon, as the Izembek National Wildlife Refuge.

As described in ANILCA, Izembek Refuge purposes include the following:

(i) To conserve fish and wildlife populations and habitats in their natural diversity;

(ii) To fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) To provide, in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents; and

(iv) To ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the refuge.

Section 702(6) of ANILCA also designated 300,000 acres (72 percent) of the Izembek Refuge as a wilderness area under the Wilderness Act. The Wilderness Act creates additional purposes for designated wilderness areas within refuge boundaries. Specifically, these areas are to be managed ''for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.'' The Wilderness Act prohibits the construction of permanent roads through a wilderness area designated under the Act.

The Izembek Refuge is inhabited by a diverse and abundant community of fish and wildlife. Izembek Lagoon and adjacent coastal waters and wetlands form one of the most important migratory bird staging habitats in the world. In recognition of this, and for its importance to internationally migrating birds, it was designated as a Globally Important Bird Area by the American Bird Conservancy in 2001. Hundreds of thousands of geese, ducks, and shorebirds use the Izembek Refuge's wetlands and the adjacent lagoons to rest and feed during their long migrations between arctic breeding areas and their diverse wintering areas, some as far away as South America and New Zealand. Each spring and fall, Izembek Lagoon provides staging habitat for more than 90 percent of the world's population of Pacific brant and many sea ducks and other waterbirds winter at the Izembek Refuge and adjacent marine waters.

Together, the Izembek Refuge and Izembek State Game Refuge, which encompasses the tidelands of Izembek Lagoon, were recognized for the area's extraordinary ecological values when they became one of the first sites in North America to be designated a Wetland of International Importance under the Ramsar convention, one of only 19 such sites within the United States. Izembek Lagoon supports some of the most extensive remaining eelgrass meadows in the world, providing a rich environment for waterbirds and other wildlife. Izembek Lagoon and adjacent habitats qualify as a site of Regional Importance (hosts at least 20,000 birds annually) and likely International Importance (hosts at least 100,000 birds annually) in the Western Hemispheric Shorebird Reserve Network. The lagoon's barrier islands protect the eelgrass habitat and wildlife species from the dramatic storms of the Bering Sea.

The Izembek Refuge also supports species of concern such as the threatened Steller's eider, threatened sea otter, threatened Steller sea lion, tundra swan, black brant, gray-bellied brant, and emperor goose. Wildlife habitat throughout the Izembek Wilderness currently maintains a high level of connectivity providing undisturbed habitat for brown bear, caribou, moose, salmon and countless migratory birds. Additionally, caribou use Izembek Refuge as wintering grounds and brown bear use the area around the isthmus for denning. Red fox, wolves and wolverines are found on the refuge and harbor seals can be seen along the coastline and in the lagoons. Coho, chum, sockeye, and pink salmon return in great numbers to the many streams of Izembek Refuge to spawn each year.

The refuge also has a rich human history, from ancient settlements of Alaska Natives, through the 18th and 19th century Russian fur traders, to a World War II outpost. The Izembek Wilderness covers most of the refuge and includes pristine streams, extensive wetlands, steep mountains, tundra, and sand dunes, and provides high scenic, wildlife, and scientific values, as well as outstanding opportunities for solitude and primitive and unconfined recreation. Currently, the narrow isthmus separating the Bering Sea from the North Pacific is not fragmented by road construction and provides connectivity of habitat for many species inhabiting the southern Alaska Peninsula region. In addition to lands within Izembek Refuge, the land exchange involves parcels on Sitkinak Island within Alaska Maritime National Wildlife Refuge and parcels owned by the King Cove Corporation and the State of Alaska located on the Alaska Peninsula. Sitkinak Island is primarily owned by the State of Alaska, with two parcels owned by the Service.

The King Cove Corporation is an Alaska Native Village Corporation established under the Alaska Native Claims Settlement Act of 1971 (43 U.S.C. 1601 et seq.) (ANCSA). Under the authority of ANCSA, Congress granted King Cove Corporation land entitlements within and adjacent to Izembek Refuge. The State of Alaska also owns lands, submerged lands, shorelands, and tidelands within and adjacent to Izembek and Alaska Peninsula Refuges, including the Izembek State Game Refuge.

Prior legislation and an EIS also focused on providing access between the communities of King Cove and Cold Bay. The King Cove Health and Safety Act (Section 353) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Pub. L. 105–227) provided appropriations of $37.5 million for the Aleutians East Borough to construct a marine-road link between the communities of King Cove and Cold Bay ($20 million). This law also provided an appropriation for improvements to the King Cove Airport ($15 million) and King Cove Clinic ($2.5 million). The conference committee report on this law stated the committees agreed to these funds as an alternative to an easement for a road through the Izembek National Wildlife Refuge wilderness area to address critical health and safety needs.

The U.S. Army Corps of Engineers, Alaska District, completed the King Cove Access Project EIS and issued a Record of Decision addressing the marine-road link in 2003. The road was constructed to Lenard Harbor, where hovercraft support facilities were installed. A hovercraft was purchased and began operating in 2007. Hovercraft transit service was provided by the Aleutians East Borough until November 2010. Throughout this time, King Cove residents continued to advocate for a road as the safest and most reliable transportation system.

The extraordinary wildlife and wilderness resources of Izembek National Wildlife Refuge have been recognized for their national and international significance. Congress designated the wilderness area for its outstanding opportunities for solitude and primitive and unconfined type of recreation. It contains outstanding ecological, geological, or other features of scientific, educational, scenic, and historical value. It has retained its primeval character and influence, without permanent improvements or human habitation, and is currently managed to protect and preserve its natural conditions. Section 6402(b) of the Act, requires the Service to prepare an environmental impact statement (EIS) under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), and its implementing regulations (40 CFR parts 1500–1508). The Act directs that the EIS analyze the proposed land exchange and the potential construction and operation of a road between the communities of King Cove and Cold Bay, Alaska. The Act requires that the Service identify a specific road corridor through the refuge for consideration in consultation with the State, the City of King Cove, and the Agdaagux Tribe of King Cove. Following completion of the EIS and Record of Decision, if a land exchange alternative is selected, section 6402(d) of the Act requires the Secretary to determine whether the land exchange (including the construction of a road between the City of King Cove, Alaska, and the Cold Bay Airport) is in the public interest.

EIS Alternatives We Considered

Subject to complying with the requirements of the Act, the Secretary of the Interior is authorized to consider a land exchange between the Service and State of Alaska and between the Service and the King Cove Corporation for the purpose of constructing a single-lane gravel road between the communities of King Cove and Cold Bay, Alaska. The Act also required that we prepare this final EIS. The Agdaagux Tribe of King Cove, Aleutians East Borough, City of King Cove, Federal Highway Administration/Western Federal Lands, King Cove Corporation, Native Village of Belkofski, State of Alaska, and U.S. Army Corps of Engineers, Alaska District, are formal cooperators in the preparation of this final EIS. The Service is the lead agency.

The final EIS includes evaluation of two specific potential road corridors through the Izembek Refuge and Wilderness that were identified in consultation with the State of Alaska, the City of King Cove, and the Agdaagux Tribe of King Cove. We developed and evaluated the following alternatives, summarized in the table and described briefly below. A full description of each alternative is in the final EIS.

Alternative 1—no action	Alternative 2	Alternative 3	Alternative 4	Alternative 5
No land exchange. Continue current modes of transportation, including air and marine.	Land exchange and southern road alignment through Izembek Refuge and Wilderness.	Land exchange and northern alignment through Izembek Refuge and Wilderness.	Hovercraft operation 6 days per week from Northeast Hovercraft Terminal to Cross Wind Cove.	Lenard Harbor ferry with Cold Bay dock improvements

Alternative 1—No Action

Under Alternative 1, the Service would not enter into a land exchange with King Cove Corporation and the State of Alaska for the purpose of constructing a road between King Cove and Cold Bay, Alaska. Current modes of transportation between the cities of King Cove and Cold Bay would continue to operate, including air, personal marine vessels, and a ferry service approximately twice per month in the summer season. The Aleutians East Borough has indicated they have considered an aluminum landing craft/passenger ferry to provide a marine-road link between the Northeast Hovercraft Terminal and the Cross Wind Cove if there is no land exchange.

According to the Borough, the vessel contemplated would accommodate

approximately 30 passengers, occasional wheeled vehicles/ambulances and limited cargo. The vessel would operate between the Northeast Hovercraft Terminal and Cross Wind Cove, the same route analyzed in the 2003 EIS for the hovercraft.

Alternative 2—Land Exchange and Southern Road Alignment

Alternative 2 proposes a land exchange between the Federal government, State of Alaska, and King Cove Corporation as described in the Proposed Action. The estimated amount of Federal land exchanged in this alternative for the road corridor would be 201 acres, including 131 acres in Izembek Wilderness, assuming a 100-foot corridor width.

Alternative 3—Land Exchange and Central Road Alignment

Alternative 3 proposes a land exchange between the Federal government, State of Alaska, and King Cove Corporation, as described in the Proposed Action. The estimated amount of Federal land exchanged in this alternative for the road corridor would be 227 acres, including 152 acres in Izembek Wilderness, assuming a 100-foot corridor width.

Alternative 4—Hovercraft Operations from the Northeast Hovercraft Terminal to Cross Wind Cove (6 days per week)

Alternative 4 is the Proposed Action in the 2003 EIS for the King Cove Access Project completed by the U.S. Army Corps of Engineers, Alaska District. The alternative considered in this EIS would not require further construction activities; the alternative will consider operations of the hovercraft, as described in the 2003 EIS, for service six days per week between the Northeast Hovercraft Terminal and the Cross Wind Cove. As the draft EIS was approaching completion, the Aleutians East Borough sent the Service a letter stating they will not resume hovercraft service in the foreseeable future.

Alternative 5—Lenard Harbor Ferry with Cold Bay Dock Improvements

Alternative 5 would use a ferry to travel 14 miles between a terminal in Lenard Harbor and a substantially modified Cold Bay dock. This alternative is similar to an alternative that was analyzed in the 2003 EIS, with the exception of project elements that have been permitted or constructed to date, including the access road to the site, a terminal building with associated utility infrastructure, and a parking area. However, the Lenard Harbor terminal structure has been damaged by a storm, and would have to be replaced. Upgrades to the parking area and security fencing would also be necessary. Ferry service would be provided six days per week.

Preferred Alternative

Council on Environmental Quality Regulations (40 CFR 1502.14) require agencies to identify the agency's preferred alternative in a final EIS. Consistent with this requirement, the Service's preferred alternative is Alternative 1, the no action alternative. This alternative was so identified because it is believed to best meet refuge purposes and the Service mission. While the proposed land exchange would provide many more acres of land as part of the Refuge System; the habitat values of these lands do not compare with the habitat values of the areas within the proposed road corridors and do not compensate for the effects that locating a road within the Izembek Wilderness would have on wildlife, habitat, and wilderness values of the refuge.

During preparation of the draft EIS, the cooperators met over 100 times. Most of the cooperators have met repeatedly with senior Service and Department of the Interior officials to express their recommendations for a preferred alternative. The identification of Alternative 1 as the preferred alternative in the EIS was made by the U. S. Fish and Wildlife Service as lead agency and is not preferred by all the cooperators on the project.

The Izembek Refuge and Alaska Peninsula Refuge would receive over 55,000 acres offered by the State and King Cove Corporation in exchange for de-designating approximately 200 acres of Izembek Refuge Wilderness and transferring it to the State of Alaska for road construction. While the over 55,000 acres offered contain important wildlife habitat, they do not provide the wildlife diversity of the internationally recognized wetland habitat of the Izembek isthmus. Simply exchanging lands will not compensate for myriad ripple effects on habitat and wildlife due to uses on and beyond the road, nor would new lands provide habitat for all the same species. State lands and private lands adjacent to the refuge to be traded to the Service are under no foreseeable threat. While adding them to the National Wildlife Refuge System should insure long-term protection; this would not compensate for the adverse effects of removing a corridor of land and constructing a road within the narrow Izembek isthmus.

The road is proposed to connect the communities of King Cove and Cold Bay to provide King Cove residents access to emergency medical and other services via the all-weather airport at Cold Bay. To address this concern, the 1997 King Cove Health and Safety Act authorized funding for a marine link between the communities and improvements to King Cove's air strip and medical clinic. Congress recognized that these funds were to provide emergency health and safety needs in the community as an alternative to a road through the Izembek Refuge and Wilderness. In 1998 Congress appropriated $37.5 million for these improvements to: (1) Upgrade the medical clinic, (2) improve the King Cove airstrip, and (3) create a transportation link between King Cove and Cold Bay via a single lane, unpaved road from King Cove to a $10 million hovercraft and terminal. Facilities were constructed and a hovercraft operated between the communities from 2006 to 2010. During that time, the hovercraft successfully completed every medical evacuation required during the periods each year it was operating.

Hovercraft service provided by the Aleutians East Borough was suspended in November 2010. In November 2011 the Aleutians East Borough announced that hovercraft service would not resume. Since operations began in 2007, the Aleutians East Borough stated that there were issues with operability and reliable service from Lenard Harbor. Revenue generated by operations did not meet initial projections. The Aleutian East Borough reports the hovercraft lost $1 million annually when operating three days a week and that they do not plan to operate it again. The Aleutians East Borough determined that it could not sustain these costs. With no further hovercraft service planned for the community of King Cove, the hovercraft was modified and transferred to Akutan in the Aleutian Islands in 2012 where it is supposed to provide a transportation link between the City of Akutan and the Akutan Airport on Akun Island.

In a February 24, 2012 letter to the U.S. Army Corps of Engineers, the Aleutians East Borough stated it is exploring an aluminum landing craft/passenger ferry to provide a marine-road link between the communities of King Cove and Cold Bay if a land exchange and road corridor is not approved. This letter states that ''It is the fervent hope'' of the Aleutians East Borough, the City of King Cove, the King Cove Corporation and the Agdaagux and Belkofski Tribes that the Secretary of the Interior will approve the land exchange. If the Secretary does not approve the land

exchange, the Aleutians East Borough ''will develop an alternative transportation link between King Cove and Cold Bay. Any alternative we develop will include the utilization of the road to Northeast Corner and associated facilities, now being constructed under the King Cove Health and Safety Act . . .. A transportation link the Borough is exploring (and we believe holds promise) is an aluminum landing craft/passenger ferry.'' The Borough hopes that this type of a transportation link could be more technically and financially viable than a hovercraft.

Thus a landing craft or other ferry or the hovercraft is a potential means of providing emergency access; the economic choices relative to use of these vessels for providing access are the purview of the Aleutians East Borough.

Public Involvement

We are releasing the final EIS for a 30-day public review period. We are not soliciting public comments at this time. The Service has afforded government agencies, tribes, and the public extensive opportunity to participate in the preparation of this EIS.

We started the EIS for the Izembek Refuge land exchange/road corridor in August 2009. At that time and throughout the planning process, we requested public comments and considered and incorporated them in numerous ways.

To gather additional input from the public, we held seven public open house meetings—five in communities adjacent to or within the boundaries of the Izembek Refuge; one in Washington, DC; and one in Anchorage, Alaska.

We considered and evaluated these issues and public concerns, and used them to develop various aspects of the draft EIS. We published the draft EIS on March 19, 2012, for public review. The comment period closed on May 18, 2012. During that time, we held four face-to-face public meetings in Anchorage, Sand Point, Cold Bay, and King Cove, Alaska and via a conference call with the communities of False Pass and Nelson Lagoon, Alaska. All meetings were recorded and transcripts are available on the Izembek Web site and in the final EIS.

Individuals and organizations provided a total of 71,960 comments during the public comment period. The responses came in the form of emails, faxes, letters, and public hearing transcripts. Approximately 76 people spoke at the six public meetings. The comments were reviewed, coded, analyzed, and developed into statements of concern. Comments were sorted into broad issue groups, including:

1. Regulatory compliance;
2. Purpose and need;
3. Proposed action, alternatives, and mitigation measures;
4. Affected environment and environmental consequences; and
5. General.

We considered and evaluated these issues and public concerns, and used them to develop various aspects of the final EIS.

Changes to the Final EIS

We made the following changes in the final EIS from the draft EIS:

No action: As indicated in the draft EIS, we have revised the no action alternative in the final EIS. The Aleutians East Borough ceased to operate the hovercraft and has indicated that if the Secretary does not approve the proposed road, they will pursue a landing craft as a marine link between the Northeast corner to Cold Bay. Therefore, we updated the no action to reflect the latest information provided by the Aleutians East Borough.

Impact summaries: Some impacts were re-classified and are reflected in the final EIS.

Socioeconomic data: The final EIS reflects the re-analysis of the socioeconomic data with the 2010 census data. However, this re-analysis did not yield any changes in the impact analysis.

Comments

We are not soliciting comments at this time. This release is intended to allow the public a period of review. Appendix C of the final EIS includes a summary report of public comments received during the scoping period. Appendix G of the final EIS contains a summary of public comments received on the draft EIS and the Service's responses to substantive comments, and includes samples of public comments received on the draft EIS.

Next Steps

Following conclusion of the 30-day public review period, a Record of Decision (ROD) will be signed, in which we disclose the Service's final decision and any conditions of approval. Availability of the ROD will be announced through the **Federal Register**, a press release, the refuge's web site, and communications with those on the EIS mailing list.

Dated: January 25, 2013.

Geoffrey L. Haskett,

Regional Director, U.S. Fish and Wildlife Service, Anchorage, Alaska.

[FR Doc. 2013–02618 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[F–14936–A; LLAK944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that an appealable decision will be issued by the Bureau of Land Management (BLM) to The Kuskokwim Corporation. The decision approves the surface estate in the lands described below for conveyance pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The subsurface estate in these lands will be conveyed to Calista Corporation when the surface estate is conveyed to The Kuskokwim Corporation. The lands are in the vicinity of Sleetmute, Alaska, and are located in:

Seward Meridian, Alaska

T. 19 N., R. 44 W.,
Sec. 5, lots 3 and 5;
Sec. 6, lot 1;
Sec. 8, lots 2 and 4.

Containing 466.02 acres.

Notice of the decision will also be published once a week for four consecutive weeks in the *Delta Discovery.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision in accordance with the requirements of 43 CFR part 4 within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 8, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43

CFR part 4, subpart E, shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at ak.blm.conveyance@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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Ralph L. Eluska, Sr.,

Land Transfer Resolution Specialist, Branch of Alaska Land Transfer.

[FR Doc. 2013–02671 Filed 2–5–13; 8:45 am]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AA–10978; LLAK–944000–L14100000–HY0000–P]

Alaska Native Claims Selection

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of decision approving lands for conveyance.

SUMMARY: As required by 43 CFR 2650.7(d), notice is hereby given that the Bureau of Land Management (BLM) will issue an appealable decision to Bristol Bay Native Corporation. The decision will approve conveyance of the surface and subsurface estates in certain lands pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq*). The lands are located northeast of New Stuyahok, Alaska, and contain 3.43 acres. Notice of the decision will also be published once a week for four consecutive weeks in the *Anchorage Daily News.*

DATES: Any party claiming a property interest in the lands affected by the decision may appeal the decision within the following time limits:

1. Unknown parties, parties unable to be located after reasonable efforts have been expended to locate, parties who fail or refuse to sign their return receipt, and parties who receive a copy of the decision by regular mail which is not certified, return receipt requested, shall have until March 8, 2013 to file an appeal.

2. Parties receiving service of the decision by certified mail shall have 30 days from the date of receipt to file an appeal.

Parties who do not file an appeal in accordance with the requirements of 43 CFR part 4, subpart E, shall be deemed to have waived their rights. Notices of appeal transmitted by electronic means, such as facsimile or email, will not be accepted as timely filed.

ADDRESSES: A copy of the decision may be obtained from: Bureau of Land Management, Alaska State Office, 222 West Seventh Avenue, #13, Anchorage, Alaska 99513–7504.

FOR FURTHER INFORMATION CONTACT: The BLM by phone at 907–271–5960 or by email at *ak.blm.conveyance@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 BLM during normal business hours. In addition, the FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the BLM. The BLM will reply during normal business hours.

Dina L. Torres,

Land Transfer Resolution Specialist, Branch of Alaska Land Transfer.

[FR Doc. 2013–02684 Filed 2–5–13; 8:45 a.m.]

BILLING CODE 4310–JA–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–AKR–KATM–11807: PX.XAKAKRO0303.00.1]

Final Environmental Impact Statement for Brooks River Visitor Access for Katmai National Park and Preserve

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability of the Final Environmental Impact Statement for the Brooks River Visitor Access for Katmai National Park and Preserve.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4332(2)(C), the National Park Service (NPS) announces the availability of the Final Environmental Impact Statement for Brooks River Visitor Access (Plan/FEIS), for Katmai National Park and Preserve, Alaska. The Plan/FEIS evaluates the environmental impacts of four action alternatives that include bridge and boardwalk systems to replace the existing Brooks River floating bridge and sites to relocate the existing Naknek Lake barge landing area at the mouth of the Brooks River. A no-action alternative is also evaluated. If implemented this EIS would amend the access provisions of the 1996 Brooks River Area Final Development Concept Plan and Environmental Impact Statement.

ADDRESSES: The Plan/FEIS is available in electronic format online at the NPS Planning, Environment and Public Comment (PEPC) Web site [*http://parkplanning.nps.gov/BrooksVisitorAccess*]. Hard copies and compact discs of the Plan/FEIS are available on request by contacting: Brooke Merrell, National Park Service, 240 West 5th Avenue Anchorage, AK 99501. Telephone: 907–644–3397. Email: *brooke_merrell@nps.gov.*

FOR FURTHER INFORMATION CONTACT: Brooke Merrell, National Park Service, 240 West 5th Avenue, Anchorage, Alaska 99501. Telephone: 907–644–3397. Email: *brooke_merrell@nps.gov.*

SUPPLEMENTARY INFORMATION: The Brooks River Visitor Access Draft Environmental Impact Statement was released to the public on June 22, 2012. The Notice of Availability for the draft environmental impact statement was published in the **Federal Register** on that date (77 FR 37707). The public comment period ran from June 22 through August 20, 2012. Three public meetings were held in Homer, Anchorage, and King Salmon, Alaska. Sixteen individuals attended the public meetings.

During the 60-day comment period, comments were received via hard copy mail, email, and through the NPS PEPC site. In total, 22 comment letters were received via these means. The 22 comment letters included two environmental organizations (National Parks Conservation Association and Sierra Club), state and Federal Agencies (State of Alaska, Environmental Protection Agency, and National Marine Fisheries Service), the Bristol Bay Native Corporation, Katmailand Inc., and 14 individuals. The FEIS presents responses to substantive comments in Chapter 5.

Five alternatives for access at the Brooks River area of Katmai National Park are presented in the EIS. Alternative 1 (the no-action alternative) presents a continuation of current management direction and is included as a baseline for comparing the consequences of implementing each alternative. Alternatives 2–5 present different ways of providing access to and within the Brooks River area.

Alternative 1 (No Action): This alternative represents a continuation of

the existing situation. The no-action alternative would maintain seasonal use of the floating bridge, which is 8 feet wide and about 320 feet long. The bridge would be used by both pedestrians and light-utility vehicles. The NPS would continue to install and remove the bridge each spring and fall. The existing barge landing and associated road would remain on the south side of the river.

Alternative 2: This alternative evaluates construction of a new bridge and boardwalk system across the Brooks. This alternative calls for a three-span bridge about 360 feet in length. This bridge would have an 8-foot-wide wooden bridge deck with a steel truss on each side, and span 120 feet between steel pile foundations. The bridge and boardwalk system would have a total estimated length of 1,600 feet. A barge landing would be located on the shore of Naknek Lake about 2,000 feet south of the existing barge landing. A new access road, approximately 1,500 feet long and 14 feet wide, would be constructed to intersect the Valley Road and extend to the new barge landing site on Naknek Lake.

Alternative 3: This alternative evaluates construction of a new bridge and boardwalk system across the Brooks River. The bridge would be a pre-engineered bridge approximately 415 feet in length. The bridge and boardwalk system would have a total estimated length of 850 feet. A new barge landing site would be located approximately 200 feet south of the mouth of the Brooks River. A new road segment (about 100 ft. long) would be constructed from the existing access road and extend to a new Naknek Lake barge landing site.

Alternative 4 (NPS Preferred Alternative): This alternative evaluates construction of a new wooden bridge and boardwalk system across the Brooks River. The bridge would be approximately 350 feet in length with a minimum distance of 24 feet between piles. The bridge and boardwalk system would have a total estimated length of 1,550 feet. A barge landing would be located on the shore of Naknek Lake about 2,000 feet south of the existing barge landing. A new access road, approximately 1,500 feet long and 14 feet wide, would intersect the Valley Road and extend to the new barge landing site on Naknek Lake. Alternative 4 is the environmentally preferred alternative.

Alternative 5: This alternative evaluates construction of a new wooden bridge and boardwalk system across the Brooks River. The bridge would be approximately 350 feet in length with a minimum distance of 24 feet between piles and would follow the alignment of the floating bridge. The bridge and boardwalk system would have a total estimated length of 1,100 feet. A barge landing would be located on the shore of Naknek Lake about 2,000 feet south of the existing barge landing. A new access road, approximately 1,500 feet long and 14 feet wide, would intersect the Valley Road and extend to the new barge landing site on Naknek Lake.

Dated: January 8, 2013.

Sue E. Masica,

Regional Director, Alaska.

[FR Doc. 2013–02616 Filed 2–5–13; 8:45 am]

BILLING CODE 4312–EF–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On January 31, 2013, the Department of Justice lodged a proposed consent decree with the United States District Court for the Northern District of Illinois in the lawsuit entitled *United States, et al.* v. *H. Kramer & Co.,* Civil Action No. 1:13-cv-00771.

In the Complaint, the United States and the State of Illinois alleged that H. Kramer & Co. (''H. Kramer'') caused or contributed to emissions of air pollution that resulted in exceedances of the national ambient air quality standard for lead, failed to use good air pollution control practices for minimizing lead emissions, and caused a common law nuisance at its facility in the Pilsen neighborhood of Chicago, Illinois. Under the consent decree, H. Kramer has agreed to install two new state-of-the-art baghouses, limit production of certain leaded alloys until the installation of the new baghouses is complete, pay a civil penalty of $35,000 (half to the United States and half to Illinois), and implement a $40,000 Supplemental Environmental Project to retrofit diesel school buses in the vicinity of the facility.

The publication of this notice opens a period of public comment on the consent decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, et al.* v. *H. Kramer & Co.,* D.J. Ref. No. 90–5–2–1–2177/2. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail ..	*pubcomment-ees.enrd@usdoj.gov*
By mail	Assistant Attorney General U.S. DOJ—ENRD P.O. Box 7611 Washington, D.C. 20044–7611.

During the public comment period, the consent decree may be examined and downloaded at this Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* We will provide a paper copy of the consent decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check in the amount of $21.50 (25 cents per page reproduction cost) payable to the United States Treasury.

Maureen Katz,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–02527 Filed 2–5–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Application; GE Healthcare

Pursuant to Title 21 Code of Federal Regulations 1301.34 (a), this is notice that on July 28, 2011, GE Healthcare, 3350 North Ridge Avenue, Arlington Heights, Illinois 60004–1412, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of Cocaine (9041), a basic class of controlled substance listed in schedule II.

The company plans to import small quantities of ioflupane, in the form of three separate analogues of Cocaine, to validate production and quality control systems, for a reference standard, and for producing material for a future investigational new drug (IND) submission.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance listed in schedule 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 March 8, 2013.

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 schedule 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: January 31, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–02682 Filed 2–5–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Foreign Claims Settlement Commission

[F.C.S.C. Meeting and Hearing Notice No. 2–13]

Sunshine Act Meeting

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR 503.25) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of an open meeting as follows:

Friday, February 15, 2013: 9:00 a.m.—Oral hearing on Objection to Commission's Proposed Decision in Claim No. LIB–II–165.

Status: Open.

All meetings are held at the Foreign Claims Settlement Commission, 600 E Street NW., Washington, DC. Requests for information, or advance notices of intention to observe an open meeting, may be directed to: Judith H. Lock, Executive Officer, Foreign Claims Settlement Commission, 600 E Street NW., Suite 6002, Washington, DC 20579. Telephone: (202) 616–6975.

Jeremy R. LaFrancois,

Chief Administrative Counsel.

[FR Doc. 2013–02773 Filed 2–4–13; 4:15 pm]

BILLING CODE 4410–BA–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

TIME AND DATE: 11:30 a.m., Tuesday, February 12, 2013.

PLACE: U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Determination on three original jurisdiction cases.

CONTACT PERSON FOR MORE INFORMATION: Patricia W. Moore, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC 20530, (202) 346–7001.

Dated: February 4, 2013.

Rockne Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 2013–02783 Filed 2–4–13; 4:15 pm]

BILLING CODE 4410–31–P

DEPARTMENT OF JUSTICE

Parole Commission

Sunshine Act Meeting

TIME AND DATE: 10:00 a.m., Tuesday, February 12, 2013.

PLACE: U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC.

STATUS: Open.

MATTERS TO BE CONSIDERED: Approval of October 16, 2012 minutes; reports from the Chairman, the Commissioners, and senior staff; Proposed Rulemaking: Revising Conditions of Release.

CONTACT PERSON FOR MORE INFORMATION: Patricia W. Moore, Staff Assistant to the Chairman, U.S. Parole Commission, 90 K Street NE., 3rd Floor, Washington, DC 20530, (202) 346–7001.

Dated: February 4, 2013.

Rockne Chickinell,

General Counsel, U.S. Parole Commission.

[FR Doc. 2013–02782 Filed 2–4–13; 4:15 pm]

BILLING CODE 4410–31–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Work Application/Job Order Recordkeeping, Extension Without Revisions

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data about the collection of data concerning the extension without changes of the data retention required by 20 CFR 652.8(d)(5) of the Wagner-Peyser Act, which requires each state to retain applications and job orders for a minimum of one year. The current expiration date for this information collection request is June 30, 2013.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before April 8, 2013.

ADDRESSES: Submit written comments to U.S. Department of Labor, Employment and Training Administration, Attention: Adriana Kaplan, 200 Constitution Avenue NW., Room S4209, Washington, DC 20210. Telephone number: 202–693–3740 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Fax: 202—693–3587. Email: *Kaplan.Adriana@dol.gov.* Obtain a copy of the proposed information collection request (ICR) by contacting the office listed above.

SUPPLEMENTARY INFORMATION:

I. Background

Currently, the Employment and Training Administration is soliciting

comments concerning the proposed extension/reinstatement of the data retention required by 20 CFR 652.8(d)(5) of the Wagner-Peyser Act, which requires each state to retain applications and job orders for a minimum of one year.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- enhance the quality, utility, and clarity of the information to be collected; and
- minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: Extension without changes.

Title: Work Application/Job Order Recordkeeping.

OMB Number: 1205–0001.

Affected Public: State governments.

Total Annual Respondents: 52.

Annual Frequency: On occasion.

Total Annual Responses: Variable depending on number of job orders and work applications.

Average Time per Response: Variable.

Estimated Total Annual Burden Hours: 8 hours per state or 416.

Total Annual Burden Cost for Respondents: 0.

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Signed in Washington, DC, this 25th day of January 2013.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2013–02545 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Comment Request for Information Collection for Veterans Retraining Assistance Program Participant (VRAP) Outreach Reporting, New Collection

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice.

SUMMARY: The Department of Labor (Department), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, ETA is soliciting comments concerning the collection of data about ''Veterans Retraining Assistance Program Participant Outreach Reporting'' which is a request for a new data collection from State Workforce Agencies, collected on a quarterly basis. This information collection will be used to ensure that VRAP participants are offered employment services after they complete the program as required in the VOW to Hire Heroes Act of 2011.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before April 8, 2013.

ADDRESSES: Submit written comments to Andrew Ridgeway, Office of Workforce Investment, Room S–4203, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210. Telephone number: 202–693–3536 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD). Fax: 202–693–3817. Email: *Ridgeway.Andrew@dol.gov.* A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above.

SUPPLEMENTARY INFORMATION:

I. Background

The ETA seeks approval for the collection of quarterly outreach reports from the State Workforce Agencies (SWA) on the Veterans Retraining Assistance Program (VRAP), which is part of the VOW to Hire Heroes Act of 2011 (Pub. L. 112–56). VRAP is a new training program for eligible veterans, funded by the Department of Veterans Affairs (VA). The program requires the Department of Labor (DOL) to offer employment placement services to each veteran who participated in the VRAP within 30 days of their completion or termination. The Department of Veterans Affairs, in collaboration with the DOL, is required to submit a report to Congress by July 1, 2014, on the outcomes of the program. The statutorily required report must include the total number of eligible veterans who participated, the associates degrees or certificates awarded (or other similar evidence of the completion of the program of education or training earned), and data related to the employment status of eligible veterans who participated in the program. The program was authorized to enroll up to 45,000 veterans in Fiscal Year (FY) 2012, from July 1, 2012 through September 30, 2012, and up to 54,000 additional veterans from October 1, 2012, through October 1, 2013, with all training to conclude no later than March 31, 2014.

The VRAP provides up to 12 months of full-time retraining assistance (currently $1,564 per month) in a ''high demand'' occupation to eligible veterans at a VA approved community college or technical school. The VRAP provides the benefit to veterans who fulfill the following eligibility criteria: As of date of application, is at least 35 years old and less than 60; discharged from active duty under conditions other than dishonorable; is unemployed as of date of application; is not eligible to receive other educational assistance from the VA; is not in receipt of compensation for a service-connected disability rated totally disabling by reason of unemployability; was not and is not enrolled in any Federal or state job training program within the previous 180 days; and, the application must be submitted not later than October 1, 2013.

Once the veteran has terminated or completed the VRAP, the VA is transmitting a secure participant report to DOL so that employment services can be offered to the participant and program outcomes can be reported. DOL will transmit a report to each state on VRAP participants within that state who

terminated or completed VRAP. DOL will transmit each state's file on a weekly basis using a secure File Transfer Protocol (sFTP) site. Each state will be able to access only its file so that it can disseminate the participant information securely to the appropriate American Job Center staff in the participant's local area enabling the American Job Center to offer employment services to the veteran.

In order for DOL to ensure employment services are being offered and outcomes are being tracked for all participants, ETA is proposing to collect quarterly reports from the states, with a 45-day reporting period following each quarter, on the outreach offered to VRAP participants. In order to reduce the amount of participant information being transferred, ETA is proposing to add two data fields to the participant report it sends to the states. The report will be in Microsoft Excel format and will include a ''unique identifier'' field (not personally identifiable information), assigned by ETA and an ''Employment Assistance'' field which will be blank. The collection instrument is included as an attachment in the Information Collection Request package. The ''Employment Assistance'' field will be completed by the state workforce agencies tracking the outreach offered to each VRAP participant. ETA is seeking approval from OMB to collect from each state the ''unique identifier'' field and the ''Employment Assistance'' field on a quarterly basis.

This information collection is subject to the Paperwork Reduction Act (PRA). A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

II. Review Focus

The Department is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

III. Current Actions

Type of Review: New Collection.

Title: Veterans Retraining Assistance Program Participant Outreach Reporting.

OMB Number: 1205—NEW.

Affected Public: State Workforce Agency staff and American Job Center staff.

Form(s): Participant Dissemination Form and Quarterly Report Form.

Total Annual Burden Cost for Respondents: $440,948 (See Supporting Statement for Calculation).

Data collection activity	Number of respondents	Frequency	Total responses	Average time per response (minutes	Burden hours
Participant Contact List Dissemination	54	52	2,808	60	2,808
Contacting VRAP Participant	44,500	1	44,500	10	7,417
Quarterly Report Preparation	54	4	216	90	324
Total					10,549

Comments submitted in response to this comment request will be summarized and/or included in the request for OMB approval of the ICR; they will also become a matter of public record.

Dated: Signed in Washington, DC, on this 29th day of January 2013.

Jane Oates,

Assistant Secretary for Employment and Training, Labor.

[FR Doc. 2013–02531 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,420; TA–W–81,420A]

PEPSICO, Inc., Business & Information Solutions (BIS) Division Including On-Site Leased Workers From Procurestaff, Cognizant, Infosys, Wipro, and TCS; Plano, TX; PEPSICO, Inc., Business & Information Solutions (BIS) Division Including On-Site Leased Workers From Cognizant Technology Solutions and Infosys Technologies Ltd. Bradenton, FL; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on May 25, 2012, applicable to workers and former workers of PepsiCo, Inc., Business & Information Solutions (BIS) Division, Plano, Texas (PepsiCo-BIS-Plano). Workers of PepsiCo-BIS are engaged in activities related to the supply of information technology support services.

In response to information obtained during an investigation of a related case, the Department reviewed the certification for workers and former workers of PepsiCo-BIS-Plano.

The Department has received information that PepsiCo, Inc., Business & Information Solutions (BIS) Division, Bradenton, Florida (PepsiCo-BIS-Bradenton) operates in conjunction with PepsiCo-BIS-Plano. PepsiCo-BIS-Bradenton includes on-site leased

workers from Cognizant Technology Solutions and Infosys Technologies Ltd. Based on these findings, the Department is amending this certification to include PepsiCo-BIS-Bradenton.

The amended notice applicable to TA–W–81,420 is hereby issued as follows:

All workers of PepsiCo, Inc., Business & Information Solutions (BIS), including on-site leased workers from Procurestaff, Cognizant, Infosys, Wipro, and TCS, Plano, Texas (TA–W–81,420) and PepsiCo, Inc., Business & Information Solutions (BIS) Division, including on-site leased workers of Cognizant Technology Solutions and Infosys Technologies Ltd., Bradenton, Florida (TA–W–81,420A), who became totally or partially separated from employment on or after March 14, 2011, through May 25, 2014, and all workers in the group threatened with total or partial separation from employment on May 25, 2012 through May 25, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02537 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,116]

Heraeus Kulzer, LLC., Including On-Site Leased Workers from People Link Staffing, Forge Staffing, Career Transitions and Talent Source; South Bend, Indiana; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on November 16, 2012, applicable to workers of Heraeus Kulzer, LLC, including on-site leased workers from People Link Staffing and Forge Staffing, South Bend, Indiana. The workers are engaged in activities related to the production of dental products. The notice was published in the **Federal Register** on January 8, 2013 (78 FR 1255).

At the request of a company official, the Department reviewed the certification for workers of the subject firm. New information from the company shows that workers leased from Career Transitions and Talent Source were employed on-site at the South Bend, Indiana location of Heraeus Kulzer, LLC. The Department has determined that these workers were sufficiently under the control of Heraeus Kulzer, LLC to be considered leased workers.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in the production of dental products to Romania.

Based on these findings, the Department is amending this certification to include workers leased from Career Transitions and Talent Source working on-site at the South Bend, Indiana location of the subject firm.

The amended notice applicable to TA–W–82,116 is hereby issued as follows:

All workers from Heraeus Kulzer, LLC, including on-site leased workers from People Link Staffing, Forge Staffing, Career Transitions and Talent Source, South Bend, Indiana, who became totally or partially separated from employment on or after October 30, 2011, through November 16, 2014, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 17th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02535 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,904]

American Showa, Inc.; Blanchester Plant, Including On-Site Leased Workers From Adecco and Sims Bros., Inc.; Blanchester, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 23, 2012, applicable to workers and former workers of American Showa, Inc., Blanchester Plant, including on-site leased workers from Adecco, Blanchester, Ohio.

At the request of a State Workforce Agent, the Department reviewed the certification for workers of the subject firm.

The Department has received and confirmed information that workers from Sims Bros., Inc. were working on-site at the subject firm during the relevant period and that the services supplied by Sims Bros., Inc. were related to the production of gear boxes (and parts thereof) produced by the workers of the subject firm.

The amended notice applicable to TA–W–81,904 is hereby issued as follows:

All workers of American Showa, Inc., Blanchester Plant, including on-site leased workers from Adecco and Sims Bros., Inc., Blanchester, Ohio, who became totally or partially separated from employment on or after August 16, 2011 through October 23, 2014, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 11th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02540 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,755]

Thomson Reuters, Finance Operations & Technology Division, Including On-Site Leased Workers From Adecco; Eagan, MN; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on August 2, 2012, applicable to workers of Thomson Reuters, Finance Operations & Technology Division, including on-site leased workers from Adecco, Eagan, Minnesota. The notice was published in the **Federal Register** on August 16, 2012 (77 FR 49459).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The

workers are engaged in activities related to the supply of financial and administrative services.

New findings show that workers of Thomson Reuters, Finance Operations & Technology Division, including on-site leased workers from Adecco, Eagan, Minnesota were certified to apply for adjustment assistance under petition number TA–W–73,198. That certification expired on June 21, 2012. Accordingly, the Department is amending this certification to correct the impact date.

The amended notice applicable to TA–W–81,755 is hereby issued as follows:

All workers of Thomson Reuters, Finance Operations & Technology Division, including on-site leased workers from Adecco, Eagan, Minnesota, who became totally or partially separated from employment on June 22, 2012 through August 2, 2014, and all workers in the group threatened with total or partial separation from employment on June 22, 2012 through August 2, 2014, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 17th day of January 2013.

Michael W. Jaffe,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02538 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,833]

Franklin Electric Company, Inc., Including On-Site Leased Workers From Peoplelink Staffing Solutions, Remedy Intelligent Staffing, Labor Ready, and Driveforce Transportation; Oklahoma City, OK; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on December 3, 2010, applicable to workers and former workers of Franklin Electric Company, Inc., including on-site leased workers from Peoplelink Staffing Solutions, Oklahoma City, Oklahoma. Workers at the subject firm were engaged in employment related to the production of light centrifugal pump products.

At the request of a company official, the Department reviewed the immediate certification.

The Department has received information that workers from Remedy Intelligent Staffing, Labor Ready, and DriveForce Transportation were employed on-site at the Oklahoma City, Oklahoma facility of Franklin Electric Company, Inc. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Remedy Intelligent Staffing, Labor Ready, and DriveForce Transportation who worked on-site at the Oklahoma City, Oklahoma facility.

The amended notice applicable to TA–W–74,833 is hereby issued as follows:

All workers of Franklin Electric Company, Inc., including on-site leased workers from Peoplelink Staffing Solutions, Remedy Intelligent Staffing, Labor Ready, and DriveForce Transportation, Oklahoma City, Oklahoma, who became totally or partially separated from employment on or after November 3, 2009, through December 3, 2012, and all workers in the group threatened with total or partial separation from employment on December 3, 2010 through December 3, 2012, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 18th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02536 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–74,919]

Rg Steel Sparrows Point LLC, Formerly Known as Severstal Sparrows Point LLC, a Subsidiary of RG Steel LLC, Including On-Site Leased Workers From Echelon Service Company, Sun Associated Industries, Inc., MPI Consultants LLC, Alliance Engineering, Inc., Washington Group International, Javan & Walter, Inc., Kinetic Technical Resources Co., Innovative Practical Approach, Inc., CPSI, Accounts International, Adecco, Aerotek, Booth Consulting, Crown Security, Eastern Automation, EDS(HP), Teksystems, URS Corporation, and B More Industrial Services LLC, Sparrows Point, MD; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor (Department) issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on February 9, 2011, applicable to workers and former workers of RG Steel Sparrows Point LLC, formerly known as Severstral Sparrows Point LLC, a subsidiary of RG Steel LLC, Sparrows Point, MD; (subject firm).

On June 22, 2012, July 18, 2012, and July 30, 2012, the Department issued amended certification applicable to the subject firm.

Workers at the subject firm were engaged in employment related to the production of rolled steel. The worker group includes on-site leased workers from various firms.

At the request of a state workforce official, the Department reviewed the certification for workers and former workers of the subject firm.

The Department has received information that workers leased from B More Industrial Services LLC were employed on-site at the Sparrows Point, Maryland location of RG Steel Sparrows Point LLC. The Department has determined that these workers from B More Industrial Services LLC were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from B More Industrial Services LLC who worked on-site at the Sparrows Point, Maryland facility.

The amended notice applicable to TA–W–74,919 is hereby issued as follows:

All workers of RG Steel Sparrows Point LLC, formerly known as Severstal Sparrows Point LLC, a subsidiary of RG Steel LLC, including on-site leased workers from Echelon Service Company, Sun Associated Industries, Inc., MPI Consultants LLC, Alliance Engineering, Inc., Washington Group International, Javan & Walter, Inc., Kinetic Technical Resources Co., Innovative Practical Approach, Inc., CPSI, Accounts International, Adecco, Aerotek, Booth Consulting, Crown Security, Eastern Automation, EDS(HP), TekSystems, URS Corporation, and B More Industrial Services LLC, Sparrows Point, Maryland, who became totally or partially separated from employment on or after November 22, 2009 through February 9, 2013, and all workers in the group threatened with total or partial separation from employment on February 9, 2011 through February 9, 2013, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 16th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02534 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–82,095]

Verizon Services Corporation, Customer Services Clerk, General Clerk, Clarksburg, WV; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated December 27, 2012 and received by the Department of Labor (Department) on January 4, 2013, workers of Verizon Services Corporation, Customer Services Clerk, General Clerk, Clarksburg, West Virginia (subject firm) requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of the subject firm. The Department's determination was issued on December 19, 2012. The Department's Notice of determination was published in the **Federal Register** on January 10, 2013 (78 FR 2290).

The initial investigation resulted in a negative determination based on the findings that the subject firm did not shift to a foreign country the supply of services like or directly competitive with those supplied by the workers and did not import services like or directly competitive with those supplied by the workers.

The request for reconsideration supplied new information regarding a shift to the Philippines and India, as well as reiterated the earlier allegation of a shift to Mexico.

The Department has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the petition worker group meets the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 15th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02541 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of January 7, 2013 through January 11, 2013.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,129	Boise White Paper, LLC, Boise Paper Holdings, LLC, Guardsmark Security, Warner Enterprises, etc.	St. Helens, OR	November 2, 2011.
82,184	KCA Alamosa Sewing	Alamosa, CO	November 27, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,194	Husky Injection Molding Systems, Inc., Buffalo Spare Parts Division, Selective Staffing, Aerotek Staffing.	Buffalo, NY	November 27, 2011.
82,206	The Nielsen Company (US), LLC, A.C. Nielsen Company, LLC, Including On-Site Leased Workers From Adecco.	Green Bay, WI	December 4, 2011.
82,206A	The Nielsen Company (US), LLC, A.C. Nielsen Company, LLC, Including On-Site Leased Workers From Adecco.	Fond du Lac, WI	December 4, 2011.
82,240	Allesee Orthodontic Appliances (AOA)—Calexico	Calexico, CA	December 11, 2011.
82,243	Leach International, Esterline Technologies	Buena Park, CA	August 14, 2012.
82,243A	Leased Workers From Staffmark, Leach International, Esterline Technologies.	Buena Park, CA	December 11, 2011.
82,269	Federal-Mogul Corporation, Vehicle Component Solutions Division, Kelly Services.	Smithville, TN	December 18, 2011.
82,269A	Leased Workers From Seatoncorp, Working On-Site at Federal-Mogul Corporation, Vehicle Component Solutions D.	Smithville, TN	December 18, 2011.
82,280	Tri-Tronics, Inc, Garmin Ltd, Aerotek	Tucson, AZ	December 17, 2011.
82,293	Fiserv, POD Recon Department	Walnut, CA	December 21, 2011.
82,300	UBS Financial Services, Inc, Wealth Management Americas, Leafstone.	Weehawken, NJ	December 27, 2011.
82,301	UTC Climate Controls & Security (Carrier), Americas Division	Tyler, TX	February 19, 2013.
82,301A	UTC Climate Controls & Security (Carrier), Americas Division	Tyler, TX	December 27, 2011.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W No.	Subject firm	Location	Impact date
82,156	Johnstown Specialty Castings, Inc., Whemco	Johnstown, PA.	

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
82,112	Rockwell Collins, Inc., Commercial Systems, On-site Leased Workers From Allegis Group Services.	Cedar Rapids, IA	October 25, 2011.

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
82,096 Roanoke, IL..	ThyssenKrupp Access Manufacturing LCC.		
82,197	Delta Air Lines, Inc., Reservation Sales and Customer Care Call Center.	Seatac, WA.	
82,197A	Delta Air Lines, Inc., Reservation Sales and Customer Care Call Center.	Sioux City, IA.	
82,216	PCCW Teleservices (US), Inc.	Quincy, IL.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
82,281	Gamesa Technology Corporation, Fiberblade, LLC	Ebensburg, PA.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
82,295	Radisys Corporation	San Diego, CA.	

I hereby certify that the aforementioned determinations were issued during the period of January 7, 2013 through January 11, 2013. These determinations are available on the Department's Web site *tradeact/taa/taa search form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: January 15, 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02543 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for

workers by (TA–W) number issued during the period of January 14, 2013 through January 18, 2013.

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,077	Consolidated Pine Inc., Mid-Oregon Personnel	Prineville, OR	October 12, 2011.
82,111	Carolina Precision Plastics, Monroe Staffing	Stratford, CT	October 25, 2011.
82,168A	Foamworks, Inc	Cleveland, TN	November 21, 2011.

TA–W No.	Subject firm	Location	Impact date
82,229	Designer Blinds of Omaha, Inc	Omaha, NE	December 7, 2011.
82,279	HL Operating, LLC, Formerly HL Operating Corp., Manpower, Paid Through Samsonite LLC.	Lebanon, TN	December 6, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,173	Bank of America, Unclaimed Property/Reg D Group	Kansas City, MO	November 26, 2011.
82,189	Verizon Business Networks Services, Inc., Senior Analysts-Order Mgmt. Voice Over Internet Protocol, Small, Medium Bus.	Tampa, FL	November 28, 2011.
82,200	Covidien, Vascular Therapy Medical Devices, Kelly Services	Seneca, SC	December 3, 2011.
82,220	Netlist, Inc., Test Engineering, Vitesse Recruiting	Irvine, CA	December 5, 2011.
82,225	Dura Automotive Systems Cable Operations LLC, Control Systems Div., Hamilton Ryker, Manpower, Personnel Placements, etc.	Milan, TN	December 6, 2011.
82,230	YP Texas Region Yellow Pages LLC, Dallas Texas Division, Publishing Ops. Group, YP Texas Region, etc.	Dallas, TX	December 7, 2011.
82,254	Invensys Operations Management, Subsidiary of Invensys PLC, CDI Corporation.	Foxboro, MA	December 13, 2011.
82,272	L & W Supply Corporation, Financial Services Hub	Nottingham, MD	December 17, 2011.
82,273	Johnson Controls, Inc., Global Workplace Solutions, Americas Call Center.	Milwaukee, WI	December 14, 2011.
82,276	Peak Sun Silicon Corporation, Peak Sun Materials Corporate Division	Albany, OR	December 14, 2011.
82,304	Tyco Electronics, Telecom Networks Business Unit	Shakopee, MN	March 3, 2013.
82,306	Riverside Publishing Company, Tech. Prod. Services Group, Houghton Mifflin Harcourt Publishing Co., etc.	Rolling Meadows, IL	January 2, 2012.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,168	Foamworks, Inc	Morristown, TN	November 21, 2011.
82,336	Dana Structural Manufacturing LLC, Structures Division, Manpower	Longview, TX	February 19, 2013.

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
82,217	IronTiger Logistics, Inc., 2801 Wood Drive	Garland, TX	December 5, 2012.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
82,309	Plumas Bank, Bank Item Processing Department	Quincy, CA.	

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W No.	Subject firm	Location	Impact date
82,277	The Berry Company, LLC	Erie, PA.	
82,323	Penthera Partners, Inc	Pittsburgh, PA.	

The following determinations terminating investigations were issued in cases where these petitions were not filed in accordance with the requirements of 29 CFR 90.11. Every petition filed by workers must be signed by at least three individuals of the petitioning worker group. Petitioners separated more than one year prior to the date of the petition cannot be covered under a certification of a petition under Section 223(b), and therefore, may not be part of a petitioning worker group. For one or more of these reasons, these petitions were deemed invalid.

TA–W No.	Subject firm	Location	Impact date
82,343	Debusk Knitting Mill	New Tazewell, TN.	

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W No.	Subject firm	Location	Impact date
82,210	Wellpoint	Bronx, NY.	
82,231	PepsiCo, Inc., Business & Information Solutions (BIS) Division, Cognizant & Infosys, Ltd.	Bradenton, FL.	
82,263	American Airlines, Tulsa International Airport, Aircraft Maintenance and Related.	Tulsa, OK.	
82,294	American Airlines, Tulsa International Airport, Aircraft Maintenance and Related.	Tulsa, OK.	

I hereby certify that the aforementioned determinations were issued during the period of January 14, 2013 through January 18, 2013. These determinations are available on the Department's Web site tradeact/taa/taa search form.cfm under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: January 23, 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02533 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 19, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 19, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 23rd of January 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[19 TAA petitions instituted between 1/14/13 and 1/18/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82337	Grede II, LLC (Company)	Marion, AL	01/14/13	01/11/13

APPENDIX—Continued

[19 TAA petitions instituted between 1/14/13 and 1/18/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82338	Hampton Capital (Workers)	Aberdeen, NC	01/14/13	01/12/13
82339	Mondelez Global LLC (Company)	San Antonio, TX	01/14/13	01/11/13
82340	YP Holdings (Union)	Detroit, MI	01/14/13	01/13/13
82341	Hostess Brands, Inc. (5 Locations in WV) (State/One-Stop)	WV	01/14/13	01/11/13
82342	RG Steel Wheeling Corrugating Company (Workers)	Fort Payne, AL	01/14/13	01/13/13
82343	Debusk Knitting Mill (Workers)	New Tazewell, TN	01/14/13	01/06/13
82344	Wm Powell Valve (Union)	Cincinnati, OH	01/15/13	01/03/13
82345	Connextions, Inc. (Workers)	Concord, NC	01/15/13	01/14/13
82346	Whirlpool Corporation (State/One-Stop)	Fort Smith, AR	01/15/13	01/14/13
82347	Performance Motorsports, Inc. (State/One-Stop)	Huntington Beach, CA	01/15/13	01/14/13
82348	Delft Blue LLC (Company)	New York Mills, NY	01/15/13	01/14/13
82349	Davis—Standard LLC (State/One-Stop)	Pawcatuck, CT	01/15/13	01/15/13
82350	Kurz-Kasch, Inc. (Company)	South Boston, VA	01/16/13	01/16/13
82351	Jensen Apparel/Jensen Promotional Items, Inc (Workers)	Albemarle, NC	01/17/13	01/16/13
82352	Versalogic Corporation (Workers)	Eugene, OR	01/17/13	01/14/13
82353	Comcast Cable (Workers)	Beaverton, OR	01/18/13	12/27/12
82354	Federal—Mogul (State/One-Stop)	Lake City, MN	01/18/13	01/17/13
82355	Triumph Aerostructures Vought Aircraft Division (Union)	Grand Prairie, TX	01/18/13	01/17/13

[FR Doc. 2013–02532 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221(a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 19, 2013.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than February 19, 2013.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 15th of January 2013.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[22 TAA petitions instituted between 1/7/13 and 1/11/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82315	Lands' End, Inc. (Workers)	Dodgeville, WI	01/07/13	01/04/13
82316	Donald Nell dba Wholesalers (Company)	Cudahy, WI	01/07/13	01/06/13
82317	Bank Of America, Deposit Product Services/Retirement and Investment (Workers).	San Francisco, CA	01/07/13	01/04/13
82318	Westfield LLC (Company)	San Francisco, CA	01/07/13	01/04/13
82319	Art Print Co. (Workers)	Taylor, PA	01/07/13	01/04/13
82320	Steelcase Inc. (Company)	Kentwood, MI	01/08/13	01/07/13
82321	Stoneridge Electronics Global Wiring Division (Workers)	Warren, OH	01/08/13	01/01/13
82322	American Silk Mills LLC (Company)	Dunmore, PA	01/08/13	01/07/13
82323	Penthera Partners Inc. (Company)	Pittsburgh, PA	01/08/13	01/07/13
82324	Wells Fargo Bank (State/One-Stop)	Concord, CA	01/08/13	01/04/13
82325	TE Connectivity (Company)	Greensboro, NC	01/09/13	12/11/12
82326	YP Holdings LLC (Workers)	San Francisco, CA	01/09/13	01/08/13
82327	State Street Corporation (Workers)	Quincy, MA	01/09/13	01/08/13
82328	Cequent Perfomance Products (Company)	Huntington, IN	01/09/13	01/08/13
82329	Hostess Brands, Inc. (20 Locations in NY) (State/One-Stop)	NY	01/10/13	01/09/13
82330	Plastics Dynamics Inc. (State/One-Stop)	Kent, WA	01/10/13	01/08/13
82331	Harte-Hanks Incorporated (Workers)	Austin, TX	01/10/13	01/09/13
82332	River Valley Newspaper Group (Workers)	La Crosse, WI	01/10/13	01/04/13

APPENDIX—Continued

[22 TAA petitions instituted between 1/7/13 and 1/11/13]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82333	West Corporation (Teleservice) (Workers)	Tulsa, OK	01/11/13	12/14/12
82334	Covidien (Company)	Boulder, CO	01/11/13	01/10/13
82335	Anthem Blue Cross & Blue Shield (Workers)	Worthington, OH	01/11/13	01/10/13
82336	Dana Structural Manufacturing LLC (State/One-Stop)	Longview, TX	01/11/13	01/10/13

[FR Doc. 2013–02542 Filed 2–5–13; 8:45 am]

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DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,815]

Hartford Financial Services Group, Inc., Commercial/Actuarial/ Information Delivery Services (IDS)/Corporate & Financial Reporting Group, Hartford, CT; Notice of Negative Determination on Reconsideration

On December 4, 2012, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Hartford Financial Services Group, Inc., Commercial/Actuarial/Information Delivery Services (IDS)/Corporate & Financial Reporting group, Hartford, Connecticut (The Hartford-IDS Group). The Department's Notice of determination was published in the **Federal Register** on January 4, 2013 (78 FR 773).

The Hartford-IDS Group is engaged in activities related to the supply of financial services. The Hartford-IDS Group develops databases for creating reports for corporate, regulatory, and financial services. The Hartford-IDS Group is separately identifiable from other groups within Hartford Financial Services Group, Inc.

Workers within the Hartford-IDS Group provide business and information technology applications for corporate, regulatory, and financial reporting.

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis-interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination based on the findings that, with respect to Section 222(a) and Section 222(b) of the Trade Act of 1974, as amended (the Act), Criterion (1) has not been met because a significant number or proportion of the workers in such workers' firm have not become totally or partially separated, nor are they threatened to become totally or partially separated.

The request for reconsideration states that ''The Hartford Financial Services employs nearly 10,000 employees in Connecticut. The majority work full-time hours and are employed at the 690 Asylum Ave, Hartford, Connecticut site, the location of the petition in question * * * According to a former employee * * * his Unit was an independent unit isolated from others, but the information prepared by his unit, the database, was used by many units within The Hartford. His particular Unit encompassed roughly 75 employees. While only a few workers have been laid off to date in the specific unit, the database was used by * * * units that have been TAA-certified.''

Information obtained during the reconsideration investigation confirmed that with respect to Section 222(a) and Section 222(b) of the Act, Criterion (1) has not been met because a significant number or proportion of the workers in such workers' firm have not become totally or partially separated, nor are they threatened to become totally or partially separated.

Significant number or proportion of the workers means that: (a) In most cases the total or partial separations, or both, in a firm or appropriate subdivision thereof, are the equivalent to a total unemployment of five percent (5 percent) of the workers or 50 workers, whichever is less; or (b) At least three workers in a firm (or appropriate subdivision thereof) with a work force of fewer than 50 workers would ordinarily have to be affected (29 CFR 90.2).

A careful review of previously-submitted information and information obtained during the reconsideration investigation revealed that the worker group consisting of Hartford-IDS Group did not meet this requirement.

The workers' firm has not been publically identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in an affirmative finding of serious injury, market disruption, or material injury, or threat thereof.

Therefore, after careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After careful review, I determine that the requirements of Section 222 of the Act, 19 U.S.C. 2272, have not been met and, therefore, deny the petition for group eligibility of Hartford Financial Services Group, Inc., Commercial/Actuarial/Information Delivery Services (IDS)/Corporate & Financial Reporting group, Hartford, Connecticut, to apply for adjustment assistance, in accordance with Section 223 of the Act, 19 U.S.C. 2273.

Signed in Washington, DC, on this 11th day of January 2013.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2013–02544 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–FN–P

NATIONAL SCIENCE FOUNDATION

Committee on Equal Opportunities in Science and Engineering #1173; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L.92–463, as amended), the National Science Foundation announces the following meeting.

Name: Committee on Equal Opportunities in Science and Engineering (CEOSE).

Dates/Time: February 25, 2013, 9:00 a.m.–5:30 p.m.; February 26, 2013, 9:00 a.m.–1:00 p.m.

Place: National Science Foundation (NSF), 4201 Wilson Boulevard, Arlington, VA 22230.

To help facilitate your entry into the building, contact the individual listed below. Your request to attend this meeting must be received by email (*vfung@nsf.gov*) on or prior to February 21st, 2013.

Type of Meeting: Open.

Contact Person: Dr. Bernice Anderson, Senior Advisor and CEOSE Designated Federal Officer, Office of International and Integrative Activities, National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230.

Telephone Numbers: (703) 292–5151, 703–292–8040—*banderso@nsf.gov*.

Minutes: Meeting minutes and other information may be obtained from the Senior Advisor and CEOSE Designated Federal Officer at the above address or the Web site at *http://www.nsf.gov/od/oia/activities/ceose/index.jsp*.

Purpose of Meeting: To study data, programs, policies, and other information pertinent to the National Science Foundation and to provide advice and recommendations concerning broadening participation in science and engineering.

Agenda: Opening Statement by the CEOSE Chair

Discussions:

- Concurrence on the CEOSE Minutes of the June 19–20, 2012 Meeting
- Discussion of Key Points from the Meeting among the National Science Foundation Director and CEOSE officers
- A Conversation with Dr. Cora B. Marrett, Deputy Director of the National Science Foundation
- NSF Diversity and Inclusion Strategic Plan
- Reports of CEOSE Liaisons to NSF Advisory Committees
- Broadening Participation Efforts of NSF Centers and Major Research Instrumentation Program
- Update on Interagency Broadening Participation Activities by Federal Liaisons
- Discussion about the 2011–2012 Biennial CEOSE Report To Congress
- Discussion on CEOSE Unfinished Business and New Business

Dated: January 31, 2013.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 2013–02547 Filed 2–5–13; 8:45 am]

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POSTAL REGULATORY COMMISSION

[Docket No. MC2013–36 and CP2013–47; Order No. 1644]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail Contract 53 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 7, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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II. Notice of Filings
III. Ordering Paragraphs

I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 53 to the competitive product list.[1] It asserts that Priority Mail Contract 53 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–36.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–47.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective one business day after the Commission issues all necessary regulatory approval. *Id.* at 2. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* at 2–3. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment E.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–36 and CP2013–47 to consider the Request pertaining to the proposed Priority Mail Contract 53

[1] Request of the United States Postal Service to Add Priority Mail Contract 53 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 30, 2013 (Request).

product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than February 7, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Kenneth Moeller to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–36 and CP2013–47 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Kenneth Moeller is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than February 7, 2013.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–02570 Filed 2–5–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket No. MC2013–37 and CP2013–48; Order No. 1645]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing concerning the addition of Priority Mail Contract 54 to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* February 7, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

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I. Introduction

In accordance with 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.,* the Postal Service filed a formal request and associated supporting information to add Priority Mail Contract 54 to the competitive product list.[1] It asserts that Priority Mail Contract 54 is a competitive product ''not of general applicability'' within the meaning of 39 U.S.C. 3632(b)(3). Request at 1. The Request has been assigned Docket No. MC2013–37.

The Postal Service contemporaneously filed a redacted contract related to the proposed new product under 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. *Id.* Attachment B. The instant contract has been assigned Docket No. CP2013–48.

Request. To support its Request, the Postal Service filed six attachments as follows:

- Attachment A—a redacted copy of Governors' Decision No. 11–6, authorizing the new product;
- Attachment B—a redacted copy of the contract;
- Attachment C—proposed changes to the Mail Classification Schedule competitive product list with the addition underlined;
- Attachment D—a Statement of Supporting Justification as required by 39 CFR 3020.32;
- Attachment E—a certification of compliance with 39 U.S.C. 3633(a); and
- Attachment F—an application for non-public treatment of materials to maintain redacted portions of the contract and related financial information under seal.

In the Statement of Supporting Justification, Dennis R. Nicoski, Manager, Field Sales Strategy and Contracts, asserts that the contract will cover its attributable costs, make a positive contribution to covering institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. *Id.* Attachment D at 1. Mr. Nicoski contends that there will be no issue of market dominant products subsidizing competitive products as a result of this contract. *Id.*

Related contract. The Postal Service included a redacted version of the related contract with the Request. *Id.* Attachment B. The contract is scheduled to become effective 1 business day after the day on which the Commission issues all necessary regulatory approval. *Id.* at 2. The contract will expire 3 years from the effective date unless, among other things, either party terminates the agreement upon 30 days' written notice to the other party. *Id.* at 3. The Postal Service represents that the contract is consistent with 39 U.S.C. 3633(a). *Id.* Attachment E.

The Postal Service filed much of the supporting materials, including the related contract, under seal. *Id.* Attachment F. It maintains that the redacted portions of the Governors' Decision, contract, customer-identifying information, and related financial information, should remain confidential. *Id.* at 3. This information includes the price structure, underlying costs and assumptions, pricing formulas, information relevant to the customer's mailing profile, and cost coverage projections. *Id.* The Postal Service asks the Commission to protect customer-identifying information from public disclosure indefinitely. *Id.* at 7.

II. Notice of Filings

The Commission establishes Docket Nos. MC2013–37 and CP2013–48 to consider the Request pertaining to the proposed Priority Mail Contract 54 product and the related contract, respectively.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR 3015.5, and 39 CFR part 3020, subpart B. Comments are due no later than February 7, 2013. The public portions of these filings can be accessed via the Commission's Web site (*http://www.prc.gov*).

The Commission appoints Lyudmila Y. Bzhilyanskaya to serve as Public Representative in these dockets.

III. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–37 and CP2013–48 to consider the matters raised in each docket.

2. Pursuant to 39 U.S.C. 505, Lyudmila Y. Bzhilyanskaya is appointed to serve as an officer of the Commission (Public Representative) to represent the

[1] Request of the United States Postal Service to Add Priority Mail Contract 54 to Competitive Product List and Notice of Filing (Under Seal) of Unredacted Governors' Decision, Contract, and Supporting Data, January 30, 2013 (Request).

interests of the general public in these proceedings.

3. Comments by interested persons in these proceedings are due no later than February 7, 2013.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–02571 Filed 2–5–13; 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:* February 6, 2013.

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 January 30, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 53 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–36, CP2013–47.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–02522 Filed 2–5–13; 8:45 am]

BILLING CODE 7710–12–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:* February 6, 2013.

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 January 30, 2013, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 54 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–37, CP2013–48.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–02521 Filed 2–5–13; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17a–12 and Form X–17A–5IIB; SEC File No. 270–442, OMB Control No. 3235–0498.

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'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of an extension of the previously approved collection of information provided for in Rule 17a–12 (17 CFR 240.17a–12) and Part IIB of Form X–17A–5 (17 CFR 249.617) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule17a–12 requires OTC derivatives dealers to file quarterly Financial and Operational Combined Uniform Single Reports (''FOCUS'' reports) on Part IIB of Form X–17A–5, the basic document for reporting the financial and operational condition of over-the-counter (''OTC'') derivatives dealers. Rule 17a–12 also requires that OTC derivatives dealers file audited financial statements annually. The reports required under Rule 17a–12 provide the Commission with information used to monitor the operations of OTC derivatives dealers and to enforce their compliance with the Commission's rules. These reports also enable the Commission to review the business activities of OTC derivatives dealers and to anticipate, where possible, how these dealers may be affected by significant economic events.

There are currently four registered OTC derivatives dealers. The staff expects that one additional firm will register as an OTC derivatives dealer within the next three years. The staff estimates that the average amount of time necessary to prepare and file the quarterly reports required by the rule is eighty hours per OTC derivatives dealer [1] and that the average amount of time to prepare and file the annual audit report is 100 hours per OTC derivatives dealer per year, for a total reporting burden of 180 hours per OTC derivatives dealer annually. Thus the staff estimates that the total industry-wide reporting burden to comply with the requirements of Rule 17a–12 is 900 hours per year (180×5). Further, the Commission estimates that the total internal compliance cost associated with this requirement is approximately $250,000 per year.[2] The Commission previously estimated that there were no external annualized costs associated with Rule 17a–12. However, the cost associated with an independent accountant's examination of the financial statements OTC derivatives dealers file with the Commission should have been included in prior submissions. For purposes of the reporting burden for Rule 17a–5 under the Exchange Act (17 CFR 240.17a–5), the Commission estimated that the average annual reporting cost per broker-dealer for an independent public accountant to examine the financial statements was approximately $46,300 per broker-dealer. Based on this estimate, the total industry-wide annual reporting cost would be approximately $231,500 ($46,300 × 5).

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.

[1] Based upon an average of 4 responses per year and an average of 20 hours spent preparing each response.

[2] Based on staff experience, an OTC derivatives dealer likely would have a Compliance Manager gather the necessary information and prepare and file the quarterly reports and annual audit report and supporting schedules. According to the Securities Industry and Financial Markets Association Report on Management and Professional Earnings in the Securities Industry dated October 2011, which provides base salary and bonus information for middle-management and professional positions within the securities industry, the hourly cost of a compliance manager, which the Commission staff has modified to account for an 1800-hour work year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, is approximately $279/hour. $279 times 900 hours = $251,100.

The public may view background documentation for this information collection at the following Web site: *www.reginfo.gov.* Please direct your written comments to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC, 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312, or send an email to *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02565 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 14f–1; OMB Control No. 3235–0108, SEC File No. 270–127.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved.

Under Exchange Act Rule 14f–1 (17 CFR 240.14f–1), if a person or persons have acquired securities of an issuer in a transaction subject to Sections 13(d) or 14(d) of the Exchange Act, and changes a majority of the directors of the issuer otherwise than at a meeting of security holders, then the issuer must file with the Commission and transmit to security holders information related to the change in directors within 10 days prior to the date the new majority takes office as directors. We estimate that it takes approximately 18 burden hours to provide the information required under Rule 14f–1 and that the information is filed by approximately 172 respondents for a total annual burden of 3,096 hours.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02564 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Rule 13e–1;
OMB Control No. 3235–0305, SEC File No. 270–255.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Rule 13e–1 (17 CFR 240.13e–1) under the Securities Exchange Act of 1934 (U.S.C. 78 *et seq.*) makes it unlawful for an issuer who has received notice that it is the subject of a tender offer made under Section 14(d)(1) of the Exchange Act to purchase any of its equity securities during the tender offer, unless it first files a statement with the Commission containing information required by the rule. This rule is in keeping with the Commission's statutory responsibility to prescribe rules and regulations that are necessary for the protection of investors. Public companies are the respondents. We estimate that it takes approximately 10 burden hours per response to provide the information required under Rule 13e–1 and that the information is filed by approximately 20 respondents. We estimate that 25% of the 10 hours per response (2.5 hours) is prepared by the company for a total annual reporting burden of 50 hours (2.5 hours per response × 20 responses)

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02563 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Schedule 13E–4F; OMB Control No. 3235–0375, SEC File No. 270–340.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Schedule 13E–4F (17 CFR 240.13e–102) may be used by an issuer that is incorporated or organized under the laws of Canada to make a cash tender or exchange offer for the issuer's own securities if less than 40 percent of the class of such issuer's securities outstanding that are the subject of the tender offer is held by U.S. holders. The information collected must be filed with the Commission and is publicly available. We estimate that it takes approximately 2 hours per response to prepare Schedule 13E–4F and that the information is filed by approximately 3 respondents annually for a total annual reporting burden of 6 hours (2 hours per response × 3 responses).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov*. Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov*; and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02568 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17Ad–16; SEC File No. 270–363, OMB Control No. 3235–0413.

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'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the existing collection of information provided for in Rule 17Ad–16 (17 CFR 240.17Ad–16) under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17Ad–16 requires a registered transfer agent to provide written notice to the appropriate qualified registered securities depository when assuming or terminating transfer agent services on behalf of an issuer or when changing its name or address. In addition, transfer agents that provide such notice shall maintain such notice for a period of at least two years in an easily accessible place. This rule addresses the problem of certificate transfer delays caused by transfer requests that are directed to the wrong transfer agent or the wrong address.

We estimate that the transfer agent industry submits approximately 3,700 Rule 17Ad–16 notices to appropriate qualified registered securities depositories. The staff estimates that the average amount of time necessary to create and submit each notice is approximately 15 minutes per notice. Accordingly, the estimated total industry burden is 925 hours per year (15 minutes multiplied by 3,700 notices filed annually).

Because the information needed by transfer agents to properly notify the appropriate registered securities depository is readily available to them and the report is simple and straightforward, the cost is relatively minimal. The average internal compliance cost to prepare and send a notice is approximately $7.50 (15 minutes at $30 per hour). This yields an industry-wide internal compliance cost estimate of $27,750 (3,700 notices multiplied by $7.50 per notice).

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.

The public may view background documentation for this information collection at the following Web site: *www.reginfo.gov.* Please direct your written comments to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312, or send an email to *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: January 31, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02567 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–30373; File No. 812–14036]

AXA Equitable Life Insurance Company, et al; Notice of Application

January 31, 2013.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of application for an order approving the substitution of certain securities pursuant to Section 26(c) of the Investment Company Act of 1940, as amended (the ''1940 Act'' or ''Act'') and an order of exemption pursuant to Section 17(b) of the Act from Section 17(a) of the Act.

APPLICANTS: AXA Equitable Life Insurance Company (''AXA Equitable''), Separate Account 45 of AXA Equitable (''Separate Account 45''), and Separate Account 49 of AXA Equitable (''Separate Account 49'' and together with Separate Account 45, ''Separate Accounts''), AXA Premier VIP Trust (''VIP Trust'') and EQ Advisors Trust (''EQ Trust'' and together with VIP Trust, the ''Trusts''). AXA Equitable and the Separate Accounts are referred to herein as the ''Substitution Applicants.'' The Substitution Applicants and the Trusts are referred to herein as the ''Section 17 Applicants.''

SUMMARY OF APPLICATION: The Substitution Applicants seek an order pursuant to Section 26(c) of the 1940 Act, approving the substitution of shares of certain series of the EQ Trust (''Replacement Funds'') for shares of certain other series of the EQ Trust and the VIP Trust (''Existing Funds''). Each of the Replacement and Existing Funds currently serves as an underlying investment option for certain variable annuity contracts issued by AXA Equitable (the ''Contracts''). The Section 17 Applicants also seek an order pursuant to Section 17(b) of the 1940 Act exempting them from Section 17(a) of the 1940 Act to the extent necessary to permit them to engage in certain in-

kind transactions in connection with the substitution (''In-Kind Transactions'').

DATES: *Filing Date:* The application was filed on May 31, 2012, and an amended and restated application was filed on October 1, 2012, November 30, 2012, January 14, 2013 and January 30, 2013.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Secretary of the Commission and serving the applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 25, 2013, and should be accompanied by proof of service on the applicants in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requester's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the Commission.

ADDRESSES: Secretary, SEC, 100 F Street NE., Washington, DC 20549–1090. Applicants: Steven M. Joenk, Senior Vice President, AXA Equitable Life Insurance Company, 1290 Avenue of Americas, New York, New York 10104; Patricia Louie, Esq., Senior Vice President & Associate General Counsel, AXA Equitable Life Insurance Company, 1290 Avenue of Americas, New York, New York 10104; and Clifford J. Alexander, Esq. and Mark C. Amorosi, Esq., K&L Gates LLP, 1601 K Street NW., Washington, DC 20006.

FOR FURTHER INFORMATION CONTACT: Alison White, Senior Counsel, or Michael L. Kosoff, Branch Chief, Office of Insurance Products, Division of Investment Management, at (202) 551–6795.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm*, or by calling (202) 551–8090.

Applicants' Representations

1. AXA Equitable, on its own behalf and on behalf of its Separate Accounts, proposes to substitute shares of the Replacement Funds for shares of the Existing Funds held by the Separate Accounts to fund the Contracts.

2. AXA Equitable is the depositor and sponsor of the Separate Accounts.

3. Each of Separate Account 45 and Separate Account 49 is a ''separate account'' as defined by Rule 0–1(e) under the Act and each is registered under the Act as a unit investment trust for purposes of funding the Contracts. Security interests under the Contracts have been registered under the Securities Act of 1933. The application sets forth the registration statement file numbers for the Contracts and the Separate Accounts.

4. The EQ Trust is a registered open-ended management investment company of the series type (File Number 333–17217). It currently offers 72 separate series (each an ''EQ Portfolio'' and collectively, the ''EQ Portfolios''). It has three classes of shares—Class IA shares, Class IB shares and Class K shares. Only Class IA and Class IB shares will be involved in the proposed Substitutions.

5. AXA Equitable Funds Management Group, LLC (''FMG'') currently serves as investment manager (''Manager'') of each of the EQ Portfolios pursuant to the Investment Management Agreements between the EQ Trust, on behalf of each EQ Portfolio, and FMG (''Management Agreements''). FMG is a wholly-owned subsidiary of AXA Equitable and is registered as an investment adviser under the Investment Advisers Act of 1940, as amended.

6. The VIP Trust is a registered open-end management investment company of the series type (File No. 333–70754). It currently offers 20 separate series (each, a ''VIP Portfolio'' and collectively, the ''VIP Portfolios''). It has three classes of shares—Class A shares, Class B shares, and Class K shares. Only Class A and Class B shares will be involved in the proposed Substitutions.

7. FMG currently serves as investment manager of each of the VIP Portfolios pursuant to the Management Agreements between the VIP Trust, on behalf of each VIP Portfolio, and FMG.

8. Both the EQ Trust and VIP Trust have received an exemptive order from the Commission (''Multi-Manager Order'') that permits the Manager, or any entity controlling, controlled by, or under common control (within the meaning of Section 2(a)(9) of the 1940 Act) with the Manager, subject to certain conditions, to hire and replace unaffiliated subadvisors and to enter into and amend sub-advisory agreements without shareholder approval.

9. The Contracts are individual and group deferred variable annuity contracts. Under the Contracts, AXA Equitable reserves the right to substitute different underlying investment options for current underlying investment options offered as funding options under the Contracts. The prospectuses for the Contracts include disclosure of the reservation of this right. The Contracts which offer the Existing Funds are registered in the registration statements listed in footnote 2 of the application.

10. AXA Equitable, on its own behalf and on behalf of its Separate Accounts, requests an order from the Commission pursuant to Section 26(c) of the 1940 Act approving the following 26 proposed substitutions:

Sub. No.	Existing portfolio	Replacement portfolio
1.	EQ/Oppenheimer Global Portfolio	EQ/Global Multi-Sector Equity Portfolio.
2.	EQ/MFS International Growth Portfolio	EQ/International Core PLUS Portfolio.
3.	Multimanager International Equity Portfolio.	
4.	EQ/Capital Guardian Research Portfolio	EQ/Large Cap Core PLUS Portfolio.
5.	EQ/Davis New York Venture Portfolio.	
6.	EQ/Lord Abbett Large Cap Core Portfolio.	
7.	EQ/UBS Growth and Income Portfolio.	
8.	Multimanager Large Cap Core Equity Portfolio.	
9.	EQ/Equity Growth PLUS Portfolio	EQ/Large Cap Growth PLUS Portfolio.
10.	EQ/Montag & Caldwell Growth Portfolio.	
11.	EQ/T. Rowe Price Growth Stock Portfolio.	
12.	EQ/Wells Fargo Omega Growth Portfolio.	
13.	Multimanager Aggressive Equity Portfolio.	
14.	EQ/BlackRock Basic Value Equity Portfolio	EQ/Large Cap Value PLUS Portfolio.
15.	EQ/Boston Advisors Equity Income Portfolio.	
16.	EQ/JPMorgan Value Opportunities Portfolio.	

Sub. No.	Existing portfolio	Replacement portfolio
17.	EQ/Van Kampen Comstock Portfolio.	
18.	Multimanager Large Cap Value Portfolio.	
19.	Multimanager Mid Cap Growth Portfolio	AXA Tactical Manager 400 Portfolio.
20.	Multimanager Mid Cap Value Portfolio	EQ/Mid Cap Value PLUS Portfolio.
21.	Multimanager Small Cap Growth Portfolio	AXA Tactical Manager 2000 Portfolio.
22.	Multimanager Small Cap Value Portfolio.	
23.	EQ/Global Bond PLUS Portfolio	EQ/Core Bond Index Portfolio.
24.	Multimanager Multi-Sector Bond Portfolio.	
25.	Multimanager Core Bond Portfolio	EQ/Quality Bond PLUS Portfolio.
26.	EQ/PIMCO Ultra Short Bond Portfolio	EQ/AllianceBernstein Short Duration Government Bond Portfolio.

11. A comparison of the strategies, risks and performance of each Existing and Replacement Fund is included in the application. A comparison of the objectives, primary investments and fees and expenses (as of 12/31/2011) of each Existing and Replacement Fund follows:

Sub No.	Existing portfolio	Replacement portfolio
1.	*EQ/Oppenheimer Global Portfolio*	*EQ/Global Multi-Sector Equity Portfolio.*
	Objective: Capital appreciation	*Objective:* Capital appreciation; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: U.S. and foreign equity securities of companies of any size.	*Primary Investments:* U.S. and foreign equity securities of companies of any size.
	Class IA & IB	*Class IA & IB.*
	Management fee .95%	Management fee .72%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .16%	Other expenses .20%.
	Total Annual Operating Expenses 1.36%	Total Annual Operating Expenses 1.17%.
	Fee Waiver/Exp Reimb −.01%	Fee Waiver/Exp Reimb −.00%.
	Total After Fee Waiver/Exp Reimb 1.35%	Total After Fee Waiver/Exp Reimb 1.17%.
2.	*EQ/MFS International Growth Portfolio*	*EQ/International Core PLUS Portfolio.*
	Objective: Capital appreciation	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Foreign equity securities, including emerging markets equity securities.	*Primary Investments:* Foreign equity securities of issuers of any size, and including those in developing economies.
	Class IA & IB	*Class IA & IB.*
	Management fee .85%	Management fee .60%.
	12b-1 fee .25%	12b–1 fee .25%.
	Other expenses .15%	Other expenses .18%.
	Total Annual Operating Expenses 1.25%	Total Annual Operating Expenses 1.03%.
3.	*Multimanager International Equity Portfolio*	*EQ/International Core PLUS Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Foreign equity securities of issuers of any size, including those in developing economies.	*Primary Investments:* Foreign equity securities of issuers of any size, including those in developing economies.
	Class A & B	*Class IA & 1B.*
	Management fee .84%	Management fee .60%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .20%	Other expenses .18%.
	Total Annual Operating Expenses 1.29%	Total Annual Operating Expenses 1.03%.
4.	*EQ/Capital Guardian Research Portfolio*	*EQ/Large Cap Core PLUS Portfolio.*
	Objective: Capital growth	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities listed in the U.S. with market capitalization greater than $1 billion.	*Primary Investments:* Equity securities of large-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .64%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .13%	Other expenses .20%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.02%	Total Annual Operating Expenses .97%.
	Fee Waiver/Exp Reimb −.05%	Fee Waiver/Exp Reimb −.00%.
	Total After Fee Waiver/Exp Reimb .97%	Total After Fee Waiver/Exp Reimb .97%.
5.	*EQ/Davis New York Venture Portfolio*	*EQ/Large Cap Core PLUS Portfolio.*
	Objective: Capital growth	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap companies	*Primary Investments:* Equity securities of large-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .85%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .14%	Other expenses .20%.

Sub No.	Existing portfolio	Replacement portfolio
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.24%	Total Annual Operating Expenses .97%.
6.	*EQ/Lord Abbett Large Cap Core Portfolio*	*EQ/Large Cap Core PLUS Portfolio.*
	Objective: Capital appreciation and growth of income with reasonable risk.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap companies	*Primary Investments:* Equity securities of large-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .65%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .14%	Other expenses .20%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.04%	Total Annual Operating Expenses .97%.
	Fee Waiver/Exp Reimb −.04%	Fee Waiver/Exp Reimb N/A.
	Total After Fee Waiver/Exp Reimb 1.00%	Total After Fee Waiver/Exp Reimb .97%.
7.	*EQ/UBS Growth and Income Portfolio*	*EQ/Large Cap Core PLUS Portfolio.*
	Objective: Total return through capital appreciation and income	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility
	Primary Investments: Equity securities of U.S. large-cap companies.	*Primary Investments:* Equity securities of large-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .75%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .17%	Other expenses .20%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.17%	Total Annual Operating Expenses .97%.
	Fee Waiver/Exp Reimb −.12%	Fee Waiver/Exp Reimb N/A.
	−Total After Fee Waiver/Exp Reimb 1.05%	Total After Fee Waiver/Exp Reimb .97%.
8.	*Multimanager Large Cap Core Equity Portfolio*	*EQ/Large Cap Core PLUS Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility
	Primary Investments: Equity securities of U.S. large-cap companies.	*Primary Investments:* Equity securities of large-cap companies.
	Class A & B	*Class IA & IB.*
	Management fee .70%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .18%	Other expenses .20%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.13%	Total Annual Operating Expenses .97%.
9.	*EQ/Equity Growth PLUS Portfolio*	*EQ/Large Cap Growth PLUS Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap growth companies.	*Primary Investments:* Equity securities of large-cap growth companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .50%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .25%	Other expenses .18%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.00%	Total Annual Operating Expenses .95%.
10.	*EQ/Montag & Caldwell Growth Portfolio*	*EQ/Large Cap Growth PLUS Portfolio.*
	Objective: Capital appreciation	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap growth companies..	*Primary Investments:* Equity securities of large-cap growth companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .75%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .14%	Other expenses .18%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.14%	Total Annual Operating Expenses .95%.
11.	*EQ/T. Rowe Price Growth Stock Portfolio*	*EQ/Large Cap Growth PLUS Portfolio.*
	Objective: Capital appreciation and secondarily, income	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap growth companies.	*Primary Investments:* Equity securities of large-cap growth companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .78%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .12%	Other expenses .18%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.15%	Total Annual Operating Expenses .95%.
12.	*EQ/Wells Fargo Omega Growth Portfolio*	*EQ/Large Cap Growth PLUS Portfolio.*

Sub No.	Existing portfolio	Replacement portfolio
	Objective: Capital growth	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of growth companies	*Primary Investments:* Equity securities of large-cap growth companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .65%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .13%	Other expenses .18%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.03%	Total Annual Operating Expenses .95%.
13.	*Multimanager Aggressive Equity Portfolio*	*EQ/Large Cap Growth PLUS Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility
	Primary Investments: Equity securities of large-cap growth companies..	*Primary Investments:* Equity securities of large-cap growth companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .57%	Management fee .50%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .18%	Other expenses .18%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .02%.
	Total Annual Operating Expenses 1.00%	Total Annual Operating Expenses .95%.
14.	*EQ/BlackRock Basic Value Equity Portfolio*	*EQ/Large Cap Value PLUS Portfolio.*
	Objective: Capital appreciation and secondarily, income.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap value companies.	*Primary Investments:* Equity securities of large-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .57%	Management fee .48%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .12%	Other expenses .17%.
	Total Annual Operating Expenses .94%	Total Annual Operating Expenses .90%.
15.	*EQ/Boston Advisors Equity Income Portfolio*	*EQ/Large Cap Value PLUS Portfolio.*
	Objective: Combination of growth and income to achieve consistent total return.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large-cap value companies.	*Primary Investments:* Equity securities of large-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .75%	Management fee .48%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .13%	Other expenses .17%.
	Total Annual Operating Expenses 1.13%	Total Annual Operating Expenses .90%.
	Fee Waiver/Exp Reimb −.08%	Fee Waiver/Exp Reimb N/A.
	Total After Fee Waiver/Exp Reimb 1.05%	Total After Fee Waiver/Exp Reimb .90%.
16.	*EQ/JPMorgan Value Opportunities Portfolio*	*EQ/Large Cap Value PLUS Portfolio.*
	Objective: Capital appreciation	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of large- and mid-cap value companies.	*Primary Investments:* Equity securities of large-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .60%	Management fee .48%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .14%	Other expenses .17%.
	Total Annual Operating Expenses .99%	Total Annual Operating Expenses .90%.
17.	*EQ/Van Kampen Comstock Portfolio*	*EQ/Large Cap Value PLUS Portfolio.*
	Objective: Capital growth and income	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of value companies of any capitalization range.	*Primary Investments:* Equity securities of large-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .65%	Management fee .48%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .13%	Other expenses .17%.
	Total Annual Operating Expenses 1.03%	Total Annual Operating Expenses .90%.
	Fee Waiver/Exp Reimb −.03	Fee Waiver/Exp Reimb N/A.
	Total After Fee Waiver/Exp Reimb 1.00%	Total After Fee Waiver/Exp Reimb .90%.
18.	*Multimanager Large Cap Value Portfolio*	*EQ/Large Cap Value PLUS Portfolio*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of U.S. large-cap value companies.	*Primary Investments:* Equity securities of large-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .73%	Management fee .48%.
	12b–1 fee .25%	12b–1 fee .25%.

Sub No.	Existing portfolio	Replacement portfolio
	Other expenses .18%	Other expenses .17%.
	Total Annual Operating Expenses 1.16%	Total Annual Operating Expenses .90%.
19.	*Multimanager Mid Cap Growth Portfolio*	*AXA Tactical Manager 400 Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of mid-cap growth companies.	*Primary Investments:* Equity securities of mid-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .80%	Management fee .45%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .21%	Other expenses .27%.
	Total Annual Operating Expenses 1.26%	Total Annual Operating Expenses .97%.
	Fee Waiver/Exp Reimb N/A	Fee Waiver/Exp Reimb −.02.
	Total After Fee Waiver/Exp Reimb 1.26%	Total After Fee Waiver/Exp Reimb .95%.
20.	*Multimanager Mid Cap Value Portfolio*	*EQ/Mid Cap Value PLUS Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of U.S. mid-cap value companies.	*Primary Investments:* Equity securities of mid-cap value companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .80%	Management fee .55%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .19%	Other expenses .18%.
	Acquired Fund Fees N/A	Acquired Fund Fees.03%.
	Total Annual Portfolio Operating Expenses 1.24%	Total Annual Portfolio Operating Expenses 1.01%.
21.	*Multimanager Small Cap Growth Portfolio*	*AXA Tactical Manager 2000 Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of U.S. small-cap growth companies.	*Primary Investments:* Equity securities of small-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .85%	Management fee .45%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .18%	Other expenses .25%.
	Total Annual Operating Expenses 1.28%	Total Annual Operating Expenses .95%.
22.	*Multimanager Small Cap Value Portfolio*	*AXA Tactical Manager 2000 Portfolio.*
	Objective: Capital growth; emphasize risk-adjusted returns and managing volatility.	*Objective:* Capital growth; emphasize risk-adjusted returns and managing volatility.
	Primary Investments: Equity securities of U.S. small-cap value companies.	*Primary Investments:* Equity securities of small-cap companies.
	Class IA & IB	*Class IA & IB.*
	Management fee .85%	Management fee .45%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .18%	Other expenses .25%.
	Total Annual Operating Expenses 1.28%	Total Annual Operating Expenses .95%.
23.	*EQ/Global Bond PLUS Portfolio*	*EQ/Core Bond Index Portfolio.*
	Objective: Growth and current income	*Objective:* Approximate total return performance of the Barclays Capital Intermediate U.S. Government Credit Index.
	Primary Investments: Investment-grade debt securities of U.S. and foreign issuers.	*Primary Investments:* Certain U.S. Treasury and government related, corporate, credit and agency fixed rate securities.
	Class IA & IB	*Class IA & IB.*
	Management fee .55%	Management fee .35%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .19%	Other expenses .12%.
	Total Annual Portfolio Operating Expenses .99%	Total Annual Portfolio Operating Expenses .72%.
24.	*Multimanager Multi-Sector Bond Portfolio*	*EQ/Core Bond Index Portfolio.*
	Objective: High total return through a combination of current income and capital appreciation.	*Objective:* Approximate total return performance of the Barclays Capital Intermediate U.S. Government Credit Index.
	Primary Investments: Diversified mix of investment grade bonds	*Primary Investments:* Certain U.S. Treasury and government related, corporate, credit and agency fixed rate securities.
	Class A & B	*Class IA & IB.*
	Management fee .52%	Management fee .35%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .17%	Other expenses .12%.
	Total Annual Operating Expenses .94%	Total Annual Portfolio Operating Expenses .72%.
25.	*Multimanager Core Bond Portfolio*	*EQ/Quality Bond PLUS Portfolio.*
	Objective: Balance of high current income and capital appreciation	*Objective:* High current income consistent with moderate risk to capital.
	Primary Investments: Investment grade bonds; U.S. government and corporate debt securities.	*Primary Investments:* Investment-grade debt securities of government, corporate and agency mortgage- and asset-backed securities.
	Class A & B	*Class IA & IB.*
	Management fee .52%	Management fee .40%.

Sub No.	Existing portfolio	Replacement portfolio
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .17%	Other expenses .19%.
	Acquired Fund Fees and Expenses N/A	Acquired Fund Fees and Expenses .41% [1].
	Total Annual Operating Expenses .94%	Total Annual Operating Expenses 1.25%.
		Fee Waiver/Exp Reimb −.40.
		Total After Fee Waiver/Exp Reimb .85%.
26.	*EQ/PIMCO Ultra Short Bond Portfolio*	*EQ/AllianceBernstein Short Duration Government Bond Portfolio.*
	Objective: Generate a return in excess of traditional money market products.	*Objective:* Balance of current income and capital appreciation.
	Primary Investments: Diversified portfolio of fixed income instruments of varying maturities and financial instruments that derive their value from such securities.	*Primary Investments:* Debt securities issued by the U.S. Government and its agencies and instrumentalities and financial instruments that derive their value from such securities.
	Class IA & IB	*Class IA & 1B.*
	Management fee .46%	Management fee .45%.
	12b–1 fee .25%	12b–1 fee .25%.
	Other expenses .12%	Other expenses .13%.
	Total Annual Operating Expenses .83%	Total Annual Operating Expenses .83%.

12. The Substitution Applicants state that the principal purposes of the Substitutions are: (1) To streamline and simplify the investment line-up that is available to Contract owners under the affected contracts; (2) to provide Replacement Portfolios with similar principal risks and strategies to their respective Existing Portfolios, but with lower volatility and better risk-adjusted returns; (3) to provide Replacement Portfolios with the same or lower net operating expenses; and (4) to provide Contract owners with an opportunity to continue their investment in a substantially similar Portfolio without interruption or cost to them; (5) to reduce costs and enhance risk management.

13. By supplements to the prospectuses for the Contracts and Separate Accounts, which will be delivered to Contract owners at least thirty (30) days before the proposed Substitutions, AXA Equitable will notify all Contract owners of its intention to take the necessary actions, including seeking the order requested by this Application, to substitute shares of each Replacement Portfolio for the corresponding Existing Portfolio as described herein. The supplements will advise Contract owners that from the date of the supplement until the date of the proposed Substitutions (''Substitution Date''), Contract owners are permitted to make transfers of Contract value (or annuity unit value) out of an Existing Portfolio subaccount to one or more other subaccounts without the transfers (or exchanges) being treated as one of a limited number of permitted transfers (or exchanges) or a limited number of transfers (or exchanges) permitted without a transfer charge, to the extent any transfer limitations or charges are applicable under the Contract. The supplements also will inform Contract owners that AXA Equitable will not exercise any rights reserved under any Contract to impose additional restrictions on transfers until at least 30 days after the proposed Substitutions. The supplement also will advise Contract owners how to instruct AXA Equitable, if so desired in light of the proposed Substitutions, to reallocate Contract value from an Existing Portfolio subaccount to any other subaccount available for investment under their Contracts. In addition, the supplements will advise Contract owners that any Contract value remaining in an Existing Portfolio subaccount on the Substitution Date will be transferred to the corresponding Replacement Portfolio subaccount and that the proposed Substitutions will take place at relative net asset value. The supplements will also advise Contract owners that for at least 30 days following the proposed Substitutions, AXA Equitable will permit Contract owners to make transfers of Contract value (or annuity unit value) out of a Replacement Portfolio subaccount to one or more other subaccounts without the transfers (or exchanges) being treated as one of a limited number of permitted transfers (or exchanges) or a limited number of transfers (or exchanges) permitted without a transfer charge, to the extent any transfer limitations or charges are applicable under the Contract. AXA Equitable also will send Contract owners prospectuses for the Replacement Portfolios prior to the Substitutions.

14. The Substitution Applicants will send the appropriate prospectus supplement (or other notice, in the case of Contracts no longer actively marketed and for which there are a relatively small number of existing Contract owners), containing this disclosure to all existing Contract owners. Prospective purchasers and new purchasers of Contracts will be provided with a Contract prospectus and the supplement containing disclosure regarding the proposed Substitutions, as well as prospectuses and supplements for the Replacement Portfolios. The Contract prospectus and supplement, and the prospectuses and supplements for the Replacement Portfolios will be delivered to purchasers of new Contracts in accordance with all applicable legal requirements.

15. In addition to the prospectus supplements distributed to Contract owners, within five business days after the Substitution Date, Contract owners will be sent a written notice of the Substitutions informing them that the Substitutions were carried out and that they may transfer all Contract value or cash value under a Contract in a subaccount invested in a Replacement Portfolio on the date of the notice to one or more other subaccounts available under their Contract at no cost and without regard to the usual limit on the frequency of transfers among the variable investment options, to the extent any transfer limitations or charges are applicable under the Contract. The notice will also reiterate that (other than with respect to implementing policies and procedures designed to prevent disruptive transfers and other market timing activity) AXA Equitable will not exercise any rights reserved by it under the Contracts to impose additional restrictions on transfers or, to the extent transfer charges apply to a Contract, to impose any charges on transfers until at least 30 days after the Substitution Date. AXA

[1] The portion of the acquired fund fees and expenses attributable to the management fees of the underlying funds is 0.30%.

Equitable will also send each Contract owner a current prospectus for the Replacement Portfolios if they have not previously received a current version.

16. AXA Equitable also is seeking approval of the proposed Substitutions from any state insurance regulators whose approval may be necessary or appropriate.

17. The proposed Substitutions will take place at relative net asset value determined on the Substitution Date pursuant to Section 22 of the 1940 Act and Rule 22c–1 thereunder with no change in the amount of any Contract owner's Contract value, cash value, or death benefit or in the dollar value of his or her investment in the Separate Accounts. Likewise, any guaranteed living or death benefits whose determination depends upon the Contract value, cash value, or death benefit will not change as a result of the Substitutions.

18. The proposed Substitutions will be effected by redeeming shares of each Existing Portfolio in cash and/or in-kind on the Substitution Date at their net asset value and using the proceeds of those redemptions to purchase shares of each corresponding Replacement Portfolio at their net asset value on the same date. All in-kind redemptions will be effected in accordance with the conditions set forth in the no-action letter issued by the staff of the Commission to *Signature Financial Group, Inc.* (pub. Avail. Dec. 28, 1999).

19. Contract owners will not incur any fees or charges as a result of the proposed Substitutions, nor will their rights or insurance benefits or AXA Equitable's obligations under the Contracts be altered in any way. All expenses incurred in connection with the proposed Substitutions, including any brokerage, legal, accounting, and other fees and expenses, will be paid by AXA Equitable. In addition, the proposed Substitutions will not impose any tax liability on Contract owners. The proposed Substitutions will not cause the Contract fees and charges currently being paid by Contract owners to be greater after the Substitutions than before the Substitutions; all Contract-level fees will remain the same after the Substitutions. In addition, because the Substitutions will not be treated as a transfer for purposes of assessing transfer charges or computing the number of permissible transfers under the Contracts, no fees will be charged on the transfers made at the time of the Substitutions, to the extent any transfer limitations or charges are applicable under the Contracts.

20. It is anticipated that the total annual operating expense ratio, taking into account fee waivers and reimbursements, for each class of shares of each Replacement Portfolio will be the same as or lower than that of the corresponding class of shares of the corresponding Existing Portfolio immediately after the Substitution. Accordingly, the Substitution will benefit Contract owners by lowering, or at least maintaining, the total annual operating expense ratio, taking into account fee waivers and reimbursements. To ensure that those who were Contract owners on the date of the proposed Substitution do not incur higher expenses for a period of two years after the Substitution, AXA Equitable will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) during the two years following the date of the proposed Substitution, the subaccounts investing in the Replacement Portfolio such that the sum of the Replacement Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio (asset-based fees and charges deducted on a daily basis from subaccount assets and reflected in the calculations of subaccount unit value) for such period will not exceed, on an annualized basis, the sum of the Existing Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio for fiscal year 2012. In addition, for twenty-four months following the date of the proposed substitutions, AXA Equitable will not increase asset-based fees or charges for Contracts that are in force on the date of the proposed Substitution.

21. With respect to Substitution 25 substituting shares of the EQ/Quality Bond PLUS Portfolio for shares of the Multimanager Core Bond Portfolio, if the management fees attributable to the underlying funds in which the EQ/Quality Bond PLUS Portfolio invests are included with the EQ/Quality Bond PLUS Portfolio's management fee, then the management fee plus 12b–1 fee of the EQ/Quality Bond PLUS Portfolio may be higher than the management fee plus 12b–1 fee of the Multimanager Core Bond Portfolio. To ensure that those Contract owners with subaccount assets invested in the Multimanager Core Bond Portfolio on the date of the proposed Substitution do not incur higher expenses, AXA Equitable will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) for the life of each such Contract, the subaccounts investing in the EQ/Quality Bond PLUS Portfolio as a result of the Substitution, such that the sum of the EQ/Quality Bond PLUS Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio (asset-based fees and charges deducted on a daily basis from subaccount assets and reflected in the calculations of subaccount unit value) for such period will not exceed, on an annualized basis, the sum of the Multimanager Core Bond Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio for fiscal year 2012. In addition, for the life of each such Contract, AXA Equitable will not increase the asset-based fees and charges for affected Contracts that are in force on the date of the proposed Substitution.

Legal Analysis and Conditions

Section 26(c) Relief

1. The Substitution Applicants request that the Commission issue an order pursuant to Section 26(c) of the 1940 Act approving the proposed Substitutions. Section 26(c) of the Act requires the depositor of a registered unit investment trust holding the securities of a single issuer to obtain Commission approval before substituting the securities held by the trust.

2. The Substitution Applicants have reserved the right under the Contracts to substitute shares of another underlying investment option for one of the current underlying investment options offered as a funding option under the Contracts. The prospectuses for the Contracts and the Separate Accounts contain appropriate disclosure of this right.

3. The Substitution Applicants represent that the proposed Substitutions will protect the Contract owners who have allocated Contract value to the Existing Portfolio by: (1) Providing an underlying investment option for subaccounts invested in the Existing Portfolio that is sufficiently similar to, and in many cases substantially similar to, the Existing Portfolio; (2) generally providing such Contract owners with simpler disclosure documents; and (3) providing such Contract owners with an investment option that would have total operating expenses after the Substitution that are lower than or equal to the current investment option.

4. The Substitution Applicants generally submit that the proposed Substitutions meet the standards that the Commission and its staff have applied to similar substitutions that the

Commission previously has approved. The Substitution Applicants also submit that the proposed Substitutions are not of the type that Section 26(c) was designed to prevent. Unlike traditional unit investment trusts where a depositor could only substitute investment securities in a manner that permanently affected all the investors in the trust, the Contracts provide each Contract owner with the right to exercise his or her own judgment, and transfer Contract values and cash values into and among other investment options available to Contract owners under their Contracts. Additionally, the proposed Substitutions will not reduce in any manner the nature or quality of the available investment options. As such, investments in any of the Replacement Portfolios may be temporary investments for Contract owners as each Contract owner may exercise his or her own judgment as to the most appropriate investment alternative available. In this regard, the proposed Substitutions retain for Contract owners the investment flexibility that is a central feature of the Contracts. Moreover, the Substitution Applicants will offer Contract owners the opportunity to transfer amounts out of the affected subaccounts without any cost or other penalty (other than those necessary to implement policies and procedures designed to prevent disruptive transfer and other market timing activity) that may otherwise have been imposed for a period beginning on the date of the supplement notifying Contract owners of the proposed Substitutions (which supplement will be delivered to Contract owners at least thirty (30) days before the Substitutions) and ending no earlier than thirty (30) days after the Substitutions. The proposed Substitutions, therefore, will not result in the type of costly forced redemption that Section 26(c) was designed to prevent.

5. The proposed Substitutions also are unlike the type of substitution that Section 26(c) was designed to prevent in that by purchasing a Contract, Contract owners select much more than a particular underlying fund in which to invest their Contract values; they also select the specific type of insurance coverage offered by the Substitution Applicants under the applicable Contract, as well as numerous other rights and privileges set forth in the Contract. Contract owners also may have considered AXA Equitable's size, financial condition, and its reputation for service in selecting their Contract. These factors will not change as a result of the proposed Substitutions, nor will the annuity, life or tax benefits afforded under the Contracts held by any of the affected Contract owners.

6. AXA Equitable will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) during the two years following the date of the proposed Substitution, the subaccounts investing in the Replacement Portfolio such that the sum of the Replacement Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio (asset-based fees and charges deducted on a daily basis from subaccount assets and reflected in the calculations of subaccount unit value) for such period will not exceed, on an annualized basis, the sum of the Existing Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio for fiscal year 2012. In addition, for twenty-four months following the date of the proposed substitutions, AXA Equitable will not increase asset-based fees or charges for Contracts that are in force on the date of the proposed Substitution.

7. AXA Equitable will reimburse, on the last business day of each fiscal period (not to exceed a fiscal quarter) for the life of each such Contract, the subaccounts investing in the EQ/Quality Bond PLUS Portfolio as a result of the Substitution, such that the sum of the EQ/Quality Bond PLUS Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio (asset-based fees and charges deducted on a daily basis from subaccount assets and reflected in the calculations of subaccount unit value) for such period will not exceed, on an annualized basis, the sum of the Multimanager Core Bond Portfolio's total annual operating expense ratio, taking into account any expense waivers or reimbursements, and subaccount expense ratio for fiscal year 2012. In addition, for the life of each such Contract, AXA Equitable will not increase the asset-based fees and charges for affected Contracts that are in force on the date of the proposed Substitution.

8. The Substitution Applicants submit that, for all the reasons stated above, the proposed Substitutions are consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

Section 17(b) Relief

1. The Section 17 Applicants request that the Commission issue an order pursuant to Section 17(b) of the 1940 Act exempting them from the provisions of Section 17(a) of the 1940 Act to the extent necessary to permit them to carry out the In-Kind Transactions.

2. Section 17(a)(1) of the 1940 Act, in relevant part, prohibits any affiliated person of a registered investment company, or any affiliated person of such a person, acting as principal, from knowingly selling any security or other property to that company. Section 17(a)(2) of the 1940 Act generally prohibits the same persons, acting as principals, from knowingly purchasing any security or other property from the registered investment company.

3. The Existing Portfolios and the Replacement Portfolios may be deemed to be affiliated persons of one another, or affiliated persons of an affiliated person. Shares held by a separate account of an insurance company are legally owned by the insurance company. AXA Equitable and its affiliates collectively own substantially all of the shares of the Trusts. Accordingly, the Trusts and their respective Portfolios could be deemed to be under the control of AXA Equitable. If the Trusts and their respective Portfolios are under the common control of AXA Equitable, then AXA Equitable is an affiliated person or an affiliated person of an affiliated person of the Trusts and their respective Portfolios. If the Trusts and their respective Portfolios are under the control of AXA Equitable, then the Trusts and their respective Portfolios are affiliated persons of AXA Equitable.

Regardless of whether or not AXA Equitable can be considered to control the Trusts and their respective Portfolios, because AXA Equitable and its affiliates own of record more than 5% of the shares of each Portfolio, AXA Equitable may be deemed to be an affiliated person of each Portfolio. Likewise, each Portfolio may be deemed to be an affiliated person of AXA Equitable and an affiliated person of an affiliated person of each other Portfolio.

Similarly, because the Manager is an affiliated person of each Trust and its Portfolios by virtue of serving as the investment manager to each Portfolio and is under common control with AXA Equitable, then AXA Equitable may be deemed to be an affiliated person, or an affiliated person of an affiliated person, of each Portfolio.

The proposed In-Kind Transactions could be seen as the indirect purchase of shares of certain Replacement Portfolios with portfolio securities of certain Existing Portfolios and the indirect sale of portfolio securities of certain Existing Portfolios for shares of

certain Replacement Portfolios. Pursuant to this analysis, the proposed In-Kind Transactions also could be categorized as a purchase of shares of certain Replacement Portfolios by certain Existing Portfolios, acting as principal, and a sale of portfolio securities by certain Existing Portfolios, acting as principal, to certain Replacement Portfolios. In addition, the proposed In-Kind Transactions could be viewed as a purchase of securities from certain Existing Portfolios, and a sale of securities to certain Replacement Portfolios, by AXA Equitable (or its Separate Accounts), acting as principal. If categorized in this manner, the proposed In-Kind Transactions may be deemed to contravene Section 17(a) due to the affiliated status of these participants.

4. The Section 17 Applicants submit that the terms of the proposed In-Kind Transactions, including the consideration to be paid and received, as described in this Application, are reasonable and fair and do not involve overreaching on the part of any person concerned. The Section 17 Applicants also submit that the proposed In-Kind Transactions are consistent with the policies of the relevant Existing Portfolios and the relevant corresponding Replacement Portfolios, as recited in the current registration statement and reports of the relevant investment company filed with the Commission under the federal securities laws. Finally, the Section 17 Applicants submit that the proposed In-Kind Transactions are consistent with the general purposes of the 1940 Act.

5. The Section 17 Applicants maintain that the terms of the proposed In-Kind Transactions, including the consideration to be paid and received, are reasonable, fair and do not involve overreaching because: (1) The In-Kind Transactions will not adversely affect or dilute the interests of Contract owners; and (2) the In-Kind Transactions will comply with the conditions set forth in Rule 17a–7, other than the requirement relating to cash consideration.

The In-Kind Transactions will be effected at the respective net asset values of each of the relevant Existing Portfolios and each of the relevant Replacement Portfolios, as determined in accordance with the procedures disclosed in the registration statement for the relevant investment company and as required by Rule 22c–1 under the 1940 Act. The In-Kind Transactions will not change the dollar value of any Contract owner's investment in any of the Separate Accounts, the value of any Contract, the accumulation value or other value credited to any Contract, or the death benefit payable under any Contract. After the proposed In-Kind Transactions, the value of a Separate Account's investment in a Replacement Portfolio will equal the value of its investments in the corresponding Existing Portfolio (together with the value of any pre-existing investments in the Replacement Portfolio) before the In-Kind Transactions.

The Section 17 Applicants assert that because the proposed In-Kind Transactions would comply in substance with the principal conditions of Rule 17a–7, the Commission should consider the extent to which the In-Kind Transactions would meet these or other similar conditions and issue an order if such conditions would provide the substance of the protections embodied in Rule 17a–7. The Section 17 Applicants will assure themselves that the investment companies will carry out the proposed In-Kind Transactions in conformity with the conditions of Rule 17a–7, except that the consideration paid for the securities being purchased or sold will not be cash.

The proposed In-Kind Transactions will be effected based upon the independent current market price of the portfolio securities as specified in paragraph (b) of Rule 17a–7 and at the respective net asset values of each of the relevant Existing Portfolios and each of the relevant Replacement Portfolios, as determined in accordance with the procedures disclosed in the registration statement for the relevant investment company and as required by Rule 22c–1 under the 1940 Act. The proposed In-Kind Transactions will be consistent with the policy of each registered investment company and separate series thereof participating in the In-Kind Transactions, as recited in the relevant registered investment companies' registration statement or reports in accordance with paragraph (c) of Rule 17a–7. In addition, the proposed In-Kind Transactions will comply with paragraph (d) of Rule 17a–7 because no brokerage commission, fee or other remuneration (except for any customary transfer fees) will be paid to any party in connection with the proposed In-Kind Transactions. Moreover, the Trusts are in compliance with the board oversight and fund governance provisions of paragraphs (e) and (f) of Rule 17a–7. Finally, a written record of the proposed In-Kind Transactions will be maintained and preserved in accordance with paragraph (g) of Rule 17a–7.

Even though the proposed In-Kind Transactions will not comply with the cash consideration requirement of paragraph (a) of Rule 17a–7, the terms of the proposed In-Kind Transactions will offer to each of the relevant Existing Portfolios and each of the relevant Replacement Portfolios the same degree of protection from overreaching that Rule 17a–7 generally provides in connection with the purchase and sale of securities under that Rule in the ordinary course of business. In particular, AXA Equitable and its affiliates cannot effect the proposed In-Kind Transactions at a price that is disadvantageous to any Replacement Portfolio and the proposed In-Kind Transactions will not occur absent an exemptive order from the Commission. The Section 17 Applicants intend that the In-Kind Transactions will be carried out in substantial compliance with the other conditions of Rule 17a–7 as discussed above.

6. The proposed redemption of shares of each of the relevant Existing Portfolios will be consistent with the investment policies of that Existing Portfolio, as recited in the relevant investment company's current registration statement, because the shares will be redeemed at their net asset value in conformity with Rule 22c–1 under the 1940 Act. Likewise, the proposed sale of shares of each of the relevant Replacement Portfolios for investment securities is consistent with the investment policies of that Replacement Portfolio, as recited in the relevant Trust's current registration statement, because: (1) The shares will be sold at their net asset value; and (2) the investment securities will be of the type and quality that a Replacement Portfolio could have acquired with the proceeds from the sale of its shares had the shares been sold for cash. To assure that the second of these conditions is met, the Manager and relevant Adviser will examine the portfolio securities being transferred to each Replacement Portfolio to ensure that they are consistent with that Replacement Portfolio's investment objective and policies and could have been acquired by the Replacement Portfolio in a cash transaction.

Conclusion

For the reasons and upon the facts set forth above and in the application, the Substitution Applicants and the Section 17 Applicants believe that the requested orders meet the standards set forth in Section 26(c) of the Act and Section 17(b) of the Act, respectively, and should therefore, be granted.

For the Commission, by the Division of Investment Management, under delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02561 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30374; File No. 813–374]

WINCO Investment Partnership 2008 L.P. and Winstead PC; Notice of Application

January 31, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of application for an order under sections 6(b) and 6(e) of the Investment Company Act of 1940 (the ''Act'') granting an exemption from all provisions of the Act, except section 9 and sections 36 through 53, and the rules and regulations thereunder. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a–1 under the Act, the exemption is limited as set forth in the application.

SUMMARY OF APPLICATION: Applicants request an order to exempt certain investment funds formed for the benefit of eligible current and former equity shareholders of Winstead PC from certain provisions of the Act. Each investment fund will be an ''employees' securities company'' within the meaning of section 2(a)(13) of the Act.

APPLICANTS: WINCO Investment Partnership 2008 L.P. (the ''Investment Fund'') and Winstead PC (together with any entity that results from a reorganization of such firm into a different type of business organization or into an entity organized under the laws of another jurisdiction, the ''Firm'').

DATES: *Filing Dates:* The application was filed on September 24, 2008 and amended on September 28, 2009, June 25, 2010, and November 1, 2012.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 25, 2013 and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090; WINCO Investment Partnership 2008 L.P. and Winstead PC, 500 Winstead Building, 2728 N. Harwood Street, Dallas, Texas 75201.

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Attorney Adviser, at (202) 551–6819, or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Firm is a law firm organized as a Texas professional corporation. The Firm and its affiliates, if any, as defined in rule 12b–2 under the Securities Exchange Act of 1934 (the ''Exchange Act''), are referred to collectively as the ''Winstead Group'' and individually as a ''Winstead Entity.'' As a professional corporation, the Firm's equity owners are shareholders (the ''Equity Shareholders'').

2. The Investment Fund is a Texas limited partnership. Subsequent pooled investment vehicles identical in all material respects (other than investment objectives and strategies, operational differences related to the form of organization and other differences described in the application) may be offered in the future to the same class of investors as those investing in the Investment Fund (the ''Subsequent Funds''). The Investment Fund and each of the Subsequent Funds (together, the ''Funds'') will be an employees' securities company within the meaning of section 2(a)(13) of the Act. The Funds will operate as non-diversified, closed-end management investment companies. The Investment Fund has been, and each Subsequent Fund will be, established to enable Eligible Investors (as defined below) to participate in certain investment opportunities that come to the attention of the Winstead Group. Participation as investors in the Funds will allow the Eligible Investors to diversify their investments and to have the opportunity to participate in investments that might not otherwise be available to them or that might be beyond their individual means. Participation in any Fund will be voluntary.

3. The Investment Fund's general partner, WINCO Asset Services, Inc., a Texas corporation and wholly-owned subsidiary of The WINCO Group Incorporated, a Texas corporation and a Winstead Entity, will manage the Investment Fund. The Investment Fund's general partner or another Winstead Entity will manage each Subsequent Fund (such general partner or Winstead Entity, the ''Manager''). The Manager may designate an advisory board composed of, among others, the members of the Firm's executive committee, its department heads and other designated shareholders of the Firm (the ''Investment Committee''). The Investment Committee may be consulted for purposes of identifying and assessing investments which come to a Fund's attention through the Firm. The Manager or any person involved in the operation of the Funds will register as an investment adviser if required under the Investment Advisers Act of 1940, or the rules thereunder. The applicants represent and concede that the Manager in managing a Fund is an ''investment adviser'' within the meaning of sections 9 and 36 of the Act and is subject to those sections.

4. The Firm will control the Funds within the meaning of the Act. The Firm, the Manager, the members of the Investment Committee, and any other person acting for or on behalf of a Fund shall act in the best interest of the Fund and its Fund Investors (as defined below). Whenever the Firm, the Manager, the members of the Investment Committee, or any other person acting for or on behalf of the Funds is required or permitted to make a decision, take or approve an action, or omit to do any of the foregoing in such person's discretion, then such person shall exercise such discretion in accordance with reasonableness and good faith and any fiduciary duties owed to the Funds and the Fund Investors. The organizational documents for and any other contractual arrangement regarding a Fund will not contain any provision which protects or purports to protect the Firm, the Manager, the members of the Investment Committee, or their delegates against any liability to the Fund or its Fund Investors to which such person would otherwise be subject by reason of willful misfeasance, bad faith, or gross negligence in the

performance of such person's duties, or by reason of such person's reckless disregard of such person's obligations and duties under such contract or organizational documents.

5. Interests in a Fund (''Interests'') will be offered without registration in reliance on section 4(2) of the Securities Act of 1933 (the ''Securities Act'') or Regulation D under the Securities Act (''Regulation D''). Interests will be offered solely to Eligible Investors, who consist of ''Eligible Employees,'' ''Qualified Investment Vehicles'' (each as defined below), and the Winstead Group. Prior to offering Interests in a Fund to an individual, the Manager must reasonably believe that the individual is a sophisticated investor capable of understanding and evaluating the risks of participating in the Fund without the benefit of regulatory safeguards. The term ''Fund Investors'' refers to the Eligible Investors who elect to participate and then acquire Interests in the Funds.

6. An ''Eligible Employee'' is a person who is a current or former Equity Shareholder of the Firm and who, at the time of investment, is also an employee of the Winstead Group. Each Eligible Employee must be an ''accredited investor'' meeting the net worth requirement set forth in rule 501(a)(5), or the income requirement of rule 501(a)(6) of Regulation D, or is one of 35 or fewer Eligible Employees who (a) meets the sophistication requirements set forth in rule 506(b)(2)(ii) of Regulation D, has a graduate degree, a minimum of 3 years business and/or professional experience, and compensation of at least $150,000 in the preceding 12 month period and a reasonable expectation of compensation of at least $150,000 in each of the two immediately succeeding 12 month periods,[1] or (b) is a ''knowledgeable employee,'' as defined in rule 3c–5 under the Act, of the Fund (with the Fund treated as though it were a ''Covered Company'' for purposes of the rule).

7. A ''Qualified Investment Vehicle'' is: (a) A partnership, corporation or other entity all of the voting power of which is controlled by Eligible Employees, or (b) a trust or other entity the sole beneficiaries of which are Eligible Employees or their Immediate Family Members, or the settlors and the trustees of which consist of Eligible Employees or Eligible Employees together with Immediate Family Members. ''Immediate Family Members'' include any parent, child, spouse of a child, spouse, brother or sister, and includes any step and adoptive relationships. A Qualified Investment Vehicle must be either (a) an ''accredited investor'' as defined in rule 501(a) of Regulation D or (b) an entity for which an Eligible Employee is a settlor and principal investment decision-maker and which is counted toward the 35 non-accredited Fund Investors.[2]

8. The Manager will provide to each Fund Investor a copy of the organizational documents and any offering memorandum relating to the Fund, prior to his or her investment in the Fund. Additionally, all material terms of the Funds will be fully disclosed to Eligible Investors prior to their investment in a Fund. Each Fund will send its Fund Investors annual reports, which will contain audited financial statements, as soon as practicable after the end of each fiscal year.[3] In addition, as soon as practicable after the end of each fiscal year, each Fund will transmit to each Fund Investor a report setting out information with respect to that Fund Investor's distributive share of income, gains, losses, credits and other items for federal and state income tax purposes.

9. A Fund Investor will be permitted to transfer his or her Interests only with the express consent of the Manager. The Manager does not anticipate giving such consent. Any such transfer must be to another Eligible Investor. Upon a Fund Investor's death or divorce, such Fund Investor's estate, heirs or spouse, as applicable, will succeed to the Interest of such Fund Investor and shall possess the economic attributes of the Fund Investor's Interest in the Fund, but shall not be admitted as a substitute Fund Investor.

10. The Firm reserves the right to impose vesting provisions on a Fund Investor's investments in a Fund. In an investment program that provides for vesting provisions, all or a portion of a Fund Investor's Interests will be treated as ''unvested,'' and ''vesting'' will occur through the passage of a specified period of time. A Fund Investor's Interests that are or become ''vested'' will not be subject to repurchase by the Fund except to the extent that a Fund Investor withdraws from the applicable Fund. Any portion of a Fund Investor's Interests that are ''unvested'' at the time of the termination of a Fund Investor's association or employment with the Firm (or at the time of that Fund Investor's failure to achieve the relevant performance milestone) are subject to repurchase or cancellation by the Fund. In the event of such a repurchase or cancellation, the Fund Investor will receive, at a minimum, the lesser of (a) the amount actually allocated to such Fund Investor by the Fund at the time the Interests are acquired less the amount of any distributions received by that Fund Investor from the Fund and (b) the fair market value of the Interests determined at the time of repurchase or cancellation, as determined in good faith by the Manager.

11. The Firm may be reimbursed by the Funds for reasonable and necessary out-of-pocket costs directly associated with the organization and operation of the Funds, including administrative and overhead expenses. In addition, the Firm may allocate to a Fund any out-of-pocket expenses specifically attributable to the organization and the operation of that Fund. There will be no allocation of any of the Firm's operating expenses to a Fund. No separate management fee will be charged to a Fund by the Manager, and no compensation will be paid by a Fund or by Fund Investors to the Manager for its services. Also, no fee of any kind will be charged in connection with the sale of Interests of the Funds.

12. A Fund will not borrow from any person if such borrowing would cause any person not named in section 2(a)(13) of the Act to own outstanding securities of the Fund (other than short-term paper). Any such borrowing will be non-recourse to the Fund Investors. If a Winstead Entity or an Equity Shareholder makes a loan to a Fund, the interest rate on the loan will be no less favorable to the Fund than the rate that could be obtained on an arm's-length basis.

13. No Fund will acquire any security issued by a registered investment company if, immediately after the acquisition, the Fund would own more than 3% of the outstanding voting stock of the registered investment company.

Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission may, by order upon application, conditionally or unconditionally exempt any ''employees' securities company'' from the provisions of the Act, if and to the

[1] Such Eligible Employee will not be permitted to invest in any calendar or fiscal year (as determined by the Firm) more than 10% of his or her income from all sources for the immediately preceding calendar or fiscal year in one or more Funds.

[2] If a Qualified Investment Vehicle is an entity other than a trust, (a) the reference to ''settlor'' shall be construed to mean an Eligible Employee (alone or with Immediate Family Members) who created the vehicle, alone or together with others, and also contributed funds or other assets to the vehicle, and (b) the reference to ''trustee'' shall be construed to mean a person who performs functions similar to those of a trustee.

[3] For purposes of this requirement, ''audit'' shall have the meaning defined in rule 1–02(d) of Regulation S–X.

extent that such exemption is consistent with the protection of investors. Section 6(b) provides that the Commission will consider, in determining the provisions of the Act from which the company should be exempt, the company's form of organization and capital structure, the persons owning and controlling its securities, the price of the company's securities and the amount of any sales load, how the company's funds are invested, and the relationship between the company and the issuers of the securities in which it invests. Section 2(a)(13) defines an employees' securities company as any investment company all of whose securities (other than short-term paper) are beneficially owned (a) by current or former employees, or persons on retainer, of one of more affiliated employers, (b) by immediate family members of such person, or (c) by such employer or employers, together with any of the persons in (a) or (b).

2. Section 7 of the Act generally prohibits investment companies that are not registered under section 8 of the Act from selling or redeeming their securities. Section 6(e) provides that, in connection with any order exempting an investment company from any provision of section 7, certain provisions of the Act, as specified by the Commission, will be applicable to the company and other persons dealing with the company as though the company were registered under the Act. Applicants request an order under sections 6(b) and 6(e) of the Act exempting the Funds from all provisions of the Act, except section 9 and sections 36 through 53, and the rules and regulations under the Act. With respect to sections 17 and 30 of the Act, and the rules and regulations thereunder, and rule 38a–1 under the Act, the exemption is limited as set forth in the application.

3. Section 17(a) of the Act generally prohibits any affiliated person of a registered investment company, or any affiliated person of an affiliated person, acting as principal, from knowingly selling any security or other property to the investment company or knowingly purchasing a security or other property from the investment company. Applicants request an exemption from section 17(a) to permit a Fund to: (a) Purchase, from the Firm or any affiliated person thereof, securities or interests in properties previously acquired for the account of the Firm or any affiliated person thereof; (b) sell, to the Firm or any affiliated person thereof, securities or interests in properties previously acquired by the Funds; (c) invest in companies, partnerships or other investment vehicles offered, sponsored or managed by the Firm or any affiliated person thereof; (d) purchase interests in any company or other investment vehicle: (i) in which the Firm owns 5% or more of the voting securities; or (ii) that otherwise is an affiliated person of the Fund (or an affiliated person of such an affiliated person) or the Firm; and (e) participate as a selling security-holder in a public offering in which the Firm or any affiliated person thereof acts as or represents a member of the selling group.

4. Applicants submit that an exemption from section 17(a) is consistent with the protection of investors and the purposes of the Act. Applicants state that the Fund Investors will be informed in the Fund's communications relating to a particular investment opportunity of the possible extent of the Fund's dealings with the Firm or any affiliated person thereof, and Eligible Investors, as financially sophisticated professionals and investors, will be able to evaluate the risks associated with those dealings. Applicants also assert that a community of interest among the Fund Investors and the Firm will serve to reduce the risk of abuse in transactions involving a Fund and the Firm or any affiliated person thereof.

5. Section 17(d) of the Act and rule 17d–1 under the Act prohibit any affiliated person of a registered investment company, or any affiliated person of an affiliated person, acting as principal, from participating in any joint arrangement with the company unless authorized by the Commission. Applicants request relief to permit a Fund to engage in transactions in which an affiliated person (or an affiliated person of such person) participates as a joint participant with such Fund. Joint transactions in which a Fund could participate include the following: (a) An investment by one or more Funds in a security: (i) In which the Firm or an affiliated person thereof (including Eligible Employees) or another Fund is a participant or plans to become a participant; or (ii) with respect to which the Firm or any affiliated person thereof is entitled to receive fees of any kind, including, but not limited to legal fees, consulting fees, placement fees, investment banking fees or brokerage commissions, or other economic benefits or interests; (b) an investment by one or more Funds in an investment vehicle sponsored, offered or managed by the Firm or any affiliated person thereof; and (c) an investment by one or more Funds in a security in which an affiliated person of the Fund, or an affiliated person of such a person, is a participant or plans to become a participant, including situations in which that person has a partnership or other interest in, or compensation arrangement with, the issuer, sponsor or offeror of the security.

6. Applicants assert that compliance with section 17(d) would cause the Funds to forego investment opportunities simply because a Fund Investor, the Firm or other affiliated persons of the Fund also had made or is contemplating making a similar investment. In addition, because attractive investment opportunities of the types considered by the Funds often require that each participant make available funds in an amount that may be substantially greater than that available to the investor alone, there may be certain attractive opportunities of which a Fund may be unable to take advantage except as a co-participant with other persons, including affiliates. Applicants note that, in light of the Firm's purpose of establishing the Funds so as to reward Eligible Investors and to attract highly qualified personnel to the Firm, the possibility is minimal that an affiliated party investor will enter into a transaction with a Fund structured to provide such person with an unfair advantage over the Fund. Applicants assert that the flexibility to structure co-investments and joint investments will not involve abuses of the type section 17(d) and rule 17d–1 were designed to prevent.

7. Section 17(f) of the Act designates the entities that may act as investment company custodians, and rule 17f–2 under the Act allows an investment company to act as self-custodian, subject to certain requirements. Applicants request an exemption from section 17(f) and rule 17f–2 to permit the following exceptions from the requirements of rule 17f–2: (a) Compliance with paragraph (b) of the rule may be achieved through safekeeping in the locked files of the Firm or of an Eligible Employee; (b) for purposes of paragraph (d) of the rule: (i) Employees of the Firm will be deemed employees of the Funds; (ii) officers of a Manager will be deemed to be officers of such Fund; and (iii) the Manager of a Fund will be deemed to be the board of directors of such Fund; and (c) instead of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two senior level employees of the Firm. Applicants assert that the securities held by the Funds are most suitably kept in the Firm's files, where they can be referred to as necessary.

8. Section 17(g) of the Act and rule 17g–1 under the Act generally require the bonding of officers and employees of

a registered investment company who have access to its securities or funds. Rule 17g–1 requires that a majority of directors who are not interested persons take certain actions and give certain approvals relating to fidelity bonding. Paragraph (g) of rule 17g–1 sets forth certain materials relating to the fidelity bond that must be filed with the Commission and certain notices relating to the fidelity bond that must be given to each member of the investment company's board of directors. Paragraph (h) of rule 17g–1 provides that an investment company must designate one of its officers to make the filings and give the notices required by paragraph (g). Paragraph (j) of rule 17g–1 exempts a joint insured bond provided and maintained by an investment company and one or more other parties from section 17(d) of the Act. Rule 17g–1(j)(3) requires that the board of directors of an investment company satisfy the fund governance standards defined in rule 0–1(a)(7).

9. Applicants request an exemption from section 17(g) and rule 17g–1 to the extent necessary to permit the Manager to take the action and make the approvals set forth in the rule. Because the Manager will be an interested person of the Funds, the Funds would not be able to comply with rule 17g–1 without the requested relief. Applicants also request an exemption from the requirements of rule 17g–1(g) and (h) relating to the filing of copies of fidelity bonds and related information with the Commission and the provision of notices to the board of directors and from the requirements of rule 17g–1(j)(3). Applicants believe that the filing requirements are burdensome and unnecessary as applied to the Funds. The Manager will maintain the materials otherwise required to be filed with the Commission by rule 17g–1(g) and agrees that all such material will be subject to examination by the Commission and its staff. The Manager will designate a person to maintain the records otherwise required to be filed with the Commission under paragraph (g) of the rule. Applicants maintain that the notices otherwise required to be given to each member of the board of directors would be unnecessary as the Funds will not have boards of directors. The Funds will comply with all the other requirements of rule 17g–1.

10. Section 17(j) of the Act and paragraph (b) of rule 17j–1 under the Act make it unlawful for certain enumerated persons to engage in fraudulent or deceptive practices in connection with the purchase or sale of a security held or to be acquired by a registered investment company. Rule 17j–1 also requires that every registered investment company adopt a written code of ethics and that every access person of a registered investment company report personal securities transactions. Applicants request an exemption from the requirements of rule 17j–1, with the exception of the anti-fraud provisions of rule 17j–1(b), because they would be time-consuming and expensive and would serve little purpose in light of the community of interests among the Fund Investors by virtue of their common association with the Firm. Applicants assert that the requested exemption is consistent with the purposes of the Act because the dangers against which section 17(j) and rule 17j–1 are intended to guard are not present in the case of the Funds.

11. Applicants request exemption from the requirements in sections 30(a), 30(b), and 30(e) of the Act, and the rules under those sections, that registered investment companies file with the Commission and mail to their shareholders certain periodic reports and financial statements. Applicants state that the forms prescribed by the Commission for periodic reports have little relevance to the Funds and would entail administrative and legal costs that outweigh any benefit to the Fund Investors. Applicants request exemptive relief to the extent necessary to permit each Fund to report annually to its Fund Investors in the manner prescribed for the Fund by its Fund Agreement. Applicants also request an exemption from section 30(h) of the Act to the extent necessary to exempt the executive officers and directors of the Manager and the Manager and any other persons who may be deemed to be members of an advisory board of a Fund from filing Forms 3, 4 and 5 under section 16 of the Exchange Act with respect to their ownership of Interests in the Funds. Applicants assert that, because there is no trading market for Interests and transferability of Interests is severely restricted, these filings are unnecessary for the protection of investors and would be burdensome to those who would be required to file them.

12. Rule 38a–1 requires investment companies to adopt, implement, and periodically review written policies and procedures reasonably designed to prevent violation of federal securities laws, appoint a chief compliance officer and maintain certain records. The Funds will comply with rule 38a–1(a), (c) and (d), except that (a) the Manager of each Fund will fulfill the responsibilities assigned to the Fund's board of directors under the rule, and (b) since the Manager would be considered an interested person of the Funds, approval by a majority of disinterested directors required by rule 38a–1 will not be obtained. In addition, the Funds will comply with the requirement in rule 38a–1(a)(4)(iv) that the chief compliance officer meet with the independent directors by having the chief compliance officer meet with the Manager.

Applicants' Conditions

The applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Each proposed transaction to which a Fund is a party otherwise prohibited by section 17(a) or section 17(d) and rule 17d–1 (each a ''Section 17 Transaction'') will be effected only if the Manager determines that: (a) The terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to the Fund Investors of the participating Fund and do not involve overreaching of the Fund or its Fund Investors on the part of any person concerned; and (b) the Section 17 Transaction is consistent with the interests of the Fund Investors of the participating Fund, the Fund's organizational documents and the Fund's reports to its Fund Investors.

In addition, the Manager will record and preserve a description of such Section 17 Transactions, its findings, the information or materials upon which its findings are based and the basis therefor. All such records will be maintained for the life of a Fund and at least six years thereafter, and will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

2. If purchases or sales are made by a Fund from or to an entity affiliated with the Fund by reason of an Equity Shareholder or employee of the Winstead Group (a) serving as an officer, director, general partner or investment advisor of the entity, or (b) having a 5% or more investment in the entity, such individual will not participate in the Fund's determination of whether or not to effect the purchase or sale.

3. The Manager will adopt, and periodically review and update, procedures designed to ensure that reasonable inquiry is made, prior to the consummation of any Section 17 Transaction, with respect to the possible involvement in the transaction of any affiliated person or promoter of or principal underwriter for the Funds, or any affiliated person of such a person, promoter, or principal underwriter.

4. The Manager will not make on behalf of a Fund any investment in which a Co-Investor (as defined below) has or proposes to acquire the same class of securities of the same issuer, where the investment involves a joint enterprise or other joint arrangement within the meaning of rule 17d–1 in which the Fund and the Co-Investor are participants, unless any such Co-Investor, prior to disposing of all or part of its investment: (a) Gives the Manager sufficient, but not less than one day's, notice of its intent to dispose of its investment, and (b) refrains from disposing of its investment unless the participating Fund holding such investment has the opportunity to dispose of its investment prior to or concurrently with, on the same terms as, and on a pro rata basis with the Co-Investor. The term ''Co-Investor'' with respect to any Fund means any person who is: (a) An ''affiliated person'' (as defined in section 2(a)(3) of the Act) of the Fund; (b) a Winstead Entity; (c) an Equity Shareholder or other employee of a Winstead Entity; (d) an investment vehicle offered, sponsored, or managed by the Firm or an affiliated person of the Firm; or (e) an entity in which a Winstead Entity acts as a general partner, or has a similar capacity to control the sale or disposition of the entity's securities.

The restrictions contained in this condition, however, shall not be deemed to limit or prevent the disposition of an investment by a Co-Investor: (a) To its direct or indirect wholly-owned subsidiary, to any company (a ''parent'') of which the Co-Investor is a direct or indirect wholly-owned subsidiary, or to a direct or indirect wholly-owned subsidiary of its parent; (b) to Immediate Family Members of the Co-Investor or a trust established for any such Immediate Family Member; or (c) when the investment is comprised of securities that are (i) listed on any exchange registered under section 6 of the Exchange Act; (ii) NMS stocks pursuant to section 11A(a)(2) of the Exchange Act and rule 600(a) of Regulation NMS thereunder; (iii) government securities as defined in section 2(a)(16) of the Act or other securities that meet the definition of ''Eligible Security'' in rule 2a–7 under the Act; or (iv) listed on or traded on any foreign securities exchange or board of trade that satisfies regulatory requirements under the law of the jurisdiction in which such foreign securities exchange or board of trade is organized similar to those that apply to a national securities exchange or a national market system for securities.

5. The Manager of each Fund will send to each person who was a Fund Investor in such Fund at any time during the fiscal year then ended audited financial statements of the Fund. At the end of each fiscal year, the Manager will make a valuation or have a valuation made of all of the assets of the Fund as of the fiscal year end in a manner consistent with customary practice with respect to the valuation of assets of the kind held by the Fund. In addition, as soon as practicable after the end of each fiscal year of each Fund, the Manager of the Fund shall send a report to each person who was a Fund Investor at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Fund Investor of his or her federal and state income tax returns and a report of the investment activities of such Fund during such year.

6. Each Fund and the Manager will maintain and preserve, for the life of each Fund and at least six years thereafter, such accounts, books, and other documents as constitute the record forming the basis for the audited financial statements and annual reports of such Fund to be provided to its Fund Investors, and agree that all such records will be subject to examination by the Commission and its staff. All such records will be maintained in an easily accessible place for at least the first two years.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02562 Filed 2–5–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68787; File No. SR–NYSEMKT–2013–08]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Delaying the Operative Date of A Rule Change to Exchange Rule 80B—Equities, Which Provides for Methodology for Determining When To Halt Trading in All Stocks Due to Extraordinary Market Volatility, From the Date of February 4, 2013, Until April 8, 2013

January 31, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b-4 thereunder,[3] notice is hereby given that on January 23, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to Exchange Rule 80B-Equities, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. The text of the proposed rule change [sic] 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 amend Rule 80B—Equities, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

Plan'').[4] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 80B—Equities would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 80B—Equities would be in effect.

Current Rule 80B—Equities

In its current form,[5] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The Exchange disseminates the new trigger levels quarterly to the media and via an Information Memo and [sic] is available on the Exchange's Web site.[6] The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 80B—Equities circuit breaker is in effect, trading in all stocks halt for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;

At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;

At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;

At or after 1:00 p.m. but before 2:00 p.m.—one hour;

At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 80B—Equities trading halt for stocks that comprise the DJIA.

Amended Rule 80B—Equities

The Exchange amended Rule 80B—Equities to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breakers'').[7] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 80B—Equities as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 80B—Equities triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 80B—Equities: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[8] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act'')[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide

[4] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSEAmex-2011–73). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[5] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR-Amex-98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR-Phlx-98–15).

[6] *See e.g.,* NYSE Regulation Information Memos 11–19 (June 30, 2011) and 11–10 (March 31, 2011).

[7] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSEAmex-2011–73).

[8] *See id.*

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change 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–NYSEMKT–2013–08 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–NYSEMKT–2013–08.* 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–NYSEMKT–2013–08 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02629 Filed 2–5–13; 8:45 am]

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[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68791; File No. SR–BATS–2013–007]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rules Related to Price Sliding Functionality

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 25, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend Rule 11.9, entitled ''Orders and Modifiers'', and Rule 21.1, entitled ''Definitions'', to modify the operation of the Exchange's price sliding functionality described in Rules 11.9 and 21.1 applicable to the BATS equity securities trading platform (''BATS Equities'') and the BATS equity options trading platform (''BATS Options''), respectively.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently offers various forms of sliding which, in all cases, result in the ranking and/or display of an order at a price other than an order's limit price in order to comply with applicable securities laws and/or Exchange rules. Specifically, the Exchange currently offers price sliding to ensure compliance with Regulation NMS and Regulation SHO for BATS Equities, as well as price sliding for BATS Options to ensure compliance rules analogous to Regulation NMS adopted by the Exchange and other options exchanges. Price sliding currently offered by the Exchange re-prices and displays an order upon entry and in certain cases again re-prices and re-displays an order at a more aggressive price based on changes in the national best bid (''NBB'') or national best offer (''NBO'', and together with the NBB, the ''NBBO''). As described below, the Exchange proposes to modify the operation of display-price sliding in the event the Exchange displays an order subject to price sliding as a Protected Quotation[5] and such order's displayed price is locked or crossed by another equities market or options exchange, as applicable.

Under the Exchange's current rules for BATS Equities, if, at the time of entry, an order would lock or cross a Protected Quotation displayed by another trading center the Exchange ranks orders subject to display-price sliding at the locking price and displays such orders at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers). Following the initial ranking and display of an order subject to display-price sliding, an order is typically only re-ranked and re-displayed to the extent it achieves a more aggressive price. However, the Exchange proposes to re-rank an order at the same price as the displayed price (i.e., a less aggressive price) in the event such order's displayed price is locked or crossed by a Protected Quotation of an external market.[6] This will avoid the potential of a ranked price that crosses the Protected Quotation displayed by such external market, which could, in turn, lead to a trade through of such Protected Quotation at such ranked price. The Exchange notes that, as described below, when an external market crosses the Exchange's Protected Quotation and the Exchange's Protected Quotation is a displayed order subject to price sliding, the Exchange proposes to re-rank such order at the displayed price. Thus, the order displayed by the Exchange will still be ranked and permitted to execute at a price that crosses the other market's Protected Quotation, which is consistent with Rule 611(b)(4) of Regulation NMS.[7]

As an example of the behavior described above, assume the Exchange has a posted and displayed bid to buy 100 shares of a security priced at $10.10 per share and a posted and displayed offer to sell 100 shares at $10.13 per share. Assume the NBBO is $10.10 by $10.12. If the Exchange receives a non-routable bid to buy 100 shares at $10.12 per share the Exchange will rank the order to buy at $10.12 and display the order at $10.11 because displaying the bid at $10.12 would lock an external market's Protected Offer to sell for $10.12. If an external market then updated its Protected Offer to $10.11, thus locking the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange proposes to modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). By re-ranking the bid in this example to $10.11, the Exchange will not allow an order to maintain a ranked price that is crossing the NBO when the displayed price of such order is locking the NBO, and thus, such order will not have the ability to trade through the NBO if the Exchange receives a marketable contra-side offer during the locked market condition.

The Exchange notes that as proposed when an external market publishes a Protected Quotation that *crosses* an order displayed by the Exchange, the Exchange has proposed to slide the ranked price of its displayed order to

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] As defined in BATS Rule 1.5(t), applicable to BATS Equities, a ''Protected Quotation'' is ''a quotation that is a Protected Bid or Protected Offer.'' In turn, the term ''Protected Bid'' or ''Protected Offer'' means ''a bid or offer in a stock that is (i) displayed by an automated trading center; (ii) disseminated pursuant to an effective national market system plan; and (iii) an automated quotation that is the best bid or best offer of a national securities exchange or association.'' As defined in BATS Rule 27.1, applicable to BATS Options, a ''Protected Quotation'' is ''a Protected Bid or Protected Offer.'' In turn, the term ''Protected Bid'' or ''Protected Offer'' means ''a Bid or Offer in an options series, respectively, that: (A) Is disseminated pursuant to the OPRA Plan; and (B) Is the Best Bid or Best Offer, respectively, displayed by an Eligible Exchange.'' An ''Eligible Exchange'' is defined in Rule 27.1 as ''a national securities exchange registered with the SEC in accordance with Section 6(a) of the Exchange Act that: (a) is a Participant Exchange in OCC (as that term is defined in Section VII of the OCC by-laws); (b) is a party to the OPRA Plan (as that term is described in Section I of the OPRA Plan); and (c) if the national securities exchange chooses not to become a party to this Plan, is a participant in another plan approved by the Commission providing for comparable Trade-Through and Locked and Crossed Market protection.''

[6] The Exchange notes that as a general matter Regulation NMS should prevent external markets from displaying Protected Quotations that lock or cross Protected Quotations displayed by the Exchange. However, in a dynamic market, such an event can and does happen for a variety of reasons. For example, if the Exchange updates its Protected Quotation for a security at the same time another market updates its contra-side Protected Quotation, it is possible that such quotations lock or cross each other. Neither the Exchange nor the other market would know in this circumstance that such quotations would lock or cross each other when publishing their quotation updates. As another example, in the event another market receives an intermarket sweep order, such market may permissibly display such order without regard to other Protected Quotations, including quotations displayed by the Exchange that lock or cross such order.

[7] 17 CFR 242.611(b)(4).

the displayed price. Thus, an order will still be permitted to be ranked at a price that crosses an external market's Protected Quotation, and could thus trade through such quotation if executed. For instance, using the example above, assume that the NBBO is $10.10 by $10.12 and the Exchange has a price slid bid to buy 100 shares that is ranked at $10.12 and displayed at $10.11. If an external market then updated its Protected Offer to $10.10, thus crossing the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange will modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). The order displayed by the Exchange will be permitted to remain executable at a price that crosses the other market's Protected Offer. The Exchange has proposed this functionality because it is consistent with its proposed functionality when an external market *locks* the Exchange's Protected Quotation. While the Exchange believes such an order should still be permitted to execute pursuant to the exception in Regulation NMS when the market is crossed, and does not believe that the displayed price of its Protected Quotations should be adjusted based on another market published Protected Quotations that lock or cross such quotations, the Exchange believes that executing such an order at the displayed price of such order is a better result because the existence of a crossing quotation is evidence of some price discrepancy in the market. The Exchange also believes that consistency between the functionality when the Exchange's quotation is locked and when the Exchange's quotation is crossed is preferable.[8]

The Exchange also proposes to make clear that this re-ranking will not result in a change in priority for the order at its displayed price. For instance, in the example above, assume the bid described had been posted and displayed at $10.11 and ranked at $10.12 (''Order A''), and then a later arriving bid is received by the Exchange at $10.11 (''Order B'') and posted as well, with priority behind Order A. If the Exchange then re-ranks Order A because it has been locked or crossed by another market center's Protected Quotation, the Exchange does not believe it would be fair to cause such order to lose priority when it was originally first in priority amongst displayed orders on the Exchange.

As set forth in the Exchange's current price sliding rules, the ranked and displayed prices of an order subject to display-price sliding may be adjusted once or multiple times depending upon the instructions of a User[9] and changes to the prevailing NBBO. The Exchange's default price sliding process slides and ranks an order on entry so that it is ranked at the locking price and displayed at one price less aggressive and then unslides the order so that it is displayed at the ranked/locking price one time if such display becomes permissible. Multiple price sliding continues to rank and display orders at the most aggressive permissible prices based on changes to the NBBO. Multiple price sliding is optional and must be explicitly selected by a User before it will be applied. The Exchange proposes to make clear that, in connection with the changes above, if an order subject to the Exchange's default price sliding process has been locked or crossed by a Protected Quotation of an external market then the Exchange will adjust the ranked price of such order and it will not be further re-ranked or re-displayed at any other price. While in most circumstances the Exchange unslides orders subject to price sliding to a more aggressive price when permissible, in this limited circumstance, when such an order's displayed price is locked or crossed by an external market the Exchange will be sliding the ranked price to the less aggressive displayed price and will not further unslide the order. Orders subject to the optional multiple price sliding process will be further re-ranked and re-displayed as permissible based on changes to the prevailing NBBO. Thus, once slid, an order subject to multiple price sliding, including its ranked price, will be slid to more aggressive prices as permissible.

As a continuation of the example above, assume that the NBBO is $10.10 by $10.12 and the Exchange has a price slid bid to buy 100 shares that is ranked at $10.12 and displayed at $10.11. If an external market then updated its Protected Offer to $10.11, thus locking the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange will modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). If a User has selected the default price sliding process then the order will not further re-rank or re-display such order, even if the NBO moves back to $10.12 such that the order could again be ranked at that price. However, if a User has opted into multiple price sliding, the Exchange will re-rank such order at $10.12 (still displayed at $10.11), and if the NBO then moved to $10.13, the Exchange will re-display such order at $10.12.

BATS Options—Display-Price Sliding

In order to maintain consistency between analogous processes offered by BATS Equities and BATS Options, the Exchange proposes to modify the rules of BATS Options to conform with the changes described above related to display-price sliding. Accordingly, the Exchange proposes to modify Rule 21.1(h), which is based on Rule 11.9, as amended. Proposed Rule 21.1(h) relates to display-price sliding offered to ensure compliance with locked and crossed market rules relevant to participation on BATS Options. As proposed, in order to adopt a similar change for BATS Options display-price sliding, Rule 21.1(h) will provide that an order will only be re-ranked and re-displayed to the extent it achieves a more aggressive price, provided, however, that the Exchange will re-rank an order at the same price as the displayed price in the event such order's displayed price is locked or crossed by a Protected Quotation of another options exchange. Such event will not result in a change in priority for the order at its displayed price. As is true for BATS Equities, display-price sliding for BATS Options will default to re-ranking such an order only once unless a User opts-in to multiple price sliding. As drafted, the amendments to Rule 21.1(h) are identical to the amendments proposed for Rule 11.9 as described above with the exception of minor references necessary due to the difference between rules applicable to BATS Equities and BATS Options.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[11] because 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

[8] *Id.*

[9] As defined in BATS Rule 1.5(cc), a User is ''any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.''

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

perfect the mechanism of, a free and open market and a national market system.

The Exchange believes that the proposed changes to price sliding are consistent with Section 6(b)(5) of the Act,[12] as well as Rules 610 and 611 of Regulation NMS.[13] The Exchange is not modifying the overall functionality of price sliding, which, to avoid locking or crossing quotations of other market centers, displays orders at permissible prices while retaining a price at which the User is willing to buy or sell, in the event display at such price or an execution at such price becomes possible. Instead, the Exchange is making changes to ensure that if the Exchange's own Protected Quotation is a price slid order that is locked or crossed by an external market's Protected Quotation, that [sic] the Exchange will re-rank such order so that its displayed price is the same as its ranked price.

Rule 610(d) requires exchanges to establish, maintain, and enforce rules that require members reasonably to avoid ''[d]isplaying quotations that lock or cross any protected quotation in an NMS stock.'' [14] Such rules must be ''reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock,'' and must ''prohibit * * * members from engaging in a pattern or practice of displaying quotations that lock or cross any quotation in an NMS stock.'' [15] Thus, display-price sliding offered by the Exchange, including the functionality offered for BATS Options, assists Users by displaying orders at permissible prices.

Rule 611 requires trading centers to ''establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations'' unless an exception applies. The Exchange believes that the proposal to modify its price sliding functionality to prevent the ranked prices of orders subject to price sliding from working at a price that could trade through other market centers when the Exchange's quotation is locked is consistent with this Rule 611. Similarly, although a trade through would be permissible if the Exchange's quotation is crossed by another market center based on an applicable exception, the Exchange believes that the proposal to re-rank orders in such a circumstance to the displayed price is consistent with the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition. To the contrary, the proposal will ensure that the Exchange's processes are designed to prevent trade throughs consistent with Regulation NMS in the event the Exchange's own quotations are locked or crossed by external markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [18] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6) [19] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will allow the Exchange to immediately enhance its price sliding functionality to avoid potential trade throughs when the Exchange's quotation is locked by an external market. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BATS–2013–007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2013–007. 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

[12] *Id.*

[13] 17 CFR 242.610; 17 CFR 242.611.

[14] 17 CFR 242.610(d).

[15] *Id.*

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6).

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BATS–2013–007 and should be submitted on or before February 27, 2013].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02559 Filed 2–5–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68792; File No. SR–C2–2013–004]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Schedule

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 24, 2013, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its transaction fees for simple, non-complex orders in equity options classes (all of which may be listed on other exchanges as well as C2). Going forward, fees will be calculated based on the following formula (fees are calculated on a per-contract basis): Fee = (C2 BBO Market Width at time of execution) × (Market Participant Rate) × 50. The C2 BBO Market Width is the difference between the quoted best offer and best bid in each class on C2 (the displayed C2 ask price minus the displayed C2 bid price). The Market Participant Rates are different rates for different types of market participants, as follows:

Market Participant	Rate (percent)
C2 Market-Maker	30
Public Customer (Maker)	40
All other origins	50

The Exchange multiplies the C2 BBO Market Width and the Market Participant Rate by 50 because this allows C2 to reach a per-contract amount that takes into account half of the C2 BBO Market Width. The use of 50 as a multiplier is mathematically equivalent to the nominal C2 BBO Market Width divided by two, academically making the assumption that the theoretical value of the difference between the ask price and the bid price is the midpoint between the two. For purposes of this fee structure, the Exchange will be using the BBO as calculated by C2. The fee does not apply to Public Customer Takers because they will be receiving a rebate for such transactions (to be described later in this proposed rule change).

The Exchange uses different Market Participant Rates for different market participants as a function of each market participant's obligations and responsibilities in the relevant class, as well as to provide incentives for Market-Makers to quote in a manner that narrows bid-ask spreads, which promotes market liquidity and therefore enhances market quality. C2 Market-Makers purchase permits and have quoting obligations, thereby justifying a lower Market Participant Rate. Public Customers have a lower Market Participant Rate than orders originating from other origins (other than C2 Market-Makers) because Public Customer order flow is a desirable commodity for all options exchanges and the Exchange seeks to attract such order flow. Further, Public Customers do not have access to many of the resources (such as technology, capital treatment, etc.) that other market participants may more easily access. Moreover, assessing different fee rates to different types of market participants is a common practice within the options industry, and many options exchanges, including C2, currently do so.[3]

The maximum fee for simple, non-complex orders in all equity options classes will be $0.85 per contract because, notwithstanding the tenets of the overall proposal, the Exchange does not want to have fees and rebates match or exceed the minimum trading increment ($0.01 x the 100 multiplier, or $1.00 per contract). This maximum fee amount is reasonable because, among other things, the fee will not always be assessed for the maximum amount. The fee will only be for the maximum amount when the BBO Market Width is wide. Otherwise, the fee will be smaller. Indeed, the purpose of the proposed new fees structure is to encourage tighter quoting by linking lower fees to such tighter quoting. A maximum fee amount is necessary to prevent fees from becoming prohibitively high in the event of a wide BBO Market Width. A maximum fee amount of $0.85 per contract is reasonable because it is lower than the minimum trading increment. The Commission has, in the past, noted the argument that a maximum fee of $0.99 per contract or lower may be viable

[3] *See* current C2 Fees Schedule, Section 1, which lists lower transaction fees for Public Customers than other market participants. *See also* Chicago Board Options Exchange, Incorporated (''CBOE'') Fees Schedule, Rate Tables on pages 1–2, which list lower transaction fees for Customers and CBOE Market-Makers than other market participants. *See also* International Securities Exchange, LLC (''ISE'') Schedule of Fees, Section 1, which lists lower transaction fees for Customers and ISE Market-Makers than other market participants.

because any maximum fee of $0.99 per contract or lower still allows for price improvement.[4] Purchasing an options contract at $2.00 with an execution fee of $0.99 is a better all-inclusive price than purchasing the same options contract at $2.01 with no execution fees. Simply put, the execution of an order at a $0.01 better price will bring a better all-inclusive price as long as the fee is $0.99 per contract or lower. The proposed maximum fee here is not even $0.99 per contract, but only $0.85 per contract. And, as stated above, $0.85 will not be assessed on all transactions, but is merely a maximum fee amount based on the formula described above for determining fees under the proposed fees structure. Indeed, the Exchange anticipates that the vast majority of transactions will be assessed a significantly lower per-contract fee than $0.85.

In conjunction with this new fee calculation for simple, non-complex orders in all equity options classes, the Exchange proposes to adopt a rebate (in lieu of a fee) for simple, non-complex Public Customer orders in all equity options classes that remove liquidity (i.e. takers) based upon the following formula (rebates are calculated on a per-contract basis):

Rebate = (C2 BBO Market Width at time of execution) x (Order Size Multiplier) x 50

The Order Size Multiplier is a different multiplier based upon the size of the order:

Number of contracts in order	Multiplier (percent)
1–10	36
11–99	30
100–250	20
251+	0

The rebate is limited to Public Customer taker orders because, at this time, C2 seeks to provide extra incentives for Public Customer order flow to route to the Exchange. Further, providing rebates targeted towards Public Customers is a common practice within the options industry, and many options exchanges, including C2, currently do so.[5] The Exchange applies different Order Size Multipliers for different size orders because the Exchange desires to attract smaller orders, and on related note, because of different hedging considerations associated with these smaller orders. Smaller orders are more attractive to Market-Makers because they are easier to hedge than large orders. For example, imagine a situation in which a Public Customer executes a 5-contract trade of at-the-money calls against a counterparty. In a practical delta hedge, the counterparty would execute a stock trade for 250 shares of the underlying stock (5 contracts X 50 delta). In contemporary stock markets, this size share block is relatively easy to execute. Had the transaction been for 500 contracts, the counterparty would have had to trade 25,000 shares of the underlying stock, which would be much more difficult. C2 will be most able to incent counterparties to participate in trades if they have a reasonable assumption that a meaningful amount of incoming orders will be for smaller quantities. This can be achieved by incentivizing order flow providers to direct small Public Customer ''taker'' orders to C2.

The proposed maximum rebate will be $0.75 per contract for the same reasons described above for limiting the maximum per-contract fee. It is necessary to maintain a spread between the maximum fee of $0.85 per contract and the maximum rebate, because, in the event that the maximum fee and rebate both apply, the $0.10 per-contract difference will allow the Exchange to maintain a minimum level of profit potential. Rebate amounts are often generally lower than fee amounts on the Exchange, as well as on other exchanges,[6] for this reason (among others).

With respect to the rebate, in order to prevent order flow providers from ''shredding'' large Public Customer orders into smaller orders in order to take advantage of the higher rebates offered to such smaller Public Customer taker orders, multiple orders from the same executing firm for itself or for a Clearing Member Trading Agreement (''CMTA'') or correspondent firm in the same series on the same side of the market that are received by the Exchange within 500 milliseconds will be aggregated for purposes of determining the order quantity. 500 milliseconds is the proper amount of time to discourage shredding to take advantage of quantity-based fees. Such a time interval is lengthy enough to discourage ''shredding'' due to the market risk the sender would realize in trying to game this interval. This time interval also matches that used by the Chicago Board Options Exchange, Incorporated (''CBOE'') to prevent ''shredding.''[7]

To illustrate how the new fee and rebate structure would operate, consider the following examples. First, consider a situation in which the C2 market in an equity options class is 1.00–1.03, with the offer comprised of a resting C2 Market-Maker quote to sell 10 contracts. A Public Customer order to buy 10 contracts comes in and executes against that C2 Market-Maker quote at 1.03. At the time of the execution, the BBO Market Width is 0.03 (the difference between the C2 offer and the C2 bid). The fee for the C2 Market-Maker would be calculated by multiplying 0.03 by 30% (the Market Participant Rate for C2 Market-Makers), and then multiplying that by 50. As such, the fee for the C2 Market-Maker would be $0.45 per contract. Because the Public Customer order is a ''taker'' order, the Public Customer would receive a rebate. This rebate would be calculated by multiplying the BBO Market Width of 0.03 by the Order Size Multiplier of 36% (because the Public Customer order is for 10 contracts), and then multiplying that by 50. As such, the Public Customer would receive a rebate of $0.54 per contract.

Now, consider a situation in which the C2 market in an equity options class is 3.50—3.52. The resting offer on the C2 Book is a C2 Market-Maker quote for 10 contracts, and next on the C2 Book sits a broker-dealer sell order at the same price for 15 contracts. Following that is a C2 Market-Maker quote for 25 contracts at 3.53 and a broker-dealer order for 20 contracts at 3.55. The best offer on another exchange is 3.54 for 25 contracts. A Public Customer (''taker'') market order to buy 60 contracts at the market is received by C2.

The Public Customer buy order would trade with all interest at 3.52. The BBO Market Width here is 0.02. Therefore, the fees for execution of the C2 Market-Maker quote resting at 3.52 and the broker-dealer behind the C2 Market-Maker (but also at 3.52) would be calculated by multiplying 0.02 by the Market Participant Rate, which for a C2 Market-Maker is 30% and for a broker-dealer is 50%, and then multiplying each of those amounts by 50. The C2 Market-Maker sell quote's execution fee for those first 10 contracts would therefore be $0.30 per contract (0.02 x 30% x 50), and the broker-dealer sell order's fee for the next 15 contracts

[4] *See* Securities Exchange Act Release No. 61902 (April 14, 2010), 75 FR 20738 (April 20, 2010) (File No. S7–09–10) at 20750 (''It could be argued that because investors will not be worse off accessing a price that is better by $1 per contract as long as the fee to access that quotation is not more than $0.99 per contract, any fee cap should not be lower than $0.99 per contract * * *'').

[5] *See* current C2 Fees Schedule, Section 1, *and* NASDAQ Stock Market LLC Options Market (''NOM'') Chapter XV (Options Pricing), Section 2.

[6] *See* current C2 Fees Schedule, Section 1, *and* NOM Chapter XV (Options Pricing), Section 2.

[7] *See* CBOE Fees Schedule Table on ''Linkage Fees''.

would be $0.50 per contract (0.02 x 50% x 50). The rebate for the Public Customer buy order would be calculated by multiplying the BBO Market Width (0.02) by the Order Size Multiplier (30%, because the size of the total order sent in by the Public Customer was 60 contracts), and then multiplying that amount by 50. Therefore, the Public Customer rebate would be $0.30 per contract for these first 25 contracts that traded at 3.52.

With 35 contracts remaining in the Public Customer buy order, it would then interact with the resting C2 Market-Maker quote to sell 25 contracts at 3.53. The fee for execution of this C2 Market-Maker quote would be calculated by multiplying the new BBO Market Width (now 0.03) by the C2 Market-Maker Market Participant Rate of 30%, and then multiplying that amount by 50. Therefore, the C2 Market-Maker's fee for these 25 contracts would be $0.45 per contract. The rebate for the Public Customer buy order (for these next 25 contracts) would be calculated by multiplying this new BBO Market Width of 0.03 by the Order Size Multiplier of 30%, and then multiplying that by 50. Therefore, the Public Customer rebate for these 25 contracts would be $0.45 per contracts.

There remain 10 contracts on Public Customer's buy order. However, because another exchange is now quoting a resting order for 25 contracts at 3.54, and this quote is now the National Best Offer, the remaining 10 contracts on the buy order would be routed to that exchange rather than trading with the resting broker-dealer order on the C2 Book that is priced at 3.55.

Finally, consider a situation in which the C2 market in an equity options class is 1.00–1.05. A C2 Market-Maker quote to buy 5 contracts for at 1.00 sits on the C2 Book, with a broker-dealer order to buy another 5 contracts at the same price resting behind it. A Public Customer (''taker'') order to sell 10 contracts at the market comes in and executes against the C2 Market-Maker quote and the broker-dealer buy order. The fee for the C2 Market-Maker would be calculated by multiplying the BBO Market Width of .05 by the C2 Market-Maker Market Participant Rate of 30%, and then multiplying that by 50. The fee for the C2 Market-Maker would be $0.75 per contract. The fee for the broker-dealer would be calculated by multiplying the BBO Market Width of .05 by the broker-dealer Market Participant Rate of 50%, and then multiplying that by 50. This comes out to $1.25 per contract. However, because this amount is higher than the maximum per-contract fee of $0.85 per contract, the broker-dealer's fee would be brought down to $0.85 per contract. The Public Customer's rebate would be calculated by multiplying the BBO Market Width of 0.05 by the Order Size Multiplier of 36% (since the order is for 10 contracts) and then multiplying that by 50. This comes out to $0.90 per contract. However, because this amount is higher than the maximum per-contract rebate of $0.75 per contract, the Public Customer's rebate would be $0.75 per contract.

As with the current fee structure, there will be no fees or rebates for trades on the open. Because orders would have been received before the Exchange was disseminating a market, it would not be appropriate to assess fees (or provide rebates) based on an unknown BBO Market Width.

The Exchange proposes to adopt this new method of calculating fees and rebates because BBO Market Width is an important component of market quality and of the cost of using an exchange market. In addition, the structure of the Market Participant Rate, which is a component of the proposed fees structure, is designed to provide incentives for Market-Makers to quote in a manner that narrows bid-ask spreads, promotes market liquidity, and enhances market quality. Moreover, C2 believes that the proposed fee and rebate structure addresses issues with respect to maker-taker pricing that have been identified in academic studies. These studies find that although maker-taker pricing has led to a reduction in quoted spreads, it has not led to a decline in true economic spreads once access fees and liquidity rebates are accounted for.[8] C2 believes that, calibrated correctly, a fee formula for transaction fees and rebates based on BBO Market Width, Market Participant Rate, and order size harnesses the incentives of different market participants that leads them to behave in a way that narrows bid-ask spreads, promotes market liquidity, and thereby enhances overall market quality. C2 believes that its competitive position for order flow relative to other option exchanges is improved through rules and policies that help promote high-quality markets.

The proposed new fee and rebate structure will potentially compliment brokers' best-execution obligations towards their customers. First, the proposed fee structure provides a generous ''taker'' rebate for public customers. The concept of ''best execution'' is primarily geared towards the treatment of retail order flow by brokers, and, on C2, the majority of public retail customer orders take liquidity, as opposed to make liquidity. Further, the amount of the fee or rebate for a transaction is easily determinable by applying the simple formulas described above. Order routers and other market participants have complex options pricing and routing software that should easily handle C2's proposed formula for fees or rebates. Moreover, even if it were difficult for brokers to determine the fee amounts, they could always assume the fee would equal the $0.85 per contract cap and route orders accordingly (even though the Exchange expects that fees for most transactions will fall short of that cap). Importantly, the $0.85 per contract cap is less than $1.00 per contract, which means that, in any situation in which C2 had even a one-cent better price than any other exchange, a market participant will be getting the best all-inclusive price by routing an order to C2. In situations in which C2 as well as another exchange(s) is at the NBBO, the market participant or order router can determine the exchange to which to send the order; there are multiple factors along with fees, including systems speed, service, etc., that are taken into account to determine ''best execution'', and since trade-throughs are of course prevented, the market participant will still be getting the best price. Finally, it will not be difficult to verify the BBO Market Width at the time of execution, as it could be deduced from the fee (which will be listed on the market participant's billing reports). Additionally, the Exchange is currently developing the system functionality to list the BBO Market Width at the time of execution on the trade fill report.

The proposed new fee and rebate structure will benefit all market participants and the markets in general. A fee structure that is based upon BBO Market Width, in which fees are lower when such BBO Market Width is smaller, will encourage tighter quoting (which in turn means better prices). The rebates for Public Customers will bring greater Public Customer order flow to the Exchange, and this increased volume and liquidity will benefit all market participants. On a broader level, a new, original, different fee structure benefits investors and the market in general by providing a new and different option for investors to consider when they decide which exchange

[8] *See* James Angel, Lawrence Harris, and Chester S. Spatt, ''Equity Trading in the 21st Century,'' USC Marshall School of Business, May 18, 2010, page 42. *See also* Katya Malinova and Andreas Park, ''Subsidizing Liquidity: The Impact of Make/Take Fees on Market Quality,'' available at: *http://ssrn.com/abstract=1823600.*

provides the most attractive option for directing order flow.

The proposed changes are to take effect on February 1, 2013.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[9] Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act[10], which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The proposed fee formula for simple, non-complex orders in all equity options classes is reasonable because it takes into account BBO Market Width, which is a factor in determining the liquidity associated with any potential options trade. Offering a different fee based on BBO Market Width is equitable and not unfairly discriminatory because assessing a lower fee for narrower spreads will provide incentives to quote more narrowly, which thereby results in better prices for all market participants.

Offering a lower Market Participant Rate for C2 Market-Makers than for other market participants is equitable and not unfairly discriminatory because C2 Market-Makers take on a number of obligations, including quoting obligations and the need to purchase permits, that some other market participants do not have. Further, a fees structure that includes a lower Market Participant Rate for C2 Market-Makers, who are the market participants that do the vast majority of quoting, incentivizes more and narrower quoting, thereby encouraging liquidity provision, which is vital to the marketplace and benefits all market participants. Offering a lower Market Participant Rate for Public Customers than for orders originating from other market participants (except C2 Market-Makers) is equitable and not unfairly discriminatory because those other market participants do not have the obligations of C2 Market-Makers yet have access to many of the resources (technology, capital treatment, etc.) that Public Customers do not.

Not assessing fees or providing rebates for trades on the open is reasonable because it allows market participants to avoid having to pay fees for such trades. This is equitable and not unfairly discriminatory because orders would have been received before the Exchange was disseminating a market, and therefore it would not be appropriate to assess fees (or provide rebates) based on an unknown BBO Market Width.

In the past, in the context of market data fees, the Commission has acknowledged that exchanges can offer different prices to ''particular classes of subscribers'' based on market conditions such as ''their economic circumstances and their need for and use of'' a particular product or service.[11] For example, the Commission has previously approved or cited favorably to differential pricing between retail and non-retail investors.[12] Further, assessing different fee rates to different types of market participants is a common practice within the options industry, and many options exchanges, including C2, currently do so.[13] Far from undermining the purposes of the Exchange Act, the Commission has found that such differential pricing ''provide[s] an opportunity for many investors to have access to'' products and services that they otherwise might choose to forego.[14] Indeed, in the past, the Commission has disapproved fees when such fees would interfere with the operation of the national market system—for example, by providing market participants with quicker access to ''top of book'' data that broker dealers are required by law to access pursuant to their duty of best execution.[15] The current proposal does not present any such concerns.

Having a maximum per-contract fee amount under the proposed new formula is reasonable because it will limit the amount that market participants can pay. This maximum fee amount is reasonable because the fee will not always be for the maximum amount. The fee will only be for the maximum amount when the BBO Market Width is wide. Otherwise, the fee will be smaller. Indeed, the purpose of the proposed new fees structure is to encourage tighter quoting by linking lower fees to such tighter quoting. A maximum fee amount is necessary to prevent fees from becoming prohibitively high in the event of a wide BBO Market Width. A maximum fee amount of $0.85 per contract is reasonable because it is lower than the minimum trading increment. The Commission has, in the past, noted the argument that a maximum fee of $0.99 per contract or lower may be viable because any maximum fee of $0.99 per contract or lower still allows for price improvement.[16] Purchasing an options contract at $2.00 with an execution fee of $0.99 is a better all-inclusive price than purchasing the same options contract at $2.01 with no execution fees. Simply put, the execution of an order at a $0.01 better price will bring a better all-inclusive price as long as the fee is $0.99 per contract or lower. The proposed maximum fee here is not even $0.99 per contract, but only $0.85 per contract. And, as stated above, $0.85 will not be assessed on all transactions, but is merely a maximum fee amount based on the formula described above for determining fees under the proposed fees structure. The maximum per-contract fee is equitable and not unfairly discriminatory because this limit will apply to all market participants.

Providing a rebate for Public Customer orders in all equity options classes that remove liquidity (*i.e.* takers) is reasonable because it will allow Public Customer takers to receive a rebate, as opposed to pay a fee, for the execution of orders. Providing this rebate to Public Customer takers only is equitable and not unfairly discriminatory because the increased volume and liquidity that the rebate will incentivize will benefit all other market participants. The rebate for ''take''

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] *See* Securities Exchange Act No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999) at 70630 (Concept Release, Regulation of Market Information Fees and Revenues) (File No. S7–28–99).

[12] *See* id. at 70630–31; *see also* Securities Exchange Act Release No. 46843 (November 18, 2002), 67 FR 70471 (November 22, 2002) at 70472 (Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 to the Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Fees for Nasdaq Data Entitlement Packages) (SR–NASD–2002–33).

[13] *See* current C2 Fees Schedule, Section 1, which lists lower transaction fees for Public Customers than other market participants. *See also* CBOE Fees Schedule, Rate Tables on pages 1–2, which list lower transaction fees for Customers and CBOE Market-Makers than other market participants. *See also* ISE Schedule of Fees, Section 1, which lists lower transaction fees for Customers and ISE Market-Makers than other market participants.

[14] *See* Securities Exchange Act Release No. 46843 (November 18, 2002), 67 FR 70471 (November 22, 2002) at 70472 (Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 to the Proposed Rule Change by the National Association of Securities Dealers, Inc., Relating to Fees for Nasdaq Data Entitlement Packages) (SR–NASD–2002–33).

[15] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) at 37569 (Final Rules and Amendments to Joint Industry Plans (''Regulation NMS'')) (File No. S7–10–04).

[16] *See* Securities Exchange Act Release No. 61902 (April 14, 2010), 75 FR 20738 (April 20, 2010) (File No. S7–09–10) at 20750 (''It could be argued that because investors will not be worse off accessing a price that is better by $1 per contract as long as the fee to access that quotation is not more than $0.99 per contract, any fee cap should not be lower than $0.99 per contract * * *'').

orders will incentivize Public Customers to ''take'' orders from all market participants, thereby providing a counterparty for resting ''make'' orders from all market participants. Further, providing rebates targeted towards Public Customers is a common practice within the options industry.[17]

Offering different Order Size Multipliers for different-sized orders is equitable and not unfairly discriminatory because the highest profit opportunity exists for the lowest-size orders since the profit potential is not captured until after the counter-party has executed its hedging transaction. Smaller orders are much easier to hedge than large orders, which makes smaller orders more attractive to Market-Makers. C2 will be most able to incent counterparties to participate in trades if they have a reasonable assumption that a meaningful amount of incoming orders will be for smaller quantities. This can be achieved by incentivizing order flow providers to direct small Public Customer ''taker'' orders to C2. This will benefit all market participants with the improved liquidity and trading opportunities. Market-Makers, who have greater obligations (including quoting), will be able to engage in more trades (especially hedging) due to the incenting of the direction of small Public Customer ''taker'' orders to C2.

Having a maximum rebate of $0.75 is reasonable because it is necessary to maintain a spread between the maximum fee of $0.85 per contract and the maximum rebate in order for the Exchange to maintain a minimum level of profit potential, and the $0.10 per contract difference allows the Exchange to do so. Currently, rebates are lower than fee amounts on the Exchange, as well as on other exchanges, for this reason. Moreover, the amount of the maximum rebate is higher than the maximum rebate currently offered on the Exchange [18] and is either higher than or within the range of rebates offered on other exchanges.[19] The maximum rebate is equitable and not unfairly discriminatory because it will be applied to all Public Customers equally. Further, providing this rebate to Public Customer takers only is equitable and not unfairly discriminatory because the increased volume and liquidity that the rebate will incentivize will benefit all other market participants. The rebate for ''take'' orders will incentivize Public Customers to ''take'' orders from all market participants, thereby providing a counterparty for resting ''make'' orders from all market participants. Further, providing rebates targeted towards Public Customers is a common practice within the options industry.[20]

Aggregating, for the purposes of determining the order quantity, multiple orders from the same executing firm for itself or for a CMTA or correspondent firm in the same series on the same side of the market that are received by the Exchange within 500 milliseconds is consistent with the Section 6(b)(5) [21] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest by preventing the ''shredding'' of large orders into multiple smaller ones in order to accrue a larger rebate. 500 milliseconds is the proper amount of time to discourage shredding to take advantage of quantity-based fees. Such a time interval is lengthy enough to discourage ''shredding'' due to the market risk the sender would realize in trying to game this interval. This time interval also matches that used by CBOE to prevent ''shredding.'' [22]

Finally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[23] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. Offering the proposed fee structure based on BBO Market Width provides a new and different option for investors looking to determine to which exchange to route orders, one that encourages tighter quoting and better prices, all of which perfects the mechanism for a free and open market and national market system.

Given the robust competition for order flow that exists in the options market, new, innovative price schedules like the one being proposed here are consistent with the above-mentioned goals of the Exchange Act. Indeed, by and large, the Commission historically has permitted exchanges to set their own fees absent some evidence that market forces were insufficient to constrain prices. There is no such evidence here.

When Congress charged the Commission with supervising the development of a ''national market system'' for securities, a premise of its action was that prices ordinarily would be determined by market forces. *See, e.g.,* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (stating Congress's intent that the ''national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed''). Consistent with this purpose, Congress and the Commission have repeatedly stated their preference for competition, rather than regulatory intervention, to determine prices, products, and services in the securities markets. *See* S. Rep. No. 94–75, 94th Cong., 1st Sess. 8 (1975) (''The objective [in enacting the 1975 amendments to the Exchange Act] would be to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services.''); Order Approving Proposed Rule Change Relating to NYSE Arca Data, Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (Dec. 9, 2008) at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.'') (SR–NYSEArca–2006–21); Regulation NMS, 70 FR at 37499 (observing that NMS regulation ''has been remarkably successful in promoting market competition in [the] forms that are most important to investors and listed companies'').

In *NetCoalition* v. *Securities and Exchange Commission,* 615 F.3d 525 (D.C. Cir. 2010), the D.C. Circuit approved the Commission's practice of relying on ''competitive forces'' in determining whether an exchange's proposed data fees were consistent with the purposes of the Exchange Act—as long as it had a ''reasoned basis'' for doing so. *Id.* at 544. Around the same time, Congress reaffirmed the primary role that exchanges have in setting prices when it enacted the Dodd-Frank amendments to the Exchange Act, which expanded the authorization of

[17] *See* current C2 Fees Schedule, Section 1, and NOM Chapter XV (Options Pricing), Section 2.

[18] *See* Exchange Fees Schedule, Section 1.

[19] *See and* NOM Chapter XV (Options Pricing), Section 2.

[20] *See* current C2 Fees Schedule, Section 1, *and* NOM Chapter XV (Options Pricing), Section 2.

[21] 15 U.S.C. 78f(b)(5).

[22] *See* CBOE Fees Schedule Table on ''Linkage Fees''.

[23] 15 U.S.C. 78f(b)(5).

exchanges to file immediately effective fee schedules, subject only to limited post-effectiveness review by the Commission. 15 U.S.C. 78s(b)(3)(A).

This consistent and considered judgment of Congress and the Commission is correct, particularly in light of evidence of robust competition in the options market for orders and liquidity. There are more options exchanges now than ever before, with no single exchange commanding at a given time more than 35% of listed options market share, a very different picture than 10 or 20 years ago. As the Commission recently estimated, order volume is fairly evenly distributed between the four largest entities that own options exchanges.[24] Indeed, recent data demonstrates this distribution of market share: The CBOE Holdings entities (CBOE and C2) have combined a market share of 26.40%, the International Securities Exchange has a market share of 15.85%, the NYSE Euronext entities (NYSE Amex and NYSE Arca) have a combined market share of 25.59%, and The NASDAQ OMX Group, Inc. entities (NASDAQ OMX BX, NASDAQ OMX Phlx, and NASDAQ Options Market) have a combined market share of 25.55%.[25] None of these four entities (which control over 93% of the market) could afford to charge opportunistic fees that resulted in being placed at the bottom of an order routing table and losing market share to competitors.

In the case of C2, it is particularly unlikely that an innovative pricing approach could cause competitive harm to the options market or to market participants. C2 is a new market participant that currently handles only about 1.45% percent of total market share in options trading.[26] Thus, the proposed rule is a modest attempt by a new market entrant to attract order volume away from more established competitors by adopting an innovative pricing strategy. C2 believes that this new pricing strategy will benefit the options markets and public consumers in particular. Indeed, it is well-established that new market entrants and new business models have procompetitive effects, and that innovations like the proposed rule can incentivize competitors to develop their own innovations in response. *See, e.g., Leegin Creative Leather Prods.* v. *PSKS, Inc.,* 551 U.S. 877, 891 (2007) (''New products and new brands are essential to a dynamic economy''); *Brooke Group* v. *Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 243 (1993) (noting that ''sound antitrust policy'' encouraged ''maverick'' pricing strategies because of their procompetitive effects); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines ¶ 2.1.5 (expressing view of DOJ and FTC that ''maverick'' firms benefit consumers by ''threaten[ing] to disrupt market conditions with a new technology or business model,'' ''tak[ing] the lead in price cutting or other competitive conduct,'' and ''resist[ing] otherwise prevailing industry norms''). The fact that an exchange proposes something new is a reason to be receptive, not skeptical—innovation is the life-blood of a vibrant competitive market—and that is particularly so in the case of a new market entrant of relatively small size like C2 that can cause no widespread competitive harm if the proposed fees structure fails to attract significant order volume.

Access to exchange quotes is also more efficient than ever and helps to promote price transparency and competition among exchanges for order flow. Orders are processed and executed electronically in milliseconds (also very different than 10 years ago) and markets are more open to new users than ever before. Under the NMS plan for order protection in listed options (''Options Linkage Plan''), each participating options exchange is required ''to establish, maintain, and enforce written policies and procedures as approved by the Commission that are reasonably designed to prevent Trade-Throughs'' in each exchange's listed options contracts.[27] When more than one exchange is displaying the NBBO (which is overwhelmingly the case), brokers often assign lowest priority in their order routing tables to the exchange with the highest transaction fees. This means that if an exchange sets high fees, it risks losing business to exchanges with lower fees—the same competitive pressure used by our free markets every day to constrain price.

Indeed, order routers' ability to effectively view all exchanges' displayed prices simultaneously and execute at the exchange that charges the lowest fees is *more* disciplining than the market forces that operate in many other industries. A customer in the market for a new television, for instance, cannot simultaneously know the price of every television at every retail store. And even if all those prices were known, transaction costs often would prevent the customer from buying at the lowest price—perhaps the cheapest television is twenty miles away, for example. In the options markets, by contrast, order routers can simultaneously view and execute orders at the exchange with the lowest transaction fees when more than one exchange has, or may match, the NBBO. Plus, broker-dealers, who have accepted responsibility for handling orders on behalf of customers, are monitoring displayed quotes. They are typically more sophisticated and better-informed market participants than customers in non-financial markets, and therefore are better able to make the types of decisions that will produce efficient markets and constrain prices.

Options exchanges have adopted different pricing models (''Make or Take'' or ''Broker Payment'') based on their competitive assessment of the incentives that will best attract order flow and liquidity. This competition has helped to exert competitive pressure on the exchanges' transaction fees. The Exchange believes that its proposed model will help further competition by providing market participants with yet another option in determining where to execute orders and post liquidity. By expanding the universe of pricing models, the Exchange's proposal will help competition to achieve one of its signature benefits, *i.e.,* allowing the marketplace to determine which pricing model best serves consumer needs.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 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. On the contrary, C2 believes that the proposed rule change will promote competition. A new, original, different fee structure benefits investors and the market in general by providing a new and different option for investors to consider when they decide which exchange provides the most attractive option for directing order flow.

In the case of C2, it is particularly unlikely that an innovative pricing approach could cause competitive harm to the options market or to market participants. C2 is a new market participant that currently handles only

[24] *See* Securities Exchange Act Release No. 61902 (April 14, 2010), 75 FR. 20738 (April 20, 2010) at 20759 (Proposed Amendments to Rule 610 of Regulation NMS) (File No. S7–09–10).

[25] Market share for November 2012, as provided by the Options Clearing Corporation (available at *http://www.optionsclearing.com/webapps/exchange-volume*).

[26] *Id.*

[27] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) at 39264–65 (Joint Industry Plan; Order Approving the National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMS PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

about 1.45% percent of total market share in options trading.[28] Thus, the proposed rule is a modest attempt by a new market entrant to attract order volume away from more established competitors by adopting an innovative pricing strategy. C2 believes that this new pricing strategy will benefit the options markets and public consumers in particular. Indeed, it is well-established that new market entrants and new business models have procompetitive effects, and that innovations like the proposed rule can incentivize competitors to develop their own innovations in response. *See, e.g., Leegin Creative Leather Prods.* v. *PSKS, Inc.,* 551 U.S. 877, 891 (2007) (''New products and new brands are essential to a dynamic economy''); *Brooke Group* v. *Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 243 (1993) (noting that ''sound antitrust policy'' encouraged ''maverick'' pricing strategies because of their procompetitive effects); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines ¶ 2.1.5 (expressing view of DOJ and FTC that ''maverick'' firms benefit consumers by ''threaten[ing] to disrupt market conditions with a new technology or business model,'' ''tak[ing] the lead in price cutting or other competitive conduct,'' and ''resist[ing] otherwise prevailing industry norms''). The fact that an exchange proposes something new is a reason to be receptive, not skeptical—innovation is the life-blood of a vibrant competitive market—and that is particularly so in the case of a new market entrant of relatively small size like C2 that can cause no widespread competitive harm if the proposed fees structure fails to attract significant order volume.

Access to exchange quotes is also more efficient than ever and helps to promote price transparency and competition among exchanges for order flow. Orders are processed and executed electronically in milliseconds (also very different than 10 years ago) and markets are more open to new users than ever before. Under the Options Linkage Plan, each participating options exchange is required ''to establish, maintain, and enforce written policies and procedures as approved by the Commission that are reasonably designed to prevent Trade-Throughs'' in each exchange's listed options contracts.[29] When more than one exchange is displaying the NBBO (which is overwhelmingly the case), brokers often assign lowest priority in their order routing tables to the exchange with the highest transaction fees. This means that if an exchange sets high fees, it risks losing business to exchanges with lower fees—the same competitive pressure used by our free markets every day to constrain price.

Indeed, order routers' ability to effectively view all exchanges' displayed prices simultaneously and execute at the exchange that charges the lowest fees is more disciplining than the market forces that operate in many other industries. A customer in the market for a new television, for instance, cannot simultaneously know the price of every television at every retail store. And even if all those prices were known, transaction costs often would prevent the customer from buying at the lowest price—perhaps the cheapest television is twenty miles away, for example. In the options markets, by contrast, order routers can simultaneously view and execute orders at the exchange with the lowest transaction fees when more than one exchange has, or may match, the NBBO. Plus, broker-dealers, who have accepted responsibility for handling orders on behalf of customers, are monitoring displayed quotes. They are typically more sophisticated and better-informed market participants than customers in non-financial markets, and therefore are better able to make the types of decisions that will produce efficient markets and constrain prices.

Options exchanges have adopted different pricing models (''Make or Take'' or ''Broker Payment'') based on their competitive assessment of the incentives that will best attract order flow and liquidity. This competition has helped to exert competitive pressure on the exchanges' transaction fees. The Exchange believes that its proposed model will help further competition by providing market participants with yet another option in determining where to execute orders and post liquidity. By expanding the universe of pricing models, the Exchange's proposal will help competition to achieve one of its signature benefits, *i.e.,* allowing the marketplace to determine which pricing model best serves consumer needs.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)[30] of the Act and paragraph (f) of Rule 19b–4[31] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–C2–2013–004 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–C2–2013–004. 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

[28] Market share for November 2012, as provided by the Options Clearing Corporation (available at *http://www.optionsclearing.com/webapps/exchange-volume).*

[29] *See* Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) at 39264–65 (Joint Industry Plan; Order Approving the National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, International Securities Exchange, LLC, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMS PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f).

Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2013–004 and should be submitted by February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02630 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68798; File No. SR–BYX–2013–005]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.17, Entitled ''Clearly Erroneous Executions''

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, BATS–Y Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. 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

The Exchange is filing with the Commission a proposal to extend a pilot program related to Rule 11.17, entitled ''Clearly Erroneous Executions.'' The Exchange also proposes to adopt new paragraph (h) to Rule 11.17 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[5]

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to adopt new paragraph (h) to Rule 11.17 in connection with upcoming operation of the Limit Up-Limit Down Plan.

Proposal To Extend Pilot

Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[6] The Exchange proposes to extend the pilot program to September 30, 2013.

On October 4, 2010, the Exchange filed an immediately effective filing to adopt various rule changes to bring BYX Rules up to date with the changes that had been made to the rules of BATS Exchange, Inc., the Exchange's affiliate, while BYX's Form 1 Application to register as a national security exchange was pending approval. Such changes included changes to the Exchange's Rule 11.17, on a pilot basis, to provide for uniform treatment: (1) of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[7] The Exchange also adopted additional changes to Rule 11.17 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.17.[8] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11.17 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 11.17

The Exchange proposes to adopt new paragraph (h) to Rule 11.17, to provide that the existing provisions of Rule 11.17 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (h). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such

[32] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

[6] Securities Exchange Act Release No. 67521 (July 27, 2012), 77 FR 46132 (August 2, 2012) (SR–BYX–2012–016).

[7] Securities Exchange Act Release No. 63097 (October 13, 2010), 75 FR 64767 (October 20, 2010) (SR–BYX–2010–002).

[8] *Id.*

transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11.17 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11.17(c)(1) for securities priced above $50.00 (i.e., with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[9] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of Regular Trading Hours [10] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (i.e., whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (h) would be appealable in accordance with the provisions of Rule 11.17(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11.17(a)–(g).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[11] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[12] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.17 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the Exchange believes that FINRA and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if

[9] *See* Limit Up-Limit Down Release, *supra* note 5.

[10] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* BYX Rule 1.5(w).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[13] and Rule 19b–4(f)(6)(iii) thereunder.[14]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BYX–2013–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2013–005. 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–BYX–2013–005, and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02634 Filed 2–5–13; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68801; File No. SR–NYSEMKT–2013–11]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 128—Equities, Which Governs Clearly Erroneous Executions, Extending the Effective Date of the Pilot Until September 30, 2013 and Adopting New Paragraph (i) to Rule 128-Equities in Connection With the Upcoming Operation of the Plan To Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS Under the Act

February 1, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 30, 2013, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 128—Equities, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013. The Exchange also proposes to adopt new paragraph (i) to Rule 128—Equities in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[4] 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

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 amend Rule 128—Equities, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013.[5] The Exchange also proposes to add new paragraph (i) to Rule 128—Equities in connection with the upcoming implementation of the Limit Up-Limit Down Plan.

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended Rule 128(c), (e)(2), (f), and (g)—Equities. The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[6] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[7] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of Rule 128—Equities would be in effect, and the Exchange would have different rules than other exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 128—Equities that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 128—Equities

The Exchange proposes to adopt new paragraph (i) to Rule 128—Equities, to provide that the existing provisions of Rule 128—Equities will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 128—Equities of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 128(c)(1)—Equities for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by a single plan processor as defined in the Limit Up-Limit Down Plan.[8] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of regular trading hours[9] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSEAmex–2010–60). *See also* Securities Exchange Act Release Nos. 63480 (December 9, 2010), 75 FR 78333 (December 15, 2010) (SR–NYSEAmex–2010–116); 64233 (April 7, 2011), 76 FR 20736 (April 13, 2011) (SR–NYSEAmex–2011–24); 65066 (August 9, 2011), 76 FR 50506 (August 15, 2011) (SR–NYSEAmex–2011–58); 66137 (January 11, 2012), 77 FR 2587 (January 18, 2012) (SR–NYSEAmex–2011–106); and 67567 (August 1, 2012), 77 FR 47136 (August 7, 2012) (SR–NYSEMKT–2012–28).

[6] Terms not defined herein are defined in Rule 128—Equities.

[7] Separately, the Exchange has proposed to extend the effective date of the trading pause pilot under Rule 80C—Equities, which requires to the Exchange to pause trading in an individual security listed on the Exchange if the price moves by a specified percentage as compared to prices of that security in the preceding five-minute period during a trading day. *See* Securities Exchange Act Release No. 68744 (January 28, 2013) (SR–NYSEMKT–2012–04) [sic].

[8] *See* Limit Up-Limit Down Release, *supra* note 4.

[9] Regular trading hours commence at 9:30 a.m. Eastern Time. *See* Rule 51(a)—Equities.

promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 128(e)(2)—Equities. In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 128(a)–(h)—Equities.

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [10] of the Act, in general, and furthers the objectives of Section 6(b)(5) [11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would promote just and equitable principles of trade because it would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria. Additionally, resolution of the incident will occur promptly through a transparent process, which the Exchange believes would protect investors and the public interest. The proposed rule change would also 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 because it would help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 128—Equities is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

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. To the contrary, the Exchange believes that the Financial Industry Regulatory Authority and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii)[15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSEMKT–2013–11 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–NYSEMKT–2013–11.* 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–NYSEMKT–2013–11 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02640 Filed 2–5–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68793; File No. SR–Phlx–2013–06]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a Clarification to the Exchange's Pricing Schedule to Clarify When an Order is Adding or Removing Liquidity

January 31, 2013.

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 January 18, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to clarify its Pricing Schedule by clarifying when an order or quote is adding or removing liquidity.

The text of the proposed rule change is provided in *Exhibit 5.* The text of the proposed rule change is also available on the Exchange's Web site at *http://nasdaqomxphlx.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

The purpose of the proposed rule change is to amend Section I of the Pricing Schedule entitled ''Rebates for Adding and Removing Liquidity in Select Symbols'' to provide additional specificity with respect to the manner in which the Exchange assesses fees and pays rebates for adding and removing liquidity. Today, the Exchange determines whether to assess Fees for Removing Liquidity or Fees for Adding Liquidity and pay Rebates for Adding Liquidity based on the time the order or quote was received by Phlx XL.[3] The order or quote that arrives into the trading system first in time is considered the order or quote adding liquidity and the order or quote which trades against the order or quote that added liquidity is considered the order or quote removing liquidity.

The Exchange proposes to clarify that, with respect to Section I of the Pricing Schedule, the order that is received by the trading system first in time is considered the order adding liquidity and the order that trades against that order is considered the order removing liquidity, except with respect to orders that trigger an order exposure alert. For purposes of pricing, the order that triggered an order exposure alert is considered the order removing liquidity only during the order exposure period and the order that executed against such order is considered the order adding liquidity only during the order exposure period. For purposes of the Pricing Schedule only, the ''order exposure period'' is a time period established by the Exchange not to exceed one second. Accordingly, after the end of the order exposure period, the Exchange reverts back to considering the order received first as the order adding liquidity. This is the case today.

The Exchange seeks to clarify the manner in which it assesses its fees and pays rebates in Section I to clarify its Pricing Schedule and believes that defining the terms adding and removing liquidity in Section I of the Pricing Schedule should provide further clarity to market participants as well as transparency with respect to pricing. In

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] PHLX XL®'' is the Exchange's automated options trading system.

the ordinary sense of the terms ''adding'' and ''removing,'' the order or quote received first is considered to be adding liquidity to the Exchange. The Exchange believes that orders subject to an order exposure alert are different. During the order exposure period, those orders are, in effect, advertising in a certain way that they cannot be executed and therefore the Exchange is inviting liquidity to trade with them. The quotes and orders that respond to that advertisement are, therefore, considered to be adding liquidity, because they are adding liquidity *to the advertised orders.* Accordingly, the Exchange believes that considering those responsive orders to be adding liquidity is logical and fair, consistent with the Exchange's goal of attracting the other side of advertised orders. At the end of the order exposure period, the Exchange reverts back to treating the advertised orders as adding liquidity, because the Exchange no longer presumes that a responsive order is specifically responding to the advertisement and might be coincidental. In that case, the Exchange believes that it is more appropriate to restore to the advertised order the status of being the order adding liquidity.

2. Statutory Basis

The Exchange believes that its proposal to clarify its Pricing Schedule is consistent with Section 6(b) of the Act [4] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act [5] in particular. The Exchange's proposal to clarify its Pricing Schedule is intended to provide additional guidance to market participants with respect to the application of fees and rebates in Section I of the Pricing Schedule. The Exchange has added other clarifying rule text to its Pricing Schedule in the past to better address the applicability of its fees to certain transactions.[6] At this time, the Exchange believes that providing clarification regarding the manner in which the Exchange applies fee and rebates for adding and removing liquidity will provide additional transparency regarding the Pricing Schedule. The Exchange only recently adopted the order exposure alert message [7] and believes this filing will serve to clarify the distinction in applying add rebates and remove fees in Section I with respect to those types of alerts. The Exchange believes that this clarification is reasonable because it would provide market participants with clear guidance on the application of Section I fees and rebates.[8]

The Exchange believes that the clarification is equitable and not unfairly discriminatory because it applies to all market participants in a uniform manner. With respect to Customer pricing, the Customer is not assessed a fee when adding or removing liquidity and therefore no fee advantage or disadvantage with respect to whether an order triggering the order exposure alert is considered to be adding or removing liquidity. With respect to Firms, Broker-Dealers and Professionals, the Fees for Adding Liquidity are $0.45 per contract and the Fees for Removing Liquidity are $0.44 per contract. There is no significant fee advantage or disadvantage with respect to whether an order triggering the order exposure alert is considered to be adding or removing liquidity. Finally, with respect to Specialists and Market Makers, the Exchange is seeking to encourage these market participants to trade against orders that generate an order exposure alert by paying the Rebate to Add Liquidity and assessing the lower Fee for Removing Liquidity when responding to an order exposure alert. Even though a market participant is assessed the Fee for Removing Liquidity, they are nevertheless avoiding any routing fees from other options exchanges on FIND and SRCH orders,[9] because, potentially as a result of the order exposure alert, the order would not be routed, which lowers the overall cost of the transaction.

The Exchange assesses similar fees and pays similar rebates, pursuant to Section I, on routable FIND and SRCH orders today and prior to the implementation of the order exposure alert, which are considered the remover of liquidity. This clarification seeks to make it clear that a DNR order [10] is viewed in a similar manner as FIND and SRCH orders when the order exposure alert occurs; that is, such order is treated as the remover of liquidity. The Exchange treats all orders executed on the Exchange similarly for purposes of the order exposure alert, regardless of the market participant.

The Exchange is filing this proposed rule change to define the terms adding and removing liquidity to provide member organizations with greater transparency in pricing Section I fees and rebates. Additionally, the Exchange does not believe that there is confusion among market participants with respect to the application of add rebates and remove fees with respect to Section I generally or the order exposure alert specifically.

The Exchange believes that the proposal is consistent with of Section 6(b)(5) in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by clarifying what fees and rebate in Section I of the Exchange's Pricing Schedule apply to certain transactions. Moreover, the Exchange believes that treating orders subject to an order exposure period as removing liquidity during that period is consistent with this statutory standard, because the responding order can logically be considered adding liquidity. Thus, this rewards, in terms of fees, the order that responds and results in an execution on the Exchange. In clarifying how the Exchange applies certain fees and rebates, the Exchange believes that adding text to the Pricing Schedule to define the terms adding and removing liquidity provides transparency to market participants.

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 is merely filing this clarification to further specify how certain fees and rebates in Section I are applied to market participants. The Exchange believes that this clarification will provide greater transparency to market participants. The Exchange does not believe that this amendment creates intramarket competition among its members as it is applied uniformly to all members and there is no significant fee advantage or disadvantage with respect to orders triggering the order exposure alert.

The Exchange believes that clarifying the applicability of certain fees and rebates for adding and removing liquidity within the Pricing Schedule provides market participants clear guidance. As mentioned herein, the Exchange has added similar guidance on the applicability of its pricing in the past in order that market participants can clearly determine the manner in

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] *See* Securities Exchange Act. Release No. 62140 (May 20, 2010), 75 FR 29788 (May 27, 2010) (SR–Phlx–2010–69) (an immediately effective rule change to address the applicability of its fees to certain transactions).

[7] *See* Securities Exchange Act. Release No. 68517 (December 21, 2012), 77 FR 77134 (December 31, 2012) (SR–Phlx–2012–136).

[8] The order exposure alerts are only applicable to the Simple Orders in Section I.

[9] *See* Rule 1080(m).

[10] *See* Rule 1080(m).

which the Exchange applies its pricing and to avoid any ambiguity.

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

Pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(1) [12] thereunder, the Exchange has designated this proposal as one that constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO, and therefore has become effective.

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–2013–06 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–2013–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2013–06 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02560 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(1).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68797; File No. SR–BATS–2013–008]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 11.17, Entitled "Clearly Erroneous Executions"

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 30, 2013, BATS Exchange, Inc. (the "Exchange" or "BATS") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. 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

The Exchange is filing with the Commission a proposal to extend a pilot program related to Rule 11.17, entitled "Clearly Erroneous Executions." The Exchange also proposes to adopt new paragraph (h) to Rule 11.17 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the "Limit Up-Limit Down Plan" or "Plan").[5]

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to extend the effectiveness of the Exchange's current rule applicable to Clearly Erroneous Executions and to adopt new paragraph (h) to Rule 11.17 in connection with upcoming operation of the Limit Up-Limit Down Plan.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the "Limit Up-Limit Down Release").

Proposal To Extend Pilot

Portions of Rule 11.17, explained in further detail below, are currently operating as a pilot program set to expire on February 4, 2013.[6] The Exchange proposes to extend the pilot program to September 30, 2013.

On September 10, 2010, the Commission approved, on a pilot basis, changes to BATS Rule 11.17 to provide for uniform treatment: (1) Of clearly erroneous execution reviews in multi-stock events involving twenty or more securities; and (2) in the event transactions occur that result in the issuance of an individual stock trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on the Exchange.[7] The Exchange also adopted additional changes to Rule 11.17 that reduced the ability of the Exchange to deviate from the objective standards set forth in Rule 11.17.[8] The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 11.17 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to Rule 11.17

The Exchange proposes to adopt new paragraph (h) to Rule 11.17, to provide that the existing provisions of Rule 11.17 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (h). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 11.17 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 11.17(c)(1) for securities priced above $50.00 (i.e., with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by the single plan processor as defined in the Limit Up-Limit Down Plan.[9] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of Regular Trading Hours[10] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (i.e., whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (h) would be appealable in accordance with the provisions of Rule 11.17(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 11.17(a)–(g).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[11] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[12] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes

[6] Securities Exchange Act Release No. 67523 (July 27, 2012), 77 FR 46142 (August 2, 2012) (SR–BATS–2012–032).

[7] Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–BATS–2010–016).

[8] *Id.*

[9] *See* Limit Up-Limit Down Release, *supra* note 5.

[10] Regular Trading Hours commence at 9:30 a.m. Eastern Time. *See* BATS Rule 1.5(w).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would help assure that the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria, and that the resolution of the incident will occur promptly through a transparent process. The proposed rule change would also help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest. Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether Rule 11.17 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change implicates any competitive issues. To the contrary, the Exchange believes that FINRA and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [13] and Rule 19b–4(f)(6)(iii) thereunder.[14]

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[15]

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 under Section 19(b)(2)(B) [16] of the Act to determine whether the proposed rule change 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–BATS–2013–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2013–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room 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–BATS–2013–008, and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02633 Filed 2–5–13; 8:45 am]

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[13] 15 U.S.C. 78s(b)(3)(A).

[14] 17 CFR 240.19b-4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[15] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68779; File No. SR–NSX–2013–04]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay the Operative Date of Rule 11.20A Regarding Market-Wide Circuit Breakers Due to Extraordinary Market Volatility

January 31, 2013.

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 January 25, 2013, National Stock Exchange, Inc. (the ''Exchange'' or ''NSX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to Exchange Rule 11.20A, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room [sic].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Exchange Rule 11.20A, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time the pilot period for the LULD Plan. The current Exchange Rule 11.20A would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Exchange Rule 11.20A would be in effect.

Current Exchange Rule 11.20A

The rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 [sic] are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the (''DJIA'') for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The New York Stock Exchange, Inc. (''NYSE'') disseminates the new trigger levels quarterly to the media and via an Information Memo and [sic] is available on the NYSE's Web site.[4] The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once an Exchange Rule 11.20A circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt
- Anytime before 2:00 p.m.—one hour;
- At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
- At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt
- Anytime before 1:00 p.m.—two hours;
- At or after 1:00 p.m. but before 2:00 p.m.—one hour;
- At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt
- At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 11.20A trading halt for stocks that comprise the DJIA.

Amended Exchange Rule 11.20A

The Exchange amended Exchange Rule 11.20A to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breakers'').[5] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 11.20A as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Exchange Rule 11.20A triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Exchange Rule 11.20A: To ensure that market participants have an opportunity to

[3] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NSX–2011–11). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[4] *See e.g.,* NYSE Regulation Information Memos 11–19 (June 30, 2011) and 11–10 (March 31, 2011).

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NSX–2011–11).

become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[6] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change 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–NSX–2013–04 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–NSX–2013–04. 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

[6] *See id.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2)(B).

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–NSX–2013–04 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02593 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68788, File No. SR–BATS–2012–046]

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving Proposed Rule Change To Modify BATS Rule 11.23 Relating to Auctions of Exchange-Listed Securities

January 31, 2013.

I. Introduction

On December 6, 2012, BATS Exchange, Inc. (''BATS'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its rules governing auctions conducted by the Exchange for securities listed on the Exchange. The proposed rule change was published for comment in the **Federal Register** on December 20, 2012.[3] The Commission received no comment letters regarding the proposal. This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Description of the Proposed Rule Change

The Exchange has proposed to amend BATS Rule 11.23, which governs auctions conducted by the Exchange for securities listed on the Exchange.[4] These auctions include: (1) An opening auction (''Opening Auction''); (2) a closing auction (''Closing Auction''); (3) an auction in the event of an initial public offering (''IPO Auction''); and (4) an auction in the event of a halt of trading in a security (''Halt Auction'') (collectively referred to as ''Exchange Auctions'').[5] In connection with the Exchange Auctions, BATS offers the BATS Auction Feed, which provides recipients with uncompressed real-time data regarding the current status of price and size information related to Exchange Auctions.[6]

A. Change to the Definition of Collar Price Range

The Exchange has proposed to amend BATS Rule 11.23(a)(6) to amend the definition of ''Collar Price Range'' to incorporate the Exchange's numerical guidelines for clearly erroneous executions under BATS Rule 11.17(c)(1).[7] Currently, BATS Rule 11.23(a)(6) sets the Collar Price Range at 10% of the Volume Based Tie Breaker[8] below and above the BATS Best Bid (''ZBB'') and BATS Best Offer (''ZBO''),[9] the National Best Bid (''NBB'') and National Best Offer (''NBO''), or the Final Last Sale Eligible Trade,[10] depending on market conditions at the time of the auction.[11] The Exchange has proposed to base its Collar Price Range on numerical guidelines for clearly erroneous rules under BATS Rule 11.17(c)(1), which would be determined as follows: where the Collar Midpoint is $25.00 or less, the Collar Price Range shall be the range from 10% below the Collar Midpoint to 10% above the Collar Midpoint; where the Collar Midpoint is greater than $25.00 but less than or equal to $50.00, the Collar Price Range shall be the range from 5% below the Collar Midpoint to 5% above the Collar Midpoint; and where the Collar Midpoint is greater than $50.00, the Collar Price Range shall be the range from 3% below the Collar Midpoint to 3% above the Collar Midpoint.[12] According to the Exchange, the proposed rule change would provide greater transparency and certainty in Exchange Auctions by helping reduce the possibility that an auction would occur at a price that would qualify as a clearly erroneous under BATS Rule 11.17(c)(1) and limit the volatility in auction prices.[13]

B. Change to the Determination of the Auction Price

The Exchange has proposed to amend BATS Rule 11.23 to change how the Exchange determines the price for Exchange Auctions. Currently, to determine the auction price for an Exchange Auction, the Exchange first looks to whether there is at least one limit order either: (1) On the Continuous Book or Auction Book for Opening

[3] *See* Securities Exchange Act Release No. 68442 (December 14, 2012), 77 FR 75459 (December 20, 2012) (''Notice'').

[4] *See* Securities Exchange Act Release No. 65619 (October 25, 2011), 76 FR 67238 (October 31, 2011) (order approving proposed rule change by BATS to adopt rules applicable to auctions conducted by the Exchange for exchange-listed securities).

[5] *See id.*

[6] *See id.*

[7] *See* Notice *supra* note 3, at 76 FR 75460.

[8] BATS Rule 11.23(a)(23) defines ''Volume Based Tie Breaker'' as the midpoint of the BATS Best Bid or BATS Best Offer (''ZBBO'') for a particular security. In the event that there is either no ZBB or ZBO for the security, the National Best Bid and Offer (''NBBO'') will be used if there is at least one limit order on either the Continuous Book or the Auction Book. In the event that there is no NBB or NBO for the security or no limit orders on the Continuous Book and the Auction Book, the price of the Final Last Sale Eligible Trade will be used. *See infra* note 10 (defining ''Final Last Sale Eligible Trade''). BATS Rule 11.23(a)(1) defines the ''Auction Book'' as all Eligible Auction Orders on the BATS Book. BATS Rule 11.23(a)(7) defines ''Continuous Book'' as all orders on the BATS Book that are not Eligible Auction Orders.

[9] *See* BATS Rule 11.23(a)(24) (defining the ZBB and ZBO). BATS Rule 11.23(a)(24) defines the BATS Best Bid or BATS Best Offer as ''ZBBO.''

[10] *See* BATS Rule 11.23(a)(9) defines ''Final Last Sale Eligible Trade'' as the last trade occurring during Regular Trading Hours on the Exchange if the trade was executed within the last one second prior to either the Closing Auction or, for Halt Auctions, trading in the security being halted. Where the trade was not executed within the last one second, the last trade reported to the consolidated tape received by BATS during Regular Trading Hours and, where applicable, prior to trading in the security being halted will be used. If there is no qualifying trade for the current day, the BATS Official Closing Price from the previous trading day will be used.

[11] *See* Notice *supra* note 3, at 76 FR 75460.

[12] *See id.* The Exchange has proposed to define ''Collar Midpoint'' in BATS Rule 11.23(a)(6) as the Volume Based Tie Breaker for all applicable auctions, except for IPO Auctions in Exchange Traded Products (as defined in Rule 11.8, Interpretation and Policy .02(d)(2)), for which the Collar Midpoint will be the issue price. *See also* Notice *supra* note 3, at 76 FR 75460.

[13] The Exchange noted that the modified Collar Price Range would not necessarily prevent all clearly erroneous executions from occurring as the Collar Price Range will be based on the Collar Midpoint and the numerical guidelines for clearly erroneous executions are based on the Reference Price, which is equal to the consolidated last sale immediately prior to the execution(s) under review. *See* Notice *supra* note 3, at 76 FR 75460 n. 7.

Auctions and Closing Auctions; or (2) among Eligible Auction Orders for IPO and Halt Auctions.[14] Where there is at least one limit order, then the auction will occur at a price level within the Collar Price Range, where applicable, that maximizes the number of shares executed in the auction. In the event that there are no limit orders on the Continuous Book and Auction Book for Opening Auctions or Closing Auctions or among Eligible Auction Orders for IPO or Halt Auctions, the Exchange would use a default price, which currently is the Final Last Sale Eligible Trade for Opening Auctions, Closing Auctions, and Halt Auctions, and the issuing price for an IPO Auction.

The Exchange proposes two changes to Rule 11.23 relating to the determination of the auction price in certain circumstances. The first change modifies when the Exchange will use a default price for executions in Exchange Auctions. The second change modifies the Exchange's default price for Opening Auctions and Closing Auctions.

Regarding the first change, the Exchange has proposed to amend BATS Rules 11.23(b)(2)(B), 11.23(c)(2)(B), and 11.23(d)(2)(C) to provide that, prior to determining the price for an Exchange Auction, the Exchange will look to whether there is at least one limit order from each side that would participate in the Exchange Auction. The Exchange has proposed that where no limit orders from either or both sides would participate in the Exchange Auction, the Exchange Auction would occur at a default price, as modified in the description below with respect to Opening Auctions and Closing Auctions.

In the second change to Rule 11.23, the Exchange has proposed to amend BATS Rules 11.23(b)(2)(B) and 11.23(c)(2)(B) to use the Volume Based Tie Breaker as the default price instead of the Final Last Sale Eligible Trade for Opening Auctions and Closing Auctions. By using the Volume Based Tie Breaker as the default price, the Exchange would first look to the current market, if available, to determine the auction price before using the Final Last Sale Eligible Trade. Specifically, the Exchange would first look to the ZBBO to determine the auction price for a particular security. In the event that there is either no ZBB or ZBO, the Exchange would use the NBBO to determine the auction price for the Opening Auction or Closing Auction, if there is at least one limit order on either the Continuous Book or the Auction Book. Where there is either no NBBO for the security or no limit orders on the Continuous Book and the Auction Book, the Exchange would use the Final Last Sale Eligible Trade as the auction price for an Opening Auction or Closing Auction.

C. Limitation on Information Published in Connection With IPO and Halt Auction Data

The Exchange has also proposed to amend BATS Rule 11.23(d)(2)(A) (Publication of BATS Auction Information) in two ways. First, the Exchange has proposed to clarify that BATS Rule 11.23(d)(2)(A) applies to IPO Auctions as well as Halt Auctions. Second, the Exchange has proposed to amend BATS Rule 11.23(d)(2)(A) to provide that the Exchange will only disseminate the lesser of the Reference Buy Shares [15] and the Reference Sell Shares,[16] rather than disseminate both pieces of information, in auction information messages sent through BATS Data Feed.[17] The Exchange has represented that this proposal is designed to prevent market participants from possibly gaming an IPO or Halt Auction.[18] Specifically, the Exchange is concerned that the dissemination of both Reference Buy Shares and Reference Sell Share information could allow a market participant to discern the exact amount of liquidity available at a given price level on both sides of the IPO or Halt Auction Book.[19] Because market participants are permitted to enter orders in IPO and Halt Auctions up until the auction occurs, the Exchange believes that a market participant could use both the Reference Buy Shares and Reference Sell Shares to potentially manipulate the price of the auction.[20] By disseminating only the lesser of the Reference Buy Shares and Reference Sell Shares associated with IPO and Halt Auctions, the Exchange believes that a market participant would not able to manipulate an IPO or Halt Auction because the market participant would not have complete knowledge of liquidity available on both sides of the auction book simultaneously.[21]

D. Market Regular Hours Orders

The Exchange has proposed to amend Rule 11.23(a)(22) to provide that any unexecuted portion of a market Regular Hours Only (''RHO'') order is immediately cancelled following any Exchange Auction in which it was eligible to participate.[22] The Exchange stated that this proposed rule change would clarify that a market RHO order would either execute or be cancelled, which the Exchange believes would be consistent with the behavior of all other market orders entered on the Exchange.[23]

III. Discussion

After careful consideration of the proposed rule change, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[24] The Commission believes that the proposed rule change is consistent with Section 6(b) of the Act, in general, and Section 6(b)(5) of the Act, in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in

[14] *See* BATS Rule 11.23(a)(9) defines ''Eligible Auction Orders'' as any Market-On-Open, Limit-On-Open, Late-Limit-On-Open, Market-On-Close, Limit-On-Close, or Late-Limit-On-Close that is entered in compliance with its respective cutoff for an Opening Auction or Closing Auction, any regular hours order prior to the Opening Auction, any limit or market order not designated to exclusively participate in the Closing Auction entered during the Quote-Only Period of an IPO Auction, and any limit or market order not designated to exclusively participate in the Opening Auction or Closing Auction entered during the Quote-Only Period of a Halt Auction.

[15] BATS Rule 11.23(a)(18) defines ''Reference Buy Shares'' as the total number of shares associated with buy-side Eligible Auction Orders that are priced equal to or less than the Reference Price.

[16] BATS Rule 11.23(a)(21) defines ''Reference Sell Shares'' as the total number of shares associated with sell-side Eligible Auction Orders that are priced equal to or less than the Reference Price.

[17] *See* Notice *supra* note 3, at 76 FR 75461.

[18] *See id.*

[19] *See id.*

[20] *See id.*

[21] *See* Notice *supra* note 3, at 76 FR 75461. The Exchange notes such gaming concerns do not exist in the Opening Auctions and Closing Auctions for two reasons. First, the Exchange represents that auction information messages for Opening Auctions and Closing Auctions do not provide complete information about the auctions as such messages do not include information relating to the Continuous Book. Second, information messages for Opening Auctions and Closing Auctions are not disseminated until two minutes and five minutes prior to the auction, respectfully, at which point market participants are prohibited from modifying or canceling any Eligible Auction Orders entered in the Auction Book.

[22] *See* Notice *supra* note 3, at 77 FR at 75460. BATS Rule 11.23(a)(22) defines a RHO order as a BATS order that is designated for execution only during Regular Trading Hours, which includes the Opening Auction, the Closing Auction, and IPO/Halt Auctions.

[23] *See* Notice *supra* note 3, at 77 FR at 75460.

[24] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

general, to protect investors and the public interest.

The Commission believes that the proposed changes to the Collar Price Range definition are consistent with Section 6(b)(5) of the Act. The Exchange notes that (1) this proposed change provides greater transparency and certainty in Exchange Auctions by reducing the possibility that an auction would occur at a price that would qualify as clearly erroneous and cancelled under the Exchange's rules and (2) by narrowing the Collar Price Range, the proposed rule change will help limit the volatility in auction prices. The Commission notes that the proposed changes to the definition of the Collar Price Range are based on the numerical guidelines for clearly erroneous executions under BATS Rule 11.17(c)(1). For these reasons, the Commission believes that the proposed changes to the Collar Price Range definition are consistent with the Act.

The Commission believes that the proposed changes to how the Exchange determines the auction price are consistent with Section 6(b)(5) of the Act. The Exchanges notes that the proposed changes regarding when the Exchange will use a default price would aid in price discovery and help to prevent erroneous executions by ensuring that a single limit order on one side of an auction that might not participate in the Exchange Auction cannot on its own determine the auction price. In addition, the Exchange notes that revisions to the default price for Opening Auctions and Closing Auctions would also aid in price discovery and help to reduce the likelihood of executions in auctions occurring at prices out of line with existing market conditions. For these reasons, the Commission believes that these proposed changes are consistent with the Act.

The Commission also believes that the proposal to disseminate only the lesser of the Reference Buy Shares and the Reference Sell Shares in auction information messages for IPO and Halt Auctions is consistent with Section 6(b)(5) of the Act. The Exchange has represented that this proposal is designed to prevent market participants from possibly gaming an IPO or Halt Auction, as it would hinder a market participant from being able to discern the exact amount of liquidity available at a given price level on both sides of the IPO or Halt Auction Book. In this way, the Exchange believes that the proposal should make it more difficult for a market participant to use auction information to manipulate an IPO or Halt auction. For this reason, the Commission believes that the proposed rule change is consistent with the Act.

Finally, the Commission believes that the proposed change to provide that any unexecuted portion of a market RHO order is immediately cancelled following any Exchange Auction in which it was eligible to participate should clarify the operation of market RHO Auction Orders, as noted by the Exchange. As such, the Commission believes this proposed change is also consistent with the Exchange Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that the proposed rule change (SR–BATS–2012–046) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neil,

Deputy Secretary.

[FR Doc. 2013–02556 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68776; File No. SR–NYSEArca–2013–05]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NYSE Arca Options Fee Schedule To Change the Monthly Cost for Option Trading Permits

January 31, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 22, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (''Fee Schedule'') to change the monthly cost for Option Trading Permits (''OTPs''). 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 amend its Fee Schedule to change the monthly cost for OTPs. The Exchange proposes to make the change operative on February 1, 2013.

The Exchange requires that a Market Maker have an OTP in order to operate on the Exchange. For electronic Market Making, a Market Maker must have four OTPs in order to submit electronic quotations in every class on the Exchange. These four Market Maker OTPs also permit the firm to have at least one trader on the Floor of the Exchange as a Floor-based open outcry Market Maker. However, the manner in which those OTPs are assigned to individual traders may reduce the permissible number of issues in which electronic quotes are assigned. For instance, two associated Market Makers may assign OTP 1, 2, and 3 to trader A, while the fourth is assigned to trader B. Trader A may now only stream quotes electronically in 750 issues, while trader B may submit quotes electronically in 100 issues. To retain the appointment in more than 750 issues, all four OTPs must be in the same name, and to have an additional individual Market Maker on the Floor, a fifth OTP must be acquired.

To remain competitive in fixed fees among exchanges with trading floors, the Exchange is proposing to reduce the cost of additional Market Maker OTPs beyond the minimum of four that are required to submit electronic quotations

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

in all issues listed on the Exchange. Accordingly, while the existing fee of $4,000 per OTP per month would continue to apply to a Market Maker firm that has between one and four Market Maker OTPs, the Exchange proposes that the monthly OTP fee for Market Maker firms with more than four OTPs be reduced from $2,000 per month to $1,000 per month for each additional Market Maker OTP. As described above, each additional Market Maker OTP would permit a Market Maker firm, which already has the ability to make electronic markets in every class on the Exchange, to have an additional trader on the Floor of the Exchange as an open outcry Market Maker.

The proposed changes are not otherwise intended to address any other problem, and the Exchange is not aware of any significant problem that the affected market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and Section 6(b)(4) of the Act,[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange believes that the proposed rule change is reasonable because it will result in cost savings for members with more than four Market Marker OTPs. Lowering the cost for Market Maker firms to acquire additional OTPs related to their Market Maker activity may allow them to price their services at a level that will enable them to attract higher levels of volume to the Exchange, which will enhance liquidity and price discovery on the Exchange to the benefit of investors. The Exchange believes that the proposal constitutes an equitable allocation of fees, as all similarly situated member organizations will be subject to the same reduced fee structure and access to the Exchange's market is offered on fair and non-discriminatory terms. In addition, for the reasons stated above, the proposed changes are not designed to permit unfair discrimination between members because all members will be charged the same fee amount for each additional Market Maker OTP beyond the initial four OTPs.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

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. The proposed rule change will reduce each additional Market Maker OTP to $1,000 from $2,000, resulting in a cost savings to members who already have more than four Market Marker OTPs. In addition, the proposal will reduce a potential cost-based barrier for firms that do not have more than four Market Maker OTPs as their costs for any additional Market Maker OTPs will be reduced by one-half. As a result, the Exchange does not believe that the proposed rule change will place an unreasonable burden on current or prospective members because fees for additional Market Maker OTPs beyond four will be uniformly reduced across all members (current and prospective) and apply in a non-discriminatory manner.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[6] of the Act and subparagraph (f)(2) of Rule 19b–4[7] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[8] of the Act to determine whether the proposed rule change 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–NYSEArca–2013–05 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–2013–05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2013–05, and should be

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 15 U.S.C. 78s(b)(2)(B).

submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02555 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68781; File No. SR–BOX–2013–03]

Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposal To Amend Rule 5050(c) to Permit the Exchange to List Additional Strike Prices Until the Close of Trading on the Second Business Day Prior to Monthly Expiration in Unusual Market Conditions

January 31, 2013.

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 January 18, 2013, BOX Options Exchange LLC (the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend BOX Rule 5050(c) to permit the Exchange to list additional strike prices until the close of trading on the second business day prior to monthly expiration in the event of unusual market conditions. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission's Public Reference Room and also on the Exchange's Internet Web site at *http://boxexchange.com.*

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 Exchange proposes to amend BOX Rule 5050(c) to permit the Exchange to list additional strike prices until the close of trading on the second business day prior to monthly expiration in the event of unusual market conditions. This is a competitive filing that is based on proposals recently submitted by NYSE MKT LLC (''MKT''),[3] NYSE Arca, Inc. (''Arca''),[4] the International Securities Exchange, LLC (''ISE''),[5] and the Chicago Board Options Exchange, Inc. (''CBOE'').[6]

BOX Rule 5050 currently permits the Exchange to open additional series of options on individual stocks and exchange-traded funds (ETFs) until the beginning of the month in which the option expires or until five business days prior to expiration if unusual market conditions exist.[7] Options market participants generally prefer to focus their trading in strike prices that immediately surround the price of the underlying security. However, if the price of the underlying stock moves significantly, there may be a market need for additional strike prices to adequately account for market participants risk management needs in a stock. In these situations, the Exchange has the ability to add additional series at strike prices that are better tailored to the risk management needs of market participants.[8] The Exchange may make the determination to open additional series for trading when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market.[9] If the market need occurs prior to five business days prior to expiration, then the market participants may have access to an option contract that is more tailored to the movement in the underlying stock.[10] However, if the market need to manage risk due to unusual market conditions comes to light anytime from five to two days prior to expiration, then market participants are left without a contract that is tailored to manage their risk.[11]

The Exchange proposes to permit the listing of additional strikes until the close of trading on the second business day prior to expiration in unusual market conditions. Since expiration of the monthly contract is on a Saturday, the close of trading on the second business day will typically fall on a Thursday. However, in the cases where Friday is a holiday during which the Exchange is closed, the close of trading on the second business day will occur on a Wednesday. The Exchange will continue to make the determination to open additional series for trading when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market. The proposed change will provide an additional four days to the Exchange to gauge market impact of the underlying stock and to react to any market conditions that would render additional series prior to expiration beneficial to market participants. The Exchange believes that the impact on the market from the proposed change will be very minimal for market participants, however it will be extremely beneficial in that minority of situations where unusual market conditions dictate immediately prior to expiration. The proposal would simply allow participants to adjust their risk exposure in narrow situations when an unusual market event occurred on trading days 2, 3, 4, 5 prior to expiration.

This proposal does not raise any capacity concerns on the Exchange, because the changes have no material

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 68460 (December 18, 2012), 77 FR 76145 (December 26, 2012) (Order Approving SR- NYSEMKT–2012–41).

[4] *See* Securities Exchange Act Release No. 68461 (December 18, 2012), 77 FR 76155 (December 26, 2012) (Order Approving SR- NYSEARCA–2012–94).

[5] *See* Securities Exchange Act Release No.68491 (December 20, 2012), 77 FR 76334 (December 27, 2012) (SR–ISE–2012–101) (Notice of Filing and Immediate Effectiveness).

[6] *See* Securities Exchange Act Release No.68606 (January 9, 2013) (SR–CBOE–2012–131), 78 FR 3065 (January 15, 2013) (Notice of Filing and Immediate Effectiveness).

[7] *See* BOX Rule 5050(c). 'Until the fifth business day prior' generally means up through the end of the day on the Friday of the week prior to expiration week.

[8] *See* BOX Rule 5050.

[9] *See* BOX Rule 5050(c).

[10] *Id.*

[11] While these situations are relatively rare, the Exchange represents that approximately two times a month there is a legitimate need to add additional strikes closer to expiration than the five business day limitation permits, due to it being necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market.

difference in impact from the current rules. The Exchange notes the proposed change allows for new strikes that would otherwise be permitted to add under existing rules either on the fifth day prior or immediately after expiration.[12] A strike which opens two days prior to expiration will have minimal impact on quoting, as it adds two series out of hundreds of thousands, and only for a small number of days.[13] Thus, any additional strikes that may be added under the proposed change would have no measurable effect on systems capacity.

2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[14] in general, and Section 6(b)(4) of the Act,[15] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that providing an additional four days to the Exchange to gauge market impact and to react to any market conditions prior to expiration beneficial will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions prior to expiration. The Exchange also believes that the additional four days will provide the investing public and other market participants with additional opportunities to hedge their investment thus allowing these investors to better manage their risk exposure with additional in the money series. While the four additional days may generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to the narrow situations when an unusual market event occurred on trading days 2, 3, 4, 5 prior to expiration.

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. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to filings recently submitted by MKT, Arca, ISE and CBOE that were recently effective.[16] The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges and to establish uniform rules regarding the listing of strike prices.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[17] and Rule 19b–4(f)(6) thereunder.[18]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and would allow the Exchange, also, to add additional strikes until the close of trading on the second business day prior to a monthly expiration in the event of unusual market conditions.[19] Therefore, the Commission designates the proposal operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BOX–2013–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BOX–2013–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference 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

[12] Any new strikes added under this proposal would be added in a manner consistent with the range limitations described in BOX Rule 5050(b).

[13] In the case of a multi-stock event where multiple stocks may be subject to unusual market conditions, a strike which opens two days prior to expiration will also have minimal impact on quoting, as it adds two series per stock out of hundreds of thousands, and only for a small number of days.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4).

[16] *See supra,* notes 3, 4, 5 and 6.

[17] 15 U.S.C. 78s(b)(3)(A).

[18] 17 CFR 240.19b-4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[19] *See supra,* notes 3 and 4.

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–BOX–2013–03 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02595 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68785; File No. SR–NYSEArca–2013–06]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Delaying the Operative Date of a Rule Change to Exchange Rule 7.12, Which Provides for Methodology for Determining When To Halt Trading in All Stocks Due to Extraordinary Market Volatility, From the Date of February 4, 2013, Until April 8, 2013

January 31, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 23, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to Exchange Rule 7.12, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. The text of the proposed rule change [sic] 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 amend Rule 7.12, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[4] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 7.12 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 7.12 would be in effect.

Current Rule 7.12

In its current form,[5] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The Exchange disseminates the new trigger levels quarterly to the media and via an Information Memo and [sic] is available on the Exchange's Web site.[6] The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 7.12 circuit breaker is in effect, trading in all stocks halt for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;

At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;

At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;

At or after 1:00 p.m. but before 2:00 p.m.—one hour;

At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 7.12 trading halt for stocks that comprise the DJIA.

Amended Rule 7.12

The Exchange amended Rule 7.12 to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit

[21] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSEArca–2011–68). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[5] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR-Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR–Phlx–98–15).

[6] *See e.g.,* NYSE Regulation Information Memos 11–19 (June 30, 2011) and 11–10 (March 31, 2011).

breakers'').[7] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 7.12 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 7.12 triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 7.12: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[8] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b-4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may

[7] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSEArca–2011–68).

[8] *See id.*

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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 under Section 19(b)(2)(B) [16] of the Act to determine whether the proposed rule change 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–NYSEArca–2013–06 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–2013–06.* 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–NYSEArca–2013–06 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02626 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[16] 15 U.S.C. 78s(b)(2)(B).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68805; File No. SR–EDGX–2013–05]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Delay the Operative Date of Changes to the Rule for Halting Trading in All Stocks Due to Extraordinary Market Volatility

February 1, 2013.

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 January 31, 2013, EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to EDGX Rule 11.14, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission [sic].

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delay the operative date of the pilot in Rule 11.14, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility from February 4, 2013 until April 8, 2013 to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 11.14 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 11.14 would be in effect.

Current Rule 11.14

In its current form,[4] the rule provides for Level 1, 2, and 3 declines and

[3] The Commission approved the proposed changes to the market-wide circuit breaker on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–EDGX–2011–30). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[4] NYSE Rule 80B, the analogous rule from the New York Stock Exchange LLC, was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR-Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR-Phlx–98–15).

specified trading halts following such declines. The values of Levels 1, 2 and 3 [sic] are calculated at the beginning of each calendar quarter by the primary listing market, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The primary listing markets disseminate the new trigger levels quarterly to the media, via information memos and publication on their Web sites. The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 11.14 circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;
At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;
At or after 1:00 p.m. but before 2:00 p.m.—one hour;
At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 11.14 trading halt for stocks that comprise the DJIA.

Amended Rule 11.14

The Exchange amended Rule 11.14 to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breaker'').[5] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breaker to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 11.14 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 11.14 triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 11.14: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[6] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Act to make the necessary technological changes to implement both the changes to the market-wide circuit breaker and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breaker pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The delay in the operation of the market-wide circuit breaker pilot until April 8, 2013 will allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breaker pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–EDGX–2011–30).

[6] *See id.*

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change 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–EDGX–2013–05 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–EDGX–2013–05. 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–EDGX–2013–05 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02643 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2)(B).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68782; File No. SR–EDGX–2013–02]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendment to EDGX Rule 13.9

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on January 22, 2013 the EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a rule change to amend Rule 13.9 to allow Members the option to opt-out their routed orders from inclusion in the Edge Routed Liquidity Report℠ on a market participant identifier(s) (''MPID(s)'') basis. All of the changes described herein are applicable to EDGX Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com*, at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

In SR–EDGX–2012–37 (the ''Filing''),[3] the Exchange introduced a new market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members[4] and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Edge Routed Liquidity Report is a data feed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Securities Exchange Act Release No. 67766 (August 31, 2012), 77 FR 55251 (September 7, 2012) (SR–EDGX–2012–37).

[4] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

that contains all historical order information for orders routed to away destinations by the Exchange. The Filing stated that Edge Routed Liquidity Report is offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report'') (the Standard Report and the Premium Report shall be collectively referred to as the ''Reports''). In SR–EDGX–2012–42,[5] the Exchange amended Rule 13.9 to provide additional information regarding the features of the Standard Report and the Premium Report.

The Exchange proposes to amend Rule 13.9 to state that Members will have the ability to request, on a MPID basis, and in a form prescribed by the Exchange, that their routed orders will not be included in the Edge Routed Liquidity Report.

If a Member wishes to opt-out their routed orders from inclusion in the Service, such Member must submit a request to the Exchange in a form prescribed by the Exchange. Such request will prevent the display of the Member's routed orders in the Service effective as of the day the request was submitted. Members can notify the Exchange via email if they wish to revoke their election. Such request will be effective as of the day the request was submitted.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[6] in general, and with Section 6(b)(5) of the Act [7] in particular, which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendment is consistent with those principles as Members' election to be included or excluded in the Service is completely voluntary at any time. Providing Members the ability to opt-out their routed orders from inclusion in the Service makes available an additional choice that previously did not exist. Members that do not wish to represent their orders in the Service for any reason will be allowed to opt-out their routed orders (on an MPID basis) from being included in the Service and any Member may cancel their subscription to the Service at any time.

The Exchange also believes that the proposed amendment is consistent with the principles of Section 6(b)(5) of the Act because allowing Members the ability to opt-out their routed order data from inclusion in the Service does not implicate any concerns related to manipulation or fraud. Because all data in the Service is displayed on an anonymous basis, Subscribers will be unaware of which Members have chosen to opt-out their routed order data from the Service.

Lastly, the proposal is nondiscriminatory because it applies uniformly to all Members. The Exchange believes that it is important to make this feature transparent to Subscribers of the Service by proposing to codify this principle in Rule 13.9.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As the Service is similar to those historical data products already provided by other exchanges, the Exchange believes the Service increases competition in the market for historical data products.[8] In addition, the Exchange believes that the ability of Members to exclude their routed orders from the Service will help to maintain the competitiveness of the Service. This is because the Exchange believes that this additional feature will attract greater order flow to the Exchange as certain Members that do not wish their routed order information from being provisioned within the Service will simply exclude their routed orders from the Service as opposed to taking that additional order flow to other competing exchanges. Accordingly, allowing Members the option to exclude their routed order flow from the Service enables the Exchange to remain competitive with other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) [9] of the Act and Rule 19b-4(f)(6) thereunder.[10]

A proposed rule change filed under 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange notes that waiver of the 30-day operative delay will allow Members who wish to opt-out their routed orders from inclusion in the Service to do so immediately without further delay. The Exchange notes that, without the ability to opt-out their

[5] *See* Securities Exchange Act Release No. 67910 (September 21, 2012), 77 FR 59429 (September 27, 2012) (SR–EDGX–2012–42).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; see also, NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] *Id.*

routed orders from inclusion in the Service, Members may elect to redirect their routed order flow to the Exchange's competitors. Accordingly, the Exchange believes that this additional feature should not be delayed as it will allow the Exchange to remain competitive with other market centers. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow Members who wish to maintain order flow to the Exchange but who do not want their routed orders included in the Service to opt-out immediately. For this reason, the Commission designates the proposed rule change to be operative upon the operative date of the Filing.[13]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–EDGX–2013–02 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.

All submissions should refer to File Number SR–EDGX–2013–02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of EDGX. 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–EDGX–2013–02 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

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BILLING CODE 8011–01–P

[13] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68790; File No. SR–BYX–2013–003]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BYX Rules Related to Price Sliding Functionality

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 25, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend Rule 11.9, entitled ''Orders and Modifiers'' to modify the operation of the Exchange's price sliding functionality described in BYX Rule 11.9.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange currently offers various forms of sliding which, in all cases, result in the ranking and/or display of an order at a price other than an order's limit price in order to comply with applicable securities laws and/or Exchange rules. Specifically, the Exchange currently offers price sliding to ensure compliance with Regulation NMS and Regulation SHO. Price sliding currently offered by the Exchange re-prices and displays an order upon entry and in certain cases again re-prices and re-displays an order at a more aggressive price based on changes in the national best bid (''NBB'') or national best offer (''NBO'', and together with the NBB, the ''NBBO''). As described below, the Exchange proposes to modify the operation of display-price sliding in the event the Exchange displays an order subject to price sliding as a Protected

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

Quotation[5] and such order's displayed price is locked or crossed by another market.

Under the Exchange's current rules, if, at the time of entry, an order would lock or cross a Protected Quotation displayed by another trading center the Exchange ranks orders subject to display-price sliding at the locking price and displays such orders at one minimum price variation below the current NBO (for bids) or to one minimum price variation above the current NBB (for offers). Following the initial ranking and display of an order subject to display-price sliding, an order is typically only re-ranked and re-displayed to the extent it achieves a more aggressive price. However, the Exchange proposes to re-rank an order at the same price as the displayed price (i.e., a less aggressive price) in the event such order's displayed price is locked or crossed by a Protected Quotation of an external market.[6] This will avoid the potential of a ranked price that crosses the Protected Quotation displayed by such external market, which could, in turn, lead to a trade through of such Protected Quotation at such ranked price. The Exchange notes that, as described below, when an external market crosses the Exchange's Protected Quotation and the Exchange's Protected Quotation is a displayed order subject to price sliding, the Exchange proposes to re-rank such order at the displayed price. Thus, the order displayed by the Exchange will still be ranked and permitted to execute at a price that crosses the other market's Protected Quotation, which is consistent with Rule 611(b)(4) of Regulation NMS.[7]

As an example of the behavior described above, assume the Exchange has a posted and displayed bid to buy 100 shares of a security priced at $10.10 per share and a posted and displayed offer to sell 100 shares at $10.13 per share. Assume the NBBO is $10.10 by $10.12. If the Exchange receives a non-routable bid to buy 100 shares at $10.12 per share the Exchange will rank the order to buy at $10.12 and display the order at $10.11 because displaying the bid at $10.12 would lock an external market's Protected Offer to sell for $10.12. If an external market then updated its Protected Offer to $10.11, thus locking the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange proposes to modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). By re-ranking the bid in this example to $10.11, the Exchange will not allow an order to maintain a ranked price that is crossing the NBO when the displayed price of such order is locking the NBO, and thus, such order will not have the ability to trade through the NBO if the Exchange receives a marketable contra-side offer during the locked market condition.

The Exchange notes that as proposed when an external market publishes a Protected Quotation that *crosses* an order displayed by the Exchange, the Exchange has proposed to slide the ranked price of its displayed order to the displayed price. Thus, an order will still be permitted to be ranked at a price that crosses an external market's Protected Quotation, and could thus trade through such quotation if executed. For instance, using the example above, assume that the NBBO is $10.10 by $10.12 and the Exchange has a price slid bid to buy 100 shares that is ranked at $10.12 and displayed at $10.11. If an external market then updated its Protected Offer to $10.10, thus crossing the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange will modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). The order displayed by the Exchange will be permitted to remain executable at a price that crosses the other market's Protected Offer. The Exchange has proposed this functionality because it is consistent with its proposed functionality when an external market *locks* the Exchange's Protected Quotation. While the Exchange believes such an order should still be permitted to execute pursuant to the exception in Regulation NMS when the market is crossed, and does not believe that the displayed price of its Protected Quotations should be adjusted based on another market published Protected Quotations that lock or cross such quotations, the Exchange believes that executing such an order at the displayed price of such order is a better result because the existence of a crossing quotation is evidence of some price discrepancy in the market. The Exchange also believes that consistency between the functionality when the Exchange's quotation is locked and when the Exchange's quotation is crossed is preferable.[8]

The Exchange also proposes to make clear that this re-ranking will not result in a change in priority for the order at its displayed price. For instance, in the example above, assume the bid described had been posted and displayed at $10.11 and ranked at $10.12 (''Order A''), and then a later arriving bid is received by the Exchange at $10.11 (''Order B'') and posted as well, with priority behind Order A. If the Exchange then re-ranks Order A because it has been locked or crossed by another market center's Protected Quotation, the Exchange does not believe it would be fair to cause such order to lose priority when it was originally first in priority amongst displayed orders on the Exchange.

As set forth in the Exchange's current price sliding rules, the ranked and displayed prices of an order subject to display-price sliding may be adjusted once or multiple times depending upon the instructions of a User[9] and changes to the prevailing NBBO. The Exchange's default price sliding process slides and ranks an order on entry so that it is ranked at the locking price and displayed at one price less aggressive and then unslides the order so that it is displayed at the ranked/locking price one time if such display becomes permissible. Multiple price sliding continues to rank and display orders at the most aggressive permissible prices based on changes to the NBBO. Multiple price sliding is optional and must be explicitly selected by a User before it will be applied. The Exchange proposes to make clear that, in connection with the changes above, if an order subject to the Exchange's default price sliding process has been locked or crossed by a Protected Quotation of an external market then the Exchange will adjust the ranked price of such order and it will not be further re-ranked or re-

[5] As defined in BYX Rule 1.5(t) a ''Protected Quotation'' is ''a quotation that is a Protected Bid or Protected Offer.'' In turn, the term ''Protected Bid'' or ''Protected Offer'' means ''a bid or offer in a stock that is (i) displayed by an automated trading center; (ii) disseminated pursuant to an effective national market system plan; and (iii) an automated quotation that is the best bid or best offer of a national securities exchange or association.''

[6] The Exchange notes that as a general matter Regulation NMS should prevent external markets from displaying Protected Quotations that lock or cross Protected Quotations displayed by the Exchange. However, in a dynamic market, such an event can and does happen for a variety of reasons. For example, if the Exchange updates its Protected Quotation for a security at the same time another market updates its contra-side Protected Quotation, it is possible that such quotations lock or cross each other. Neither the Exchange nor the other market would know in this circumstance that such quotations would lock or cross each other when publishing their quotation updates. As another example, in the event another market receives an intermarket sweep order, such market may permissibly display such order without regard to other Protected Quotations, including quotations displayed by the Exchange that lock or cross such order.

[7] 17 CFR 242.611(b)(4).

[8] *Id.*

[9] As defined in BYX Rule 1.5(cc), a User is ''any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.''

displayed at any other price. While in most circumstances the Exchange unslides orders subject to price sliding to a more aggressive price when permissible, in this limited circumstance, when such an order's displayed price is locked or crossed by an external market the Exchange will be sliding the ranked price to the less aggressive displayed price and will not further unslide the order. Orders subject to the optional multiple price sliding process will be further re-ranked and re-displayed as permissible based on changes to the prevailing NBBO. Thus, once slid, an order subject to multiple price sliding, including its ranked price, will be slid to more aggressive prices as permissible.

As a continuation of the example above, assume that the NBBO is $10.10 by $10.12 and the Exchange has a price slid bid to buy 100 shares that is ranked at $10.12 and displayed at $10.11. If an external market then updated its Protected Offer to $10.11, thus locking the Exchange's displayed bid (i.e., the order subject to price sliding that is ranked at $10.12 and displayed at $10.11), then the Exchange will modify the ranked price of such bid to the same price as the displayed price (i.e., $10.11). If a User has selected the default price sliding process then the order will not further re-rank or re-display such order, even if the NBO moves back to $10.12 such that the order could again be ranked at that price. However, if a User has opted into multiple price sliding, the Exchange will re-rank such order at $10.12 (still displayed at $10.11), and if the NBO then moved to $10.13, the Exchange will re-display such order at $10.12.

2. Statutory Basis

The rule change proposed in this submission is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[10] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[11] because 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.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed changes to price sliding are consistent with Section 6(b)(5) of the Act,[12] as well as Rules 610 and 611 of Regulation NMS.[13] The Exchange is not modifying the overall functionality of price sliding, which, to avoid locking or crossing quotations of other market centers, displays orders at permissible prices while retaining a price at which the User is willing to buy or sell, in the event display at such price or an execution at such price becomes possible. Instead, the Exchange is making changes to ensure that if the Exchange's own Protected Quotation is a price slid order that is locked or crossed by an external market's Protected Quotation, that [sic] the Exchange will re-rank such order so that its displayed price is the same as its ranked price.

Rule 610(d) requires exchanges to establish, maintain, and enforce rules that require members reasonably to avoid ''[d]isplaying quotations that lock or cross any protected quotation in an NMS stock.'' [14] Such rules must be ''reasonably designed to assure the reconciliation of locked or crossed quotations in an NMS stock,'' and must ''prohibit * * * members from engaging in a pattern or practice of displaying quotations that lock or cross any quotation in an NMS stock.'' [15] Thus, display-price sliding offered by the Exchange assists Users by displaying orders at permissible prices.

Rule 611 requires trading centers to ''establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent trade-throughs on that trading center of protected quotations'' unless an exception applies. The Exchange believes that the proposal to modify its price sliding functionality to prevent the ranked prices of orders subject to price sliding from working at a price that could trade through other market centers when the Exchange's quotation is locked is consistent with this Rule 611. Similarly, although a trade through would be permissible if the Exchange's quotation is crossed by another market center based on an applicable exception, the Exchange believes that the proposal to re-rank orders in such a circumstance to the displayed price is consistent with the protection of investors and the public interest.

[12] *Id.*

[13] 17 CFR 242.610; 17 CFR 242.611.

[14] 17 CFR 242.610(d).

[15] *Id.*

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition. To the contrary, the proposal will ensure that the Exchange's processes are designed to prevent trade throughs consistent with Regulation NMS in the event the Exchange's own quotations are locked or crossed by external markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [18] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6) [19] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will allow the Exchange to immediately enhance its price sliding functionality to avoid potential trade throughs when the Exchange's quotation is locked by an external market. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6).

delay and designates the proposal operative upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BYX–2013–003 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2013–003. 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–BYX–2013–003 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02558 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68789; File No. SR–BATS–2013–005]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing of Proposed Rule Change To Modify the Competitive Liquidity Provider Program to, Among Other Things, Modify the Calculation of Size Event Tests

January 31, 2013.

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 January 18, 2013, BATS Exchange, Inc. (''Exchange'' or ''BATS'') 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 is filing with the Commission a proposal to amend Interpretation and Policy .02 to Rule 11.8, entitled ''Competitive Liquidity Provider Program.''

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On August 30, 2011, the Exchange received approval of rules applicable to the qualification, listing and delisting of securities of issuers on the Exchange.[3] More recently, the Exchange received approval to operate a program that is designed to incentivize certain market makers registered with the Exchange as Competitive Liquidity Providers (''CLPs'') to enhance liquidity on the Exchange in Exchange-listed securities (the ''Competitive Liquidity Provider Program'' or ''CLP Program'').[4] The Program seeks to establish a venue for the execution of retail orders with greater price competition and transparency than existing execution arrangements. The Exchange subsequently adopted financial incentives for the CLP Program[5] and thereafter amended certain financial incentives for the CLP Program.[6]

The purpose of this filing is to modify Interpretation and Policy .02 of Rule 11.8 regarding certain details around the implementation of the CLP Program. Specifically, the Exchange proposes to: (1) Expand the time during which the Exchange will calculate Size Event Tests (''SETs'') to between 9:25 a.m. and 4:05 p.m.; (2) calculate SETs separately for bids and offers; (3) provide separate daily rebates based on the greatest number of winning bid SETs and winning offer SETs; (4) increase the

[3] *See* Securities Exchange Act Release No. 65225 (August 30, 2011), 76 FR 55148 (September 6, 2011) (SR–BATS–2011–018).

[4] *See* Securities Exchange Act Release No. 66307 (February 2, 2012), 77 FR 6608 (February 8, 2012) (SR–BATS–2011–051).

[5] *See* Securities Exchange Act Release No. 66427 (February 21, 2012), 77 FR 11608 (February 27, 2012) (SR–BATS–2012–011).

[6] *See* Securities Exchange Act Release No. 67854 (September 13, 2012), 77 FR 58198 (September 19, 2012) (SR–BATS–2012–036).

minimum quote to have a winning SET to five round lots; (5) require a CLP to also quote at least one round lot at or within 1.2% of the CLP's bid or offer in order to have a winning SET during Regular Trading Hours;[7] and (6) change the system for allocating the daily rebate to the CLPs with the highest and second highest winning SETs from a set percentage to a pro rata basis.

Extending the Time of the CLP Program

The Exchange is proposing to expand the time during which SETs are calculated on the Exchange. Currently, the Exchange calculates SETs at least once per second, but only during Regular Trading Hours. This Exchange proposes to expand the time during which SETs are calculated to include the period five minutes before the beginning of Regular Trading Hours and five minutes after Regular Trading Hours, or 9:25 a.m. to 4:05 p.m. The Exchange is proposing this change in order to encourage CLPs to enter aggressively priced orders immediately prior to, during, and immediately after both Opening Auctions[8] and Closing Auctions[9] in BATS listed securities.

Calculating SETs Separately for Bids and Offers

The Exchange also proposes to calculate SETs and provide rebates separately for bids and offers. Currently, the Exchange calculates and determines the winner(s) of each SET by adding together the total number of bid shares that a CLP is quoting at the NBB and the number of offer shares that the CLP is quoting at the NBO (the ''Combined Shares''). The Exchange then determines the SET winner based on the highest total Combined Shares.

This proposal intends to amend Interpretation and Policy .02(g) of Rule 11.8 so that the Exchange calculates SETs separately for bids and offers. As proposed, the Exchange would evaluate a CLP's bid quotes and offer quotes separately, meaning that the CLP or CLPs with the greatest aggregate size at the NBB will be considered to have a winning bid SET and the CLP or CLPs with the greatest aggregate size at the NBO will be considered to have a winning offer SET. No CLPs would be considered to have a winning SET for having the greatest aggregate size at the NBB and NBO combined.

Minimum Quote Size Requirement

The Exchange is proposing to increase the minimum quote size requirement to be eligible to have a winning SET during Regular Trading Hours. Currently, the Exchange only requires that a CLP's orders are for at least one round lot. Specifically, this proposal to amend sub-paragraph (g)(4) of Interpretation and Policy .02 to Rule 11.8 is intended to increase the minimum quote size requirement to five round lots (usually 500 shares) for a CLP to have a winning bid or offer SET. The Exchange is proposing this change to encourage CLPs to provide additional liquidity at the NBBO in BATS listed securities.

Contra-Side Quoting Requirement

The Exchange also proposes that a CLP be required to quote at least one round lot at or within 1.2% of the CLP's bid or offer in order to have a winning SET during Regular Trading Hours. Currently, outside of daily and monthly quoting requirements, the Exchange does not have any quoting requirements for CLPs. More specifically, the Exchange does not currently have any contra-side quoting requirements that a CLP must meet in order to be considered to have a winning SET.

This proposal to add sub-paragraph (g)(5) to Interpretation and Policy .02 to Rule 11.8 is intended to require that, in order to have a winning bid SET or winning offer SET during Regular Trading Hours, a CLP must have a bid or offer on the contra-side at a price at or within 1.2% of the CLP's winning offer or bid, respectively. For example, as proposed, in order for a CLP to have a winning bid SET for a 500 share bid priced at $10.00, the CLP must, at the time of the SET, also have at least one round lot offer for between $10.00 and $10.12. For a CLP to have a winning offer SET for a 500 share offer priced at $10.00, the CLP must, at the time of the SET, also have at least one round lot bid priced between $9.88 and $10.00. The Exchange is proposing this amendment in order to require CLPs to provide liquidity on both sides of the market in order to be considered to have a winning bid or offer SET. The Exchange is proposing to have this requirement apply only to SETs during Regular Trading Hours in order to mitigate exposure due to potentially high volatility in pricing that occurs outside of Regular Trading Hours.

Providing Daily Financial Rebates Separately for Bid SETs and Offer SETs

The Exchange proposes to provide separate daily rebates based on the greatest number of winning bid SETs and winning offer SETs. Currently, the one or two CLPs (depending on the type of security) with the greatest number of winning SETs (subject to other requirements, not relevant for the purposes of this proposed change) win a set percentage of a single daily rebate. The Exchange is proposing, in conjunction with the above proposed change to calculate SETs separately for bids and offers, to amend Interpretation and Policy .02 (g)(1)(A) and (k)(1) of Rule 11.8 to provide daily financial rebates to CLPs based on which CLP or CLPs have the greatest number of winning bid SETs and, separately, winning offer SETs.

Allocation of Daily Financial Rebates

The Exchange is also proposing to amend the way that it allocates daily financial rebates to CLPs. Currently, for all CLP eligible securities with the exception of Tier II securities,[10] the Exchange allocates daily financial rebates on an 80/20 basis in which the eligible CLP with the highest number of winning SETs receives 80% of the daily financial rebate and the eligible CLP with the second highest number of winning SETs receives 20% of the daily financial rebate.[11] Frequently, the Exchange has found that the CLP with the most or second most winning SETs will realize that they are so far in front of the next CLP and/or so far behind the CLP in front of them that they no longer have incentive to continue to provide aggressive quotes.

In order to incentivize CLPs to continue to quote aggressively throughout the day, the Exchange is proposing to amend paragraph (k)(1) of Interpretation and Policy .02 to Rule 11.8 to allocate daily financial rebates to CLPs on a pro rata basis. Specifically, the Exchange is proposing to determine the two CLPs that receive the daily financial rebates on the same basis, however, rather than receiving a pre-set percentage of the financial rebate, the CLPs will split the financial rebate based on the number of each CLP's winning SETs as a percentage of total winning SETs between the two winning CLPs. For instance, where CLP1 has 6,000 winning SETs, CLP2 has 4,000

[7] Regular Trading Hours is defined in BATS Rule 1.5(w).

[8] The process for Opening Auctions in BATS listed securities is described in BATS Rule 11.23(b).

[9] The process for Closing Auctions in BATS listed securities is described in BATS Rule 11.23(c).

[10] As defined in BATS Rule 14.9.

[11] It is worth noting that the Exchange currently does not distinguish between bid SETs and offer SETs and awards the daily financial rebates to CLPs based only on the total number of winning SETs (whether on an 80/20 basis or, as under Tier II, 100% to a single CLP). As described above, the Exchange is proposing to calculate both winning bid SETs and winning offer SETs and, as such, is also proposing to provide separate and independent financial rebates to CLPs for bid SETs and offer SETs.

winning SETS, and CLP3 has 3,000 winning SETs, currently, the Exchange would award 80% to CLP1 and 20% to CLP2, based on the set percentages. However, as proposed, CLP1 would be allocated 60% of the financial rebate [6,000/(6000+4000)] and CLP2 would be allocated 40% of the financial rebate [4,000/(6,000+4,000)]. The Exchange is not proposing to reallocate the daily financial rebates for Tier II securities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[12] In particular, the proposal is consistent with Section 6(b)(5) of the Act,[13] because it would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system. The Exchange believes that the proposal will benefit market participants by incentivizing increased participation in the Opening and Closing Auction by expanding the time during which the Exchange will conduct SETs, thus improving the price discovery process. The Exchange also believes that the proposal will promote tighter spreads for all market participants by separately calculating SETs and providing rebates for bids and offers rather than combined bids and offers, which will incentivize CLPs to quote more aggressively on both the bid and offer. Further, the Exchange believes that the proposal will promote tighter spreads by requiring that CLPs quote at least one round lot at or within 1.2% of a bid or offer in order to have a winning SET during Regular Trading Hours. In addition to creating tighter spreads, the Exchange further believes that the proposal is consistent with the Act because it will help to increase liquidity at the NBBO by increasing the minimum quote size from one round lot to five round lots. Finally, the Exchange believes that the proposed pro-rata structure will incentivize CLPs to quote aggressively on a continuous basis throughout each trading day.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition. The Exchange believes that the proposal will merely improve the incentives and, in turn, the results, of its CLP Program. The Exchange believes that the proposed changes will enhance competition amongst participants in the CLP Program.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule 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 will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BATS–2013–005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2013–005. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BATS–2013–005 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02557 Filed 2–5–13; 8:45 am]

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[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendment to EDGA Rule 13.9

January 31, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 22, 2013 the EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes a rule change to amend Rule 13.9 to allow Members the option to opt-out their routed orders from inclusion in the Edge Routed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Liquidity Report[SM] on a market participant identifier(s) (''MPID(s)'') basis. All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, Proposed Rule Change

1. Purpose

In SR–EDGA–2012–38 (the ''Filing''),[3] the Exchange introduced a new market data product, Edge Routed Liquidity Report (''Edge Routed Liquidity Report'' or the ''Service'') to Members[4] and non-Members of the Exchange (collectively referred to as ''Subscribers''). The Edge Routed Liquidity Report is a data feed that contains all historical order information for orders routed to away destinations by the Exchange. The Filing stated that Edge Routed Liquidity Report is offered as either a standard report (the ''Standard Report'') or a premium report (the ''Premium Report'') (the Standard Report and the Premium Report shall be collectively referred to as the ''Reports''). In SR–EDGA–2012–42,[5] the Exchange amended Rule 13.9 to provide additional information regarding the features of the Standard Report and the Premium Report.

The Exchange proposes to amend Rule 13.9 to state that Members will have the ability to request, on a MPID basis, and in a form prescribed by the Exchange, that their routed orders will not be included in the Edge Routed Liquidity Report.

If a Member wishes to opt-out their routed orders from inclusion in the Service, such Member must submit a request to the Exchange in a form prescribed by the Exchange. Such request will prevent the display of the Member's routed orders in the Service effective as of the day the request was submitted. Members can notify the Exchange via email if they wish to revoke their election. Such request will be effective as of the day the request was submitted.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,[6] in general, and with Section 6(b)(5) of the Act[7] in particular, which requires, among other things, that the Exchange's rules are not designed to unfairly discriminate between customers, issuers, brokers or dealers and are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed amendment is consistent with those principles as Members' election to be included or excluded in the Service is completely voluntary at any time. Providing Members the ability to opt-out their routed orders from inclusion in the Service makes available an additional choice that previously did not exist. Members that do not wish to represent their orders in the Service for any reason will be allowed to opt-out their routed orders (on an MPID basis) from being included in the Service and any Member may cancel their subscription to the Service at any time.

The Exchange also believes that the proposed amendment is consistent with the principles of Section 6(b)(5) of the Act because allowing Members the ability to opt-out their routed order data from inclusion in the Service does not implicate any concerns related to manipulation or fraud. Because all data in the Service is displayed on an anonymous basis, Subscribers will be unaware of which Members have chosen to opt-out their routed order data from the Service.

Lastly, the proposal is nondiscriminatory because it applies uniformly to all Members. The Exchange believes that it is important to make this feature transparent to Subscribers of the Service by proposing to codify this principle in Rule 13.9.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As the Service is similar to those historical data products already provided by other exchanges, the Exchange believes the Service increases competition in the market for historical data products.[8] In addition, the Exchange believes that the ability of Members to exclude their routed orders from the Service will help to maintain the competitiveness of the Service. This is because the Exchange believes that this additional feature will attract greater order flow to the Exchange as certain Members that do not wish their routed order information from being provisioned within the Service will simply exclude their routed orders from the Service as opposed to taking that additional order flow to other competing exchanges. Accordingly, allowing Members the option to exclude their routed order flow from the Service enables the Exchange to remain competitive with other exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any

[3] Securities Exchange Act Release No. 67765 (August 31, 2012), 77 FR 55248 (September 7, 2012) (SR–EDGA–2012–38).

[4] A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

[5] *See* Securities Exchange Act Release No. 67909 (September 21, 2012), 77 FR 59441 (September 27, 2012) (SR–EDGA–2012–42).

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] *See* Securities Exchange Act Release No. 61885 (April 9, 2010), 75 FR 20018 (April 16, 2010) (SR–BATS–2010–002) (adopting BATS market data products, including BATS Historical Data Products); *see also,* NYSE Technologies, Market Data, *www.nyxdata.com* (providing information regarding historical data products offered by the NYSE; see also, NASDAQ Rules 7022 and 7023 (establishing fees for Historical Research and Administrative Reports and NASDAQ Depth-of-Book Data); *see also,* Securities Exchange Act Release No. 61416 (January 25, 2010), 75 FR 5821 (February 4, 2010) (SR–NASDAQ–2010–010) (relating to NASDAQ rule governing Historical ModelView product); *see also,* Securities Exchange Act Release No. 66403 (February 15, 2012), 77 FR 10593 (February 22, 2012) (SR–EDGA–2012–05) (adopting EdgeBook Cloud service); *see also,* Securities Exchange Act Release No. 66402 (February 15, 2012), 77 FR 10595 (February 22, 2012) (SR–EDGX–2012–05) (adopting EdgeBook Cloud service).

unsolicited written comments from its Members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) [9] of the Act and Rule 19b–4(f)(6) thereunder.[10]

A proposed rule change filed under 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) [12] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Exchange notes that waiver of the 30-day operative delay will allow Members who wish to opt-out their routed orders from inclusion in the Service to do so immediately without further delay. The Exchange notes that, without the ability to opt-out their routed orders from inclusion in the Service, Members may elect to redirect their routed order flow to the Exchange's competitors. Accordingly, the Exchange believes that this additional feature should not be delayed as it will allow the Exchange to remain competitive with other market centers. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow Members who wish to maintain order flow to the Exchange but who do not want their routed orders included in the Service to opt-out immediately. For this reason, the Commission designates the proposed rule change to be operative upon the operative date of the Filing.[13]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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–EDGA–2013–02 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.

All submissions should refer to File Number SR–EDGA–2013–02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of EDGA. 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–EDGA–2013–02 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02624 Filed 2–5–13; 8:45 am]

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[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] *Id.*

[13] For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68795; File No. SR–BYX–2013–007]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Delay the Operative Date of Changes to the Rule for Halting Trading in All Stocks Due to Extraordinary Market Volatility

January 31, 2013.

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 January 30, 2013, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to delay the operative date of a rule change to BYX Rule 11.18, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room [sic].

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant 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 delay the operative date of the pilot in BYX Rule 11.18, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from February 4, 2013 until April 8, 2013 to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 11.18 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 11.18 would be in effect.

Current Rule 11.18

In its current form,[4] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2, and 3 declines are calculated at the beginning of each calendar quarter, using 10%, 20%, and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 11.18 circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;
At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;
At or after 1:00 p.m. but before 2:00 p.m.—one hour;
At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 11.18 trading halt for stocks that comprise the DJIA.

Amended Rule 11.18

The Exchange amended BYX Rule 11.18 to revise the methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breaker'').[5] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breaker to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended BYX Rule 11.18 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 11.18 triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of BYX Rule 11.18: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[6] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Act[7] to make the necessary technological changes to implement both the changes to the market-wide circuit breaker and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the reasons stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013.

2. Statutory Basis

The rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[8] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[9] because it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt

[3] The Commission approved the proposed changes to the market-wide circuit breaker on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BYX–2011–025). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[4] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR–Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR-Phlx-98–15).

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BYX–2011–025).

[6] *See id.*

[7] 17 CFR 242.603(b).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breaker pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The delay in the operation of the market-wide circuit breaker pilot until April 8, 2013 will allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breaker pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change 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–BYX–2013–007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BYX–2013–007. 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–BYX–2013–007 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02632 Filed 2–5–13; 8:45 am]

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[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68784; File No. SR–NYSE–2013–10]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Delaying the Operative Date of A Rule Change to NYSE Rule 80B, Which Provides for Methodology for Determining When to Halt Trading in All Stocks Due to Extraordinary Market Volatility, From the Date of February 4, 2013, Until April 8, 2013

January 31, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b-4 thereunder,[3] notice is hereby given that January 23, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to NYSE Rule 80B, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. The text of the proposed rule change [sic] 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 amend Rule 80B, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[4] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 80B would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 80B would be in effect.

Current Rule 80B

In its current form,[5] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The Exchange disseminates the new trigger levels quarterly to the media and via an Information Memo and [sic] is available on the Exchange's Web site.[6] The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 80B circuit breaker is in effect, trading in all stocks halt for the time periods specified below:

Level 1 Halt

anytime before 2:00 p.m.—one hour;
at or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
at or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

anytime before 1:00 p.m.—two hours;
at or after 1:00 p.m. but before 2:00 p.m.—one hour;
at or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

at any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 80B trading halt for stocks that comprise the DJIA.

Amended Rule 80B

The Exchange amended Rule 80B to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breakers'').[7] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 80B as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 80B triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b-4.

[4] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSE–2011–48). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[5] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR-Amex-98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR-Phlx-98–15).

[6] *See e.g.,* NYSE Regulation Information Memos 11–19 (June 30, 2011) and 11–10 (March 31, 2011).

[7] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NYSE–2011–48).

triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 80B: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[8] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together [sic]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b–4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[15]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[16] of the Act to determine whether the proposed rule change 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

[8] *See id.*

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(iii).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[16] 15 U.S.C. 78s(b)(2)(B).

Number SR–NYSE–2013–10 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–NYSE–2013–10.* 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–NYSE–2013–10 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02625 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68775; File No. SR–FINRA–2013–008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Pilot Period Regarding the Use of Multiple MPIDs on FINRA Facilities

January 31, 2013.

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 January 24, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[3] which renders the proposal effective upon receipt of this filing by the Commission. 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

FINRA is proposing to extend through January 31, 2014, the current rules permitting the use of multiple Market Participant Symbols (''MPIDs'') in FINRA Rules 6160 (with respect to Trade Reporting Facilities (''TRFs'')), 6170 (with respect to the Alternative Display Facility (''ADF'')), and 6480 (with respect to the OTC Reporting Facility (''ORF'')).

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA 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, FINRA 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. FINRA 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

FINRA has three rules permitting the use of multiple MPIDs on FINRA facilities: Rule 6160 (Multiple MPIDs for Trade Reporting Facility Participants), Rule 6170 (Primary and Additional MPIDs for Alternative Display Facility Participants), and Rule 6480 (Multiple MPIDs for Quoting and Trading in OTC Equity Securities). The pilot period for all three rules is scheduled to expire on January 25, 2013. FINRA believes that there continue to be legitimate business reasons for members to maintain multiple MPIDs for use on FINRA facilities, and FINRA intends to file a proposed rule change later this year to make the rules permanent. In the interim, FINRA is proposing to extend the pilot period for each of the three rules until January 31, 2014. FINRA is not proposing any other changes to the rules at this time.

(1) Rule 6160

Rule 6160 provides that any Trade Reporting Facility Participant that wishes to use more than one MPID for purposes of reporting trades to a TRF must submit a written request to, and obtain approval from, FINRA Operations for such additional MPIDs. In addition, Supplementary Material to the rule states that FINRA considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. A Trade Reporting Facility Participant must identify the purpose(s) and system(s) for which the multiple MPIDs will be used. If FINRA determines that the use of multiple MPIDs is detrimental to the marketplace, or that a Trade Reporting Facility Participant is using one or more additional MPIDs improperly or for other than the purpose(s) identified by the Participant, FINRA staff retains full discretion to limit or withdraw its grant of the additional MPID(s) to such Trade Reporting Facility Participant for purposes of reporting trades to a TRF. FINRA believes that Rule 6160 is necessary to consolidate the process of issuing, and tracking the use of, multiple MPIDs used to report trades to TRFs.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 17 CFR 240.19b–4(f)(6).

Rule 6160 was approved by the Commission in 2006 on a pilot basis.[4] The pilot period has been extended several times since the rule was originally adopted and currently expires on January 25, 2013.[5]

(2) Rule 6170

Rule 6170 provides that a Registered Reporting ADF ECN may request additional MPIDs for displaying quotes and orders and reporting trades through the ADF trade reporting facility, TRACS, for any ADF-Eligible Security. Among other things, Registered Reporting ADF ECNs are prohibited from using an additional MPID to accomplish indirectly what they are prohibited from doing directly through their Primary MPID. In addition, FINRA staff retains full discretion to determine whether a bona fide regulatory and/or business need exists for being granted an additional MPID privilege and to limit or withdraw the additional MPID display privilege at any time. The procedures for requesting, and the restrictions surrounding the use of, multiple MPIDs are set forth in Supplementary Material to the rule.

The Commission approved Rule 6170 on a pilot basis on August 11, 2006.[6] The pilot period has been extended several times since the rule was originally adopted and currently expires on January 25, 2013.[7]

(3) Rule 6480

Like Rule 6160, Rule 6480 provides that any member that wishes to use more than one MPID for purposes of quoting an OTC Equity Security or reporting trades to the ORF must submit a written request to, and obtain approval from, FINRA Operations for such additional MPIDs. The rule also states that a member that posts a quotation in an OTC Equity Security and reports to a FINRA system a trade resulting from such posted quotation must utilize the same MPID for reporting purposes. In addition, Supplementary Material to the rule states that FINRA considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. When requesting an additional MPID(s), a member must identify the purpose(s) and system(s) for which the multiple MPIDs will be used. If FINRA determines that the use of multiple MPIDs is detrimental to the marketplace, or that a member is using one or more additional MPIDs improperly or for purposes other than the purpose(s) identified by the member, FINRA staff retains full discretion to limit or withdraw its grant of the additional MPID(s) to such member.

FINRA adopted Rule 6480 on a pilot basis on July 23, 2009.[8] The pilot period has been extended several times and currently expires on January 25, 2013.[9]

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change on January 25, 2013.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[10] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change is consistent with these requirements because it will continue to provide a process by which members can request, and FINRA can properly allocate, the use of additional MPIDs for displaying quotes and orders through the ADF or reporting trades to a TRF or the ORF.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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. The proposed rule change is limited to extending the pilot period for currently-existing rules and does not substantively change any FINRA rule.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6)[13] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[14] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. FINRA has requested that the Commission waive the 30-day operative delay so that the proposed rule change can become operative as soon as the current pilot period expires. The Commission notes that the proposed rule change does not present any new, unique, or substantive issues; rather, it simply extends the pilot period permitting the use of multiple MPIDs with respect to TRFs, the ADF, and the ORF. In addition, the waiver of the 30-

[4] *See* Securities Exchange Act Release No. 54715 (November 6, 2006), 71 FR 66354 (November 14, 2006); *see also* Securities Exchange Act Release No. 54715A (November 14, 2006), 71 FR 67183 (November 20, 2006).

[5] *See* Securities Exchange Act Release No. 66033 (December 22, 2011), 76 FR 82022 (December 29, 2011); *see also* Securities Exchange Act Release No. 63729 (January 18, 2011), 76 FR 4403 (January 25, 2011); Securities Exchange Act Release No. 61297 (January 6, 2010), 75 FR 2173 (January 14, 2010); Securities Exchange Act Release No. 59183 (December 30, 2008), 74 FR 842 (January 8, 2009); Securities Exchange Act Release No. 57217 (January 28, 2008), 73 FR 6234 (February 1, 2008); Securities Exchange Act Release No. 55206 (January 31, 2007), 72 FR 5479 (February 6, 2007).

[6] *See* Securities Exchange Act Release No. 54307 (August 11, 2006), 71 FR 47551 (August 17, 2006). By its terms, the initial pilot period expired on January 26, 2007, to coincide with the expiration of the ADF pilot period. *See* Securities Exchange Act Release No. 53699 (April 21, 2006), 71 FR 25271 (April 28, 2006). On January 26, 2007, the Commission approved a proposed rule change to make the ADF rules permanent. *See* Securities Exchange Act Release No. 55181 (January 26, 2007), 72 FR 5093 (February 2, 2007).

[7] *See* Securities Exchange Act Release No. 66033 (December 22, 2011), 76 FR 82022 (December 29, 2011); *see also* Securities Exchange Act Release No. 63729 (January 18, 2011), 76 FR 4403 (January 25, 2011); Securities Exchange Act Release No. 61297 (January 6, 2010), 75 FR 2173 (January 14, 2010); Securities Exchange Act Release No. 59183 (December 30, 2008), 74 FR 842 (January 8, 2009); Securities Exchange Act Release No. 57217 (January 28, 2008), 73 FR 6234 (February 1, 2008); Securities Exchange Act Release No. 55206 (January 31, 2007), 72 FR 5479 (February 6, 2007).

[8] *See* Securities Exchange Act Release No. 60414 (July 31, 2009), 74 FR 39721 (August 7, 2009).

[9] *See* Securities Exchange Act Release No. 66033 (December 22, 2011), 76 FR 82022 (December 29, 2011); *see also* Securities Exchange Act Release No. 63729 (January 18, 2011), 76 FR 4403 (January 25, 2011); Securities Exchange Act Release No. 61297 (January 6, 2010), 75 FR 2173 (January 14, 2010).

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). FINRA has requested that the Commission waive the requirement that FINRA provide the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which FINRA filed the proposed rule change pursuant to Rule 19b–4(f)(6)(iii). The Commission hereby grants this request.

[13] 17 CFR 240.19b–4(f)(6).

[14] 17 CFR 240.19b–4(f)(6)(iii).

day operative delay will allow FINRA to keep in place without interruption the pilot programs allowing use of multiple MPIDs with respect to TRFs, the ADF, and the ORF. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and, therefore, designates the proposed rule change as operative upon filing.[15]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporary 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–FINRA–2013–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2013–008. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FINRA. 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–FINRA–2013–008, and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02554 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[15] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15U.S.C. 78c(f).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68786; File No. SR–NASDAQ–2013–021]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delay the Operative Date of a Rule Change to NASDAQ Rule 4121

January 31, 2013.

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 January 28, 2013, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes a rule change to delay the operative date of a rule change to NASDAQ Rule 4121, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. The text of the proposed rule change [sic] is available at *http://nasdaq.cchwallstreet.com,* at the Exchange's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 4121, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time as the pilot period for the LULD Plan. The current Rule 4121 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 4121 would be in effect.

[3] The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NASDAQ–2011–131). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot would [sic] remain the same date as for the LULD Plan.

Current Rule 4121

The Exchange amended Rule 4121 on June 6, 2012.[4] The changes to Rule 4121 are effective, but not operative until February 4, 2013. The current standard, set forth in the rules of other exchanges,[5] provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the Dow Jones Industrial Average (''DJIA'') for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a market-wide circuit breaker is in effect, trading in all stocks halt for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;

At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;

At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;

At or after 1:00 p.m. but before 2:00 p.m.—one hour;

At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 80B trading halt for stocks that comprise the DJIA.

Amended Rule 4121

The Exchange amended Rule 4121 to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breakers'').[6] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange [sic] amended Rule 80B as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 80B triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange [sic] believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 80B: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[7] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breakers pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breakers pilot would remain the same date as for the LULD Plan.

2. *Statutory Basis*

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest..[sic]

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

[4] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–NASDAQ–2011–131).

[5] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR–Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR–Phlx-98–15).

[6] *See* supra note 4.

[7] *Id.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and subparagraph (f)(6) of Rule 19b–4 thereunder.[11]

A proposed rule change filed under Rule 19b–4(f)(6) [12] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[13] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[14]

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [15] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–021 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–2013–021. 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–2013–021, and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02628 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] 17 CFR 240.19b–4(f)(6).

[13] 17 CFR 240.19b–4(f)(6)(iii).

[14] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 15 U.S.C. 78s(b)(2)(B).

[16] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68778; File No. SR–FINRA–2013–011]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Operative Date of FINRA Rule 6121.02 (Market-wide Circuit Breakers in NMS Stocks)

January 31, 2013.

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 January 30, 2013, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. 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

FINRA is proposing to delay the operative date of FINRA Rule 6121.02 (Market-wide Circuit Breakers in NMS Stocks), which reflects changes to the methodology for triggering market-wide circuit breakers for NMS stocks.[3] FINRA is delaying the operative date from February 4, 2013 until April 8, 2013 to correspond to the initial date of operations for the Regulation NMS Plan to Address Extraordinary Market Volatility (the ''Limit Up-Limit Down'' or ''LULD'' Plan'').[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (Order Approving File No. SR–FINRA–2011–054).

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (Order Approving, on a Pilot Basis, the Limit Up-Limit Down Plan).

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA and at the Commission's Public Reference Room [sic].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA 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. FINRA 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

FINRA proposes to delay the operative date of new FINRA Rule 6121.02 (''MWCB pilot''), which addresses the methodology for triggering market-wide circuit breakers in all NMS stocks otherwise than on an exchange from February 4, 2013 until April 8, 2013 to coincide with the revised initial date of operations of the LULD Plan, unless the MWCB pilot is either extended or approved permanently.

Current Rules

In 1988, the SEC approved several self-regulatory organization (''SRO'') rule proposals that provided for market-wide circuit breakers at specified levels to promote stability and investor confidence during a period of significant stress, along with a Policy Statement by FINRA (then known as NASD) that provided trading halt authority in the event of severe market declines.[5] These measures were adopted as part of an effort by the securities and futures markets to implement a coordinated means to address potentially destabilizing market volatility.

On October 7, 2008, FINRA permanently adopted a new rule—FINRA Rule 6121—that authorizes FINRA to halt trading otherwise than on an exchange in NMS stocks if other major U.S. securities markets initiate market-wide trading halts in response to their rules or extraordinary market conditions, or if otherwise directed by the SEC.[6] Rule 6121 provides for a halt in trading otherwise than on an exchange in NMS stocks to promote stability and investor confidence during a period of significant stress.

New Rule 6121.02

FINRA adopted new Supplementary Material .02 to Rule 6121 to add more specificity to FINRA's rules for halting trading otherwise than on an exchange in all NMS stocks when a market-wide circuit breaker has been put into effect on a primary listing market. Thus, new Rule 6121.02 provides that, in the event of a Level 1, Level 2 or Level 3 Market Decline,[7] as determined by a primary listing market and publicly disseminated, FINRA shall halt trading otherwise than on an exchange in all NMS stocks and shall not permit the resumption of trading for the time periods specified by the primary listing market, except as otherwise further provided for in the rule.

Specifically, Rule 6121.02 provides that, if trading is halted in all NMS stocks for a Level 1 or a Level 2 Market Decline, FINRA will halt trading otherwise than on an exchange in all NMS stocks until trading has resumed on the primary listing market. If, however, the primary listing market does not reopen a security within 15 minutes following the end of the 15-minute halt period, FINRA may permit the resumption of trading otherwise than on an exchange in that security if trading in the security has commenced on at least one other national securities exchange. If, however, a Level 3 Market Decline occurs at any time during the trading day, FINRA shall halt trading otherwise than on an exchange in all NMS stocks until the primary listing market opens the next trading day. These amendments were adopted in coordination with the other SROs and track the provisions put in place by the other SROs.

The MWCB pilot was adopted for a period that corresponds with the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. In addition, FINRA established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented so that the SROs and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 could coordinate making the necessary technological changes to implement both pilots.

The initial date of LULD Plan operations has been changed to April 8, 2013. Thus, and for the same reasons stated above, FINRA proposes to delay the operative date of the MWCB pilot to April 8, 2013 so that the implementation date for the MWCB pilot remains the same as that for the LULD Plan.

FINRA has filed the proposed rule change for immediate effectiveness. The effective date and the implementation date will be the date of filing.

2. Statutory Basis

FINRA believes that its proposal is consistent with Section 15A(b) of the Securities Exchange Act of 1934 (the ''Act'')[8] [sic] and furthers the objectives of Section 15A(b)(6) of the Act,[9] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

Specifically, this rule proposal promotes uniformity across U.S. markets concerning when and how to halt trading in all NMS stocks as a result of extraordinary market volatility. In addition, delaying the operative date of the MWCB pilot until the initial date of operations of the LULD Plan would allow the MWCB pilot to begin and end at the same time of the LULD Plan so

FINRA anticipates that the initial date of LULD Plan operations will be April 8, 2013. *See* Letter from Janet McGinness, EVP & Corporate Secretary, General Counsel, NYSE Markets, to Elizabeth M. Murphy, Secretary, SEC dated January 17, 2013 (NYSE Markets). Therefore, this proposal likewise delays the operative date of the market-wide circuit breaker provisions to April 8, 2013 so that the implementation dates for the two pilots remain the same.

[5] *See* Securities Exchange Act Release No. 26198 (October 19, 1988), 53 FR 41637 (October 24, 1988) (Order Approving File No. SR–NASD–88–46). FINRA's Policy Statement on Market Closings (''Policy Statement'') provided, among other things, that when other major securities markets initiate market-wide trading halts in response to extraordinary market conditions, FINRA will, upon SEC request, halt domestic trading in all securities in equity and equity-related securities in the OTC market. As part of the approval order, the SEC requested that FINRA impose a trading halt as quickly as practicable whenever the NYSE and other equity markets have suspended trading. The language in the Policy Statement was subsequently codified, on a pilot basis, in Interpretive Material (IM) 4120–3 (later renumbered IM–4120–4). *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (Order Approving File No. SR–NASD–98–27). The IM–4120–3 pilot, which also was extended numerous times, expired on April 30, 2002.

[6] *See* Securities Exchange Act Release No. 58753 (October 8, 2008), 73 FR 61177 (October 15, 2008) (Order Approving File No. SR–FINRA–2008–048).

[7] Rule 6121.02 also provides that a Market Decline means a decline in the value of the S&P 500® Index between 9:30 a.m. and 4:00 p.m. on a trading day as compared to the closing value of the S&P 500® Index for the immediately preceding trading day.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78*o*-3(b)(6).

that FINRA, the other SROs and the Commission can assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA 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. The proposed changes are being made to delay the operation of the MWCB pilot until April 8, 2013 to allow it to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. The other SROs are subject to the same methodology for determining when to halt trading in all NMS stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the MWCB pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11]

FINRA has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) [13] of the Act to determine whether the proposed rule change 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–FINRA–2013–011 *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–FINRA–2013–011. 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 FINRA. 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–FINRA–2013–011 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02592 Filed 2–5–13; 8:45 am]

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[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires FINRA to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68806; File No. SR–EDGA–2013–05]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Delay the Operative Date of Changes to the Rule for Halting Trading in All Stocks Due to Extraordinary Market Volatility

February 1, 2013.

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 January 31, 2013, EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 delay the operative date of a rule change to EDGA Rule 11.14, which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. All of the changes described herein are applicable to EDGA Members. The text of the proposed rule change is available on the Exchange's Internet Web site at *www.directedge.com,* at the Exchange's principal office, and at the Public Reference Room of the Commission [sic].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delay the operative date of the pilot in Rule 11.14, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility from February 4, 2013 until April 8, 2013 to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 11.14 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 11.14 would be in effect.

Current Rule 11.14

In its current form,[4] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 [sic] are calculated at the beginning of each calendar quarter by the primary listing market, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The primary listing markets disseminate the new trigger levels quarterly to the media, via information memos and publication on their Web sites. The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 11.14 circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;
At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;
At or after 1:00 p.m. but before 2:00 p.m.—one hour;
At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 11.14 trading halt for stocks that comprise the DJIA.

Amended Rule 11.14

The Exchange amended Rule 11.14 to revise the current methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breaker'').[5] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breaker to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Rule 11.14 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 11.14 triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of Rule 11.14: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[6] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Act to make the necessary technological changes to implement both the changes to the market-wide circuit breaker and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013.

[3] The Commission approved the proposed changes to the market-wide circuit breaker on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–EDGA–2011–31). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[4] NYSE Rule 80B, the analogous rule from the New York Stock Exchange LLC, was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR–Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR–Phlx–98–15).

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–EDGA–2011–31).

[6] *See id.*

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Section 6(b)(5) of the Act,[8] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breaker pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The delay in the operation of the market-wide circuit breaker pilot until April 8, 2013 will allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breaker pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[12] of the Act to determine whether the proposed rule change should be approved or disapproved.

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2)(B).

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–EDGA–2013–05 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–EDGA–2013–05. 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–EDGA–2013–05 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02644 Filed 2–5–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68777; File No. SR–CHX–2013–02]

Self-Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Delaying the Operative Date of a Rule Change to CHX Article 20, Rule 2, Which Provides, Among Other Things, Methodology for Determining When to Halt Trading in All Stocks Due to Extraordinary Market Volatility From the Date of February 4, 2013 Until April 8, 2013

January 31, 2013.

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 January 25, 2013, the Chicago Stock Exchange, Inc. (the ''Exchange'' or ''CHX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to delay the operative date of a rule change to CHX Article 20, Rule 2, which provides, among other things, the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013. The text of this proposed rule change is available on the Exchange's Web site at (*www.chx.com*) and in the Commission's Public Reference Room [sic].

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 CHX included statements concerning the purpose of and basis for the proposed rule changes 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 CHX 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 Exchange proposes to amend Article 20, Rule 2, which provides, among other things, the methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breakers''), to delay the operative date of the pilot by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Article 20, Rule 2 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the portions of the current version of Article 20, Rule 2 that outlines the market-wide circuit breakers would be in effect.

Current Article 20, Rule 2

In its current form, Article 20, Rule 2 provides for, among other things, Level 1, 2 and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 [sic] are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the Dow Jones Industrial Average (''DJIA'') for the month prior to beginning of the quarter. The values remain then in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2 or 3 decline is no longer equal to an actual 10%, 20% or 30% decline in the most recent closing value of the DJIA.

Once the current market-wide circuit breakers are in effect, trading in all stocks halt for the time periods specified below (all times are in Central Standard Time):

Level 1 Halt
- Anytime before 12:00 [sic] p.m.—one hour;
- At or after 1:00 p.m. but before 1:30 p.m.—30 minutes;
- At or after 1:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt
- Anytime before 12:00 p.m.—two hours;
- At or after 12:00 p.m. but before 1:00 p.m.—one hour;
- At or after 1:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt
- At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during an Article 20, Rule 2 trading halt for stocks that comprise the DJIA.

Amended Article 20, Rule 2

The Exchange amended Article 20, Rule 2 to revise the current market-wide circuit breakers.[4] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breakers to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended Article 20, Rule 2 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of market-wide circuit breaker triggers with daily recalculations; (iii) replaced the 10%, 20% and 30% market decline percentages with 7%, 13% and 20% market decline percentages; (iv) modified the length of the trading halts

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission approved the proposed changes to the market-wide circuit breakers on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–CHX–2011–30). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. This proposal would set the operative date of the market-wide circuit breakers pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breakers pilot would remain the same date as for the LULD Plan.

[4] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–CHX–2011–30).

associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of the market-wide circuit breakers provisions of Article 20, Rule 2: to ensure that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breakers on a pilot basis for a period that corresponds to the pilot for the LULD Plan so that the impact of the two proposals can be reviewed together.[5] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 to make the necessary technological changes to implement both the changes to the market-wide circuit breakers and the proposed LULD Plan, the Exchange established the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the ''Act''),[6] in general, and furthers the objectives of Section 6(b)(5) of the Act,[7] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[10]

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 under Section 19(b)(2)(B)[11] of the Act to determine whether the proposed rule change 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–CHX–2013–02 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–CHX–2013–02. This file number should be included on the

[5] *See id.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

[10] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78s(b)(2)(B).

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–CHX–2013–02 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

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[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68794; File No. SR–ISE–2013–09]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend ISE Rule 2102 to Extend the Market-Wide Circuit Breaker Pilot Program

January 31, 2013.

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 January 29, 2013, International Securities Exchange, LLC (the ''Exchange'' or ''ISE'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 2102 to delay the operative date of a rule change to 2102(g), which provides for methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013.

The text of the proposed rule change is available on the Exchange's Internet Web site at *http://www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room [sic].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delay the operative date of the pilot in Rule 2102(g), which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, by which such Rule operates from the current scheduled date of February 4, 2013, until April 8, 2013, to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 2102(g) would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 2102(g) would be in effect.

Current Rule 2102(g)

In its current form,[4] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2 and 3 [sic] are calculated at the beginning of each calendar quarter, using 10%, 20% and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The NYSE disseminates the new trigger levels quarterly to the media and via an Information Memo and [sic] is available on the Exchange's Web site.[5] The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt

Anytime before 2:00 p.m.—one hour;
At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt

Anytime before 1:00 p.m.—two hours;
At or after 1:00 p.m. but before 2:00 p.m.—one hour;
At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

[3] The Commission approved the proposed changes to the market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–ISE–2011–61). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot would [sic] remain the same date as for the LULD Plan.

[4] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR-Amex-98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR-Phlx-98–15).

[5] *See e.g.,* NYSE Regulation Information Memos 11–19 (June 30, 2011) and 11–10 (March 31, 2011).

Level 3 Halt

At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 2102(g) trading halt for stocks that comprise the DJIA.

The Exchange adopted paragraph (g) to Rule 2102 to adopt a methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breaker'').[6] The Exchange, other equities, options, and futures markets, and FINRA amended or adopted, as applicable, the market-wide circuit breaker to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. The Exchange believes that Rule 2102(g) reflects today's high-speed, highly electronic trading market while ensuring that market participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted [sic] market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[7] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Securities Exchange Act of 1934 (the ''Act'') to make the necessary technological changes to implement both the changes to the market-wide circuit breaker and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the same reasons as stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[8] in general, and furthers the objectives of Section 6(b)(5) of the Act,[9] in particular, in that it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breaker pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The proposed changes are being made to delay the operation of the market-wide circuit breakers pilot until April 8, 2013 to allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the same requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breakers pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b–4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[13] of the Act to determine whether the proposed rule change 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.

[6] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–ISE–2011–61).

[7] *See id.*

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov. Please include File Number* SR–ISE–2013–09 *on the subject line.*

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2013–09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ISE–2013–09 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

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[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68804; File No. SR–NYSE–2013–11]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 128, Which Governs Clearly Erroneous Executions, Extending the Effective Date of the Pilot Until September 30, 2013 and Adopting New Paragraph (i) to NYSE Rule 128 in Connection With the Upcoming Operation of the Plan To Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS Under the Act

February 1, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that January 30, 2013, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend NYSE Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013. The Exchange also proposes to adopt new paragraph (i) to NYSE Rule 128 in connection with the upcoming operation of the Plan to Address Extraordinary Market Volatility Pursuant to Rule 608 of Regulation NMS under the Act (the ''Limit Up-Limit Down Plan'' or ''Plan'').[4] 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.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (the ''Limit Up-Limit Down Release'').

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 amend NYSE Rule 128, which governs clearly erroneous executions, to extend the effective date of the pilot by which portions of such Rule operate, until September 30, 2013. The pilot is currently scheduled to expire on February 4, 2013.[5] The Exchange also proposes to add new paragraph (i) to NYSE Rule 128 in connection with the upcoming implementation of the Limit Up-Limit Down Plan.

On September 10, 2010, the Commission approved, on a pilot basis, market-wide amendments to exchanges' rules for clearly erroneous executions to set forth clearer standards and curtail discretion with respect to breaking erroneous trades. In connection with this pilot initiative, the Exchange amended NYSE Rule 128(c), (e)(2), (f), and (g). The amendments provide for uniform treatment of clearly erroneous execution reviews (1) in Multi-Stock Events[6] involving twenty or more securities, and (2) in the event transactions occur that result in the issuance of an individual security trading pause by the primary market and subsequent transactions that occur before the trading pause is in effect on

[5] *See* Securities Exchange Act Release No. 62886 (September 10, 2010), 75 FR 56613 (September 16, 2010) (SR–NYSE–2010–47). *See also* Securities Exchange Act Release Nos. 63479 (December 9, 2010), 75 FR 78274 (December 15, 2010) (SR–NYSE–2010–80); 64232 (April 7, 2011), 76 FR 20735 (April 13, 2011) (SR–NYSE–2011–17); 65064 (August 9, 2011), 76 FR 50505 (August 15, 2011) (SR–NYSE–2011–41); 66136 (January 11, 2012), 77 FR 2589 (January 18, 2012) (SR–NYSE–2011–69); and 67555 (August 1, 2012), 77 FR 47154 (August 7, 2012) (SR–NYSE–2012–32).

[6] Terms not defined herein are defined in NYSE Rule 128.

the Exchange.[7] The amendments also eliminated appeals of certain rulings made in conjunction with other exchanges with respect to clearly erroneous transactions and limited the Exchange's discretion to deviate from Numerical Guidelines set forth in the Rule in the event of system disruptions or malfunctions.

If the pilot were not extended, the prior versions of paragraphs (c), (e)(2), (f), and (g) of NYSE Rule 128 would be in effect, and the NYSE would have different rules than other exchanges and greater discretion in connection with breaking clearly erroneous transactions. The Exchange believes the benefits to market participants from the more objective clearly erroneous executions rule should continue on a pilot basis through September 30, 2013, which is the date that the Exchange anticipates that the phased implementation of the Limit Up-Limit Down Plan will be complete. As explained in further detail below, although the Limit Up-Limit Down Plan is intended to prevent executions that would need to be nullified as clearly erroneous, the Exchange believes that certain protections should be maintained while the industry gains initial experience operating with the Limit Up-Limit Down Plan, including the provisions of Rule 128 that currently operate as a pilot.

Proposed Limit Up-Limit Down Provision to NYSE Rule 128

The Exchange proposes to adopt new paragraph (i) to NYSE Rule 128, to provide that the existing provisions of NYSE Rule 128 will continue to apply to all Exchange transactions, including transactions in securities subject to the Plan, other than as set forth in proposed paragraph (i). Accordingly, other than as proposed below, the Exchange proposes to maintain and continue to apply the Clearly Erroneous Execution standards in the same way that it does today. Notably, this means that the Exchange might nullify transactions that occur within the price bands disseminated pursuant to the Limit Up-Limit Down Plan to the extent such transactions qualify as clearly erroneous under existing criteria. As an example, assume that a Tier 1 security pursuant to the Plan has a reference price pursuant to both the Plan and Rule 128 of $100.00. The lower pricing band under the Plan would be $95.00 and the upper pricing band under the Plan would be $105.00. An execution could occur on the Exchange in this security at $96.00, as this is within the Plan's pricing bands. However, if subjected to review as potentially clearly erroneous, the Exchange would nullify an execution at $96.00 as clearly erroneous because it exceeds the 3% threshold that is in place pursuant to Rule 128(c)(1) for securities priced above $50.00 (*i.e.,* with a reference price of $100.00, any transactions at or below $97.00 or above $103.00 could be nullified as clearly erroneous). Accordingly, this proposal maintains the status quo with respect to reviews of Clearly Erroneous Executions and the application of objective numerical guidelines by the Exchange. The proposal does not increase the discretion afforded to the Exchange in connection with reviews of Clearly Erroneous Executions.

The Limit Up-Limit Down Plan is designed to prevent executions from occurring outside of dynamic price bands disseminated to the public by a single plan processor as defined in the Limit Up-Limit Down Plan.[8] The possibility remains that the Exchange could experience a technology or systems problem with respect to the implementation of the price bands disseminated pursuant to the Plan. To address such possibilities, the Exchange proposes to adopt language to make clear that if an Exchange technology or systems issue results in any transaction occurring outside of the price bands disseminated pursuant to the Plan, an Officer of the Exchange or senior level employee designee, acting on his or her own motion or at the request of a third party, shall review and declare any such trades null and void. Absent extraordinary circumstances, any such action of the Officer of the Exchange or other senior level employee designee shall be taken in a timely fashion, generally within thirty (30) minutes of the detection of the erroneous transaction. When extraordinary circumstances exist, any such action of the Officer of the Exchange or other senior level employee designee must be taken by no later than the start of regular trading hours[9] on the trading day following the date on which the execution(s) under review occurred. Although the Exchange will act as promptly as possible and the proposed objective standard (*i.e.,* whether an execution occurred outside the band) should make it feasible to quickly make a determination, there may be circumstances in which additional time may be needed for verification of facts or coordination with outside parties, including the single plan processor responsible for disseminating the price bands and other market centers. Accordingly, the Exchange believes it necessary to maintain some flexibility to make a determination outside of the thirty (30) minute guideline. In addition, the Exchange proposes that a transaction that is nullified pursuant to new paragraph (i) would be appealable in accordance with the provisions of Rule 128(e)(2). In addition, the Exchange proposes to make clear that in the event that a single plan processor experiences a technology or systems problem that prevents the dissemination of price bands, the Exchange would make the determination of whether to nullify transactions based on Rule 128(a)–(h).

The Exchange believes that cancelling trades that occur outside of the price bands disseminated pursuant to the Plan is consistent with the purpose and intent of the Plan, as such transactions are not intended to occur in the first place. If transactions do occur outside of the price bands and no exception applies—which necessarily would be caused by a technology or systems issue—then the Exchange believes the appropriate result is to nullify such transactions.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[10] of the Act, in general, and furthers the objectives of Section 6(b)(5)[11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the pilot program promotes just and equitable principles of trade in that it promotes transparency and uniformity across markets concerning review of transactions as clearly erroneous. More specifically, the Exchange believes that the extension of the pilot would promote just and equitable principles of trade because it would help assure that

[7] Separately, the Exchange has proposed to extend the effective date of the trading pause pilot under NYSE Rule 80C, which requires to the Exchange to pause trading in an individual security listed on the Exchange if the price moves by a specified percentage as compared to prices of that security in the preceding five-minute period during a trading day. *See* Securities Exchange Act Release No. 68745 (January 28, 2013) (SR–NYSE–2012–05) [sic].

[8] *See* Limit Up-Limit Down Release, *supra* note 4.

[9] Regular trading hours commence at 9:30 a.m. Eastern Time. *See* NYSE Rule 51(a).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

the determination of whether a clearly erroneous trade has occurred will be based on clear and objective criteria. Additionally, resolution of the incident will occur promptly through a transparent process, which the Exchange believes would protect investors and the public interest. The proposed rule change would also 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 because it would help assure consistent results in handling erroneous trades across the U.S. markets, thus furthering fair and orderly markets, the protection of investors and the public interest.

Although the Limit Up-Limit Down Plan will be operational during the same time period as the proposed extended pilot, the Exchange believes that maintaining the pilot for at least through the phased implementation of the Plan is operational will help to protect against unanticipated consequences. To that end, the extension will allow the Exchange to determine whether NYSE Rule 128 is necessary once the Plan is operational and, if so, whether improvements can be made. Further, the Exchange believes it consistent with the protection of investors and the public interest to adopt objective criteria to nullify transactions that occur outside of the Plan's price bands when such transactions should not have been executed but were due to a systems or technology issue.

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. To the contrary, the Exchange believes that the Financial Industry Regulatory Authority and other national securities exchanges are also filing similar proposals, and thus, that the proposal will help to ensure consistent rules across market centers.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6)(iii) thereunder.[13]

A proposed rule change filed under Rule 19b–4(f)(6)[14] normally does not become operative for 30 days after the date of filing. However, pursuant to Rule 19b–4(f)(6)(iii) [15] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the pilot program to continue uninterrupted, thereby avoiding the investor confusion that could result from a temporary interruption in the pilot program. For this reason, the Commission designates the proposed rule change to be operative upon filing.[16]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2013–11 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–NYSE–2013–11.* 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–NYSE–2013–11 and should be submitted on or before February 27, 2013.

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6)(iii). As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

[14] 17 CFR 240.19b–4(f)(6).

[15] 17 CFR 240.19b–4(f)(6)(iii).

[16] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02642 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68780; File No. SR–BATS–2013–010]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Delay the Operative Date of Changes to the Rule for Halting Trading in All Stocks Due to Extraordinary Market Volatility

January 31, 2013.

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 January 30, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to delay the operative date of a rule change to BATS Rule 11.18, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from the date of February 4, 2013, until April 8, 2013.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room [sic].

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delay the operative date of the pilot in BATS Rule 11.18, which provides the methodology for determining when to halt trading in all stocks due to extraordinary market volatility, from February 4, 2013 until April 8, 2013 to coincide with the initial date of operations of the Regulation NMS Plan to Address Extraordinary Market Volatility (''LULD Plan'').[3] As proposed, the pilot period will begin and end at the same time [sic] the pilot period for the LULD Plan. The current Rule 11.18 would remain in effect until April 8, 2013. If the pilot is not either extended or approved permanently at the end of the pilot period, the current version of Rule 11.18 would be in effect.

Current Rule 11.18

In its current form,[4] the rule provides for Level 1, 2, and 3 declines and specified trading halts following such declines. The values of Levels 1, 2, and 3 declines are calculated at the beginning of each calendar quarter, using 10%, 20%, and 30%, respectively, of the average closing value of the DJIA for the month prior to the beginning of the quarter. Each percentage calculation is rounded to the nearest fifty points to create the Levels' trigger points. The values then remain in effect until the next quarterly calculation, notwithstanding whether the DJIA has moved and a Level 1, 2, or 3 decline is no longer equal to an actual 10%, 20%, or 30% decline in the most recent closing value of the DJIA.

Once a Rule 11.18 circuit breaker is in effect, trading in all stocks halt [sic] for the time periods specified below:

Level 1 Halt
- Anytime before 2:00 p.m.—one hour;
- At or after 2:00 p.m. but before 2:30 p.m.—30 minutes;
- At or after 2:30 p.m.—trading shall continue, unless there is a Level 2 Halt.

Level 2 Halt
- Anytime before 1:00 p.m.—two hours;
- At or after 1:00 p.m. but before 2:00 p.m.—one hour;
- At or after 2:00 p.m.—trading shall halt and not resume for the rest of the day.

Level 3 Halt
- At any time—trading shall halt and not resume for the rest of the day.

Unless stocks are halted for the remainder of the trading day, price indications are disseminated during a Rule 11.18 trading halt for stocks that comprise the DJIA.

Amended Rule 11.18

The Exchange amended BATS Rule 11.18 to revise the methodology for determining when to halt trading in all stocks due to extraordinary market volatility (''market-wide circuit breaker'').[5] The Exchange, other equities, options, and futures markets, and FINRA amended the market-wide circuit breaker to take into consideration the recommendations of the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues, and to provide for more meaningful measures in today's markets of when to halt trading in all stocks. Accordingly, the Exchange amended BATS Rule 11.18 as follows: (i) Replaced the DJIA with the S&P 500; (ii) replaced the quarterly calendar recalculation of Rule 11.18 triggers with daily recalculations; (iii) replaced the 10%, 20%, and 30% market decline percentages with 7%, 13%, and 20% market decline percentages; (iv) modified the length of the trading halts associated with each market decline level; and (v) modified the times when a trading halt may be triggered. The Exchange believes that these amendments update the rule to reflect today's high-speed, highly electronic trading market while still meeting the original purpose of BATS Rule 11.18: to ensure that market

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The Commission approved the proposed changes to the market-wide circuit breaker on a pilot basis for a period scheduled to start on February 4, 2013 that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together. *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–38). The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. The proposal would delay the operative date of the market-wide circuit breaker pilot to April 8, 2013 in order for the implementation date for the market-wide circuit breaker pilot to remain the same date as for the LULD Plan.

[4] The rule was last amended in 1998, when declines based on specified point drops in the DJIA were replaced with the current methodology of using a percentage decline that is recalculated quarterly. *See* Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (SR–NYSE–98–06, SR–Amex–98–09, SR–BSE–98–06, SR–CHX–98–08, SR–NASD–98–27, and SR–Phlx–98–15).

[5] *See* Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531 (June 6, 2012) (SR–BATS–2011–38).

participants have an opportunity to become aware of and respond to significant price movements.

The Exchange adopted the proposed changes to the market-wide circuit breaker on a pilot basis for a period that corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.[6] In addition, in order for the markets and the single plan processors responsible for the consolidation of information pursuant to Rule 603(b) of Regulation NMS under the Act[7] to make the necessary technological changes to implement both the changes to the market-wide circuit breaker and the proposed LULD Plan, the Exchange established that the implementation date for the proposed rule changes should be the same date that the LULD Plan is implemented. The Exchange anticipates that the initial date of LULD Plan operations will be changed to April 8, 2013. For the reasons stated above, the Exchange proposes to delay the operative date of the market-wide circuit breaker pilot to April 8, 2013.

2. Statutory Basis

The rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[8] Specifically, the proposed change is consistent with Section 6(b)(5) of the Act,[9] because it is 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 a national market system, and, in general, to protect investors and the public interest.

Specifically, this rule proposal supports the objectives of perfecting the mechanism of a free and open market and the national market system because it promotes uniformity across markets concerning when and how to halt trading in all stocks as a result of extraordinary market volatility. Additionally, delaying the operative date of the market-wide circuit breaker pilot until the initial date of operations of the LULD Plan would allow the pilot to begin and end at the same time of the LULD Plan so that the Exchange and the Commission could further assess the impact of the two pilots on the marketplace or whether other initiatives should be adopted in lieu of the pilots, which contributes to the protection of investors and the public interest.

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. The delay in the operation of the market-wide circuit breaker pilot until April 8, 2013 will allow the pilot period to begin and end at the same time as the LULD Plan, which contributes to the protection of investors and the public interest. Other competing equity exchanges are subject to the same methodology for determining when to halt trading in all stocks due to extraordinary market volatility and the requirements specified in the LULD Plan. Thus, the proposed changes will not impose any burden on competition while providing that the market-wide circuit breaker pilot period corresponds to the pilot period for the LULD Plan so that the impact of the two proposals can be reviewed together.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b-4(f)(6) thereunder.[11]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Doing so will delay the operative date of the market-wide circuit breakers pilot until the initial date of operations of the LULD Plan, thereby allowing the pilot to run simultaneously with the LULD Plan, providing an opportunity to properly assess the impact of the two pilots on the marketplace and evaluate the pilots' effectiveness. Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[13] of the Act to determine whether the proposed rule change 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–BATS–2013–010 *on the subject line.*

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BATS–2013–010. 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

[6] *See id.*

[7] 17 CFR 242.603(b).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 15 U.S.C. 78s(b)(2)(B).

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–BATS–2013–010 and should be submitted on or before February 27, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–02594 Filed 2–5–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[File No. 500–1]

Americas Energy Company—AECo; Order of Suspension of Trading

February 4, 2013.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of Americas Energy Company-AECo (''Americas'') because Americas has not filed any periodic reports since the period ended September 30, 2011. Americas is a Nevada corporation based in Knoxville, Tennessee, and its common stock is currently quoted on OTC Link, operated by OTC Markets Group, Inc., under the symbol AENYQ.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of Americas.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the securities of Americas is suspended for the period from 9:30 a.m. EST on February 4, 2013, through 11:59 p.m. EST on February 15, 2013.

[14] 17 CFR 200.30–3(a)(12).

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2013–02752 Filed 2–4–13; 4:15 pm]

BILLING CODE 8011–01–P

DEPARTMENT OF STATE

[Public Notice 8176]

Culturally Significant Objects Imported for Exhibition Determinations: ''Henri Labrouste: Structure Brought to Light''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the objects to be included in the exhibition ''Henri Labrouste: Structure Brought to Life,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at the Museum of Modern Art, New York, New York, from on or about March 10, 2013, until on or about June 24, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 30, 2013.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–02680 Filed 2–5–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8177]

Culturally Significant Object Imported for Exhibition Determinations: ''Vermeer's Woman in Blue Reading a Letter''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236–3 of August 28, 2000, I hereby determine that the object to be included in the exhibition ''Vermeer's Woman in Blue Reading a Letter,'' imported from abroad for temporary exhibition within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit object at the J. Paul Getty Museum, Los Angeles, California, from on or about February 15, 2013, until on or about March 31, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a description of the exhibit object, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6469). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: January 30, 2013.

Ann Stock,

Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–02677 Filed 2–5–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8179]

Shipping Coordinating Committee; Notice of Committee Meeting

The Shipping Coordinating Committee (SHC) will conduct an open meeting at 12:30 p.m. on Monday February 25, 2013, in Room 5–1224 of the United States Coast Guard Headquarters Building, 2100 Second

Street SW., Washington, DC 20593–0001. This is a revision to an earlier notice (Public Notice 8148) scheduling the meeting on Wednesday, February 27, 2013. The primary purpose of the meeting is to prepare for the twenty-first session of the International Maritime Organization's (IMO) Flag State Implementation Sub-Committee to be held at the IMO Headquarters, London, England, United Kingdom, March 4–8, 2013.

The matters to be considered include:

Adoption of the agenda,
Decisions of other IMO bodies,
Responsibilities of Governments and measures to encourage flag State compliance;
Mandatory reports under International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
Casualty statistics and investigations;
Harmonization of port State control activities;
Port State Control (PSC) Guidelines on seafarers' hours of rest and PSC guidelines in relation to the Maritime Labour Convention, 2006;
Development of guidelines on port State control under the 2004 Ballast Water Management (BWM) Convention;
Comprehensive analysis of difficulties encountered in the implementation of IMO instruments;
Review of the Survey Guidelines under the Harmonized System of Survey and Certification (HSSC) and the annexes to the Code for the Implementation of Mandatory IMO Instruments;
Consideration of International Association of Classification Societies (IACS) unified interpretations;
Measures to protect the safety of persons rescued at sea,
Illegal unregulated and unreported (IUU) fishing and related matters,
Review of general cargo ship safety,
Election of Chairman and Vice-Chairman for 2014,
Any other business.

Members of the public may attend this meeting up to the seating capacity of the room. To facilitate the building security process, and to request reasonable accommodation, those who plan to attend should contact the meeting coordinator, Mr. E.J. Terminella, by email at *Emanuel.J.TerminellaJr@uscg.mil;* by phone at (202) 372–1239; or in writing at Commandant (CG–CVC), U.S. Coast Guard Headquarters, 2100 2nd Street, SW STOP 7581, Washington, DC 20593–7581. Requests should be made no later than February 19, 2013. Requests made after this date might not be able to be accommodated. Please note that due to security considerations, two valid, government issued photo identifications must be presented to gain entrance to the Headquarters building. The Headquarters building is accessible by taxi and privately owned conveyance (public transportation is not generally available), however, parking in the vicinity of the building is extremely limited. Additional information regarding this and other IMO SHC public meetings may be found at: *www.uscg.mil/imo.*

Dated:January 31, 2013.

Brian Robinson,

Executive Secretary, Shipping Coordinating Committee, Department of State .

[FR Doc. 2013–02683 Filed 2–5–13; 8:45 am]

BILLING CODE 4710–09–P

DEPARTMENT OF STATE

[Public Notice 8178]

Advisory Committee on International Postal and Delivery Services

AGENCY: Department of State.

ACTION: Notice; FACA Committee meeting announcement.

SUMMARY: As required by the Federal Advisory Committee Act, Public Law 92–463, the Department of State gives notice of a meeting of the Advisory Committee on International Postal and Delivery Services. This Committee has been formed in fulfillment of the provisions of the 2006 Postal Accountability and Enhancement Act (Pub. L. 109–435) and in accordance with the Federal Advisory Committee Act.

Date and Time: The meeting will be held on Wednesday, March 6, from 10:00 a.m. to 12:00 p.m.

Location: The American Institute of Architects, Board Room, 1735 New York Avenue NW., Washington, DC 20006.

Public input: Any member of the public interested in providing public input to the meeting should contact Ms. Helen Grove, whose contact information is listed under *for further information* section of this notice. Each individual providing oral input is requested to limit his or her comments to five minutes. Requests to be added to the speaker list must be received in writing (letter, email or fax) prior to the close of business on March 1, 2013; written comments from members of the public for distribution at this meeting must reach Ms. Grove by letter, email or fax by this same date. A member of the public requesting reasonable accommodation should make the request to Ms. Grove by that same date.

Meeting agenda: The agenda of the meeting will include a review of the major proposals and issues to be considered by the April Postal Operations Council meeting in Bern, Switzerland, and other subjects related to international postal and delivery services of interest to Advisory Committee members and the public.

For further information, please contact Ms. Helen Grove of the Office of Global Systems (IO/GS), Bureau of International Organization Affairs, U.S. Department of State, at (202) 647–1044 or by email at *GroveHA@state.gov.mailto:*

Dated: January 30, 2013.

Robert Downes,

Designated Federal Officer, Department of State.

[FR Doc. 2013–02685 Filed 2–5–13; 8:45 am]

BILLING CODE 4710–19–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Environmental Impact Statement: Theodore Francis Green Airport, Warwick, RI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability.

SUMMARY: The FAA is issuing this notice to advise the public that a Record of Decision (ROD), resulting from an Environmental Impact Statement (EIS) Re-evaluation has been prepared for Theodore Francis Green Airport, Warwick, Rhode Island.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Environmental Program Manager, Federal Aviation Administration New England, 12 New England Executive Park, Burlington MA 01803. Telephone (781) 238–7613.

SUPPLEMENTARY INFORMATION: The FAA has issued a ROD regarding airport improvements at Theodore Francis Green Airport, Warwick, Rhode Island. The ROD documents the final Agency decisions regarding the proposed projects as described and analyzed in the EIS Re-evaluation. The ROD is available for review during normal business hours at the following locations: FAA New England Region, Airports Division, 16 New England Executive Park, Burlington MA. Telephone (781) 238–7613 and at RIAC offices, T.F.Green Airport, 2000 Post Rd., Warwick RI.

Issued on: January 25, 2013.

Mary Walsh,

Manager, Airports Division.

[FR Doc. 2013–02605 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Fifteenth Meeting: RTCA Special Committee 217—Aeronautical Databases Joint with EUROCAE WG–44—Aeronautical Databases

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Notice of RTCA Special Committee 217—Aeronautical Databases Joint with EUROCAE WG–44—Aeronautical Databases.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 217—Aeronautical Databases being held jointly with EUROCAE WG–44—Aeronautical Databases.

DATES: The meeting will be held February 25 through March 1, 2013, from 9:00 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at Eurocontrol Headquarters, Rue de la Fusée, 96 1130, Brussels (Haren), Belgium.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a) (2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of RTCA Special Committee 217—Aeronautical Databases held jointly with EUROCAE WG–44—Aeronautical Databases. The agenda will include the following:

Monday, February 25—Opening Plenary Session

- Co-Chairmen's remarks and introductions
  - Introduction of new RTCA Program Director
- Housekeeping
- Approve minutes from 14th meeting
- Review and approve meeting agenda for 15th meeting
- Schedule and working arrangements for the week
- Closing Plenary Schedule

Monday thru Thursday, February 25 to 28—Working Group Sessions

Working Group One (WG1)—DO–200A/ED–76—Stephane Dubet

- Review of WG44/SC217 ToR and discussion of the scope of WG1
- Current ED76/DO200A
  - Overview of the standard
  - Review of the current version assets and identified shortcomings
- Other related standards and initiatives
  - ICAO
  - FAA
  - EU SES (EU73/2010 a.k.a. ADQ1, ADQ2)
  - Other EUROCAE/RTCA standards
- Review of ED76 change scoping
  - Initial European scoping exercise
  - US review and comments
  - Further inputs
  - Conclusions
- Organization of the updating effort, working arrangements, and implementation

Working Group Two (WG2)—DO–272/DO–276/DO–291—John Kasten

- Action Item Review
  - Highest Priority Updates (as documented in Salt Lake City Meeting)
  - Update ASRN for De-Icing Areas, Aprons and Parking Areas, DO–272
  - Format for Capture Rules and Geometric Constraints, DO–272 and DO–276
  - Use of ''location'' in feature and attribute names, DO–272 and DO–276, impact on DO–291
  - Investigate reformatting DO–291 for two parts, Airport Mapping and Terrain/Obstacle
  - Requirements for Low Visibility Taxi Routes, DO–272
  - Requirements for Preferred Taxi Routes, DO–272
  - Resolve Painted Centerline feature. DO–272
  - Resolve Bridge Point data capture, DO–272
  - Address Airport Information in Textual Format (AITF), DO–272
  - Update Taxiway Feature Attributes (intersections), DO–272
  - Requirements for Markings, e.g. Apron Entry, DO–272
  - Requirements for Runway Feature Attributes related to surface conditions, e.g. rubber on runway, DO–272
  - Requirements, directionality of hold positions, DO–272
  - ATC Requirements for use of ASRN, DO–272
  - Requirements for supporting D–NOTAM, DO–272
  - Requirements for Runway Intersection when more than two, DO–272
- Update on Activities—ARINC 816, DO–272 and DO–276

Friday, March 1—Closing Plenary session

- Presentation of WG1 and WG2 conclusions
- Proposed way forward
- Working arrangements for remaining work
- Review of action items
- Next meetings, dates and locations
- Any other business
- Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on January 30, 2013.

Paige L. Williams,

Management Analyst, Business Operations Group, ANG–A12, Federal Aviation Administration.

[FR Doc. 2013–02598 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Twelfth Meeting: RTCA Special Committee 222, Inmarsat AMS(R)S

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Meeting Notice of RTCA Special Committee 222, Inmarsat AMS(R)S.

SUMMARY: The FAA is issuing this notice to advise the public of the twelfth meeting of the RTCA Special Committee 222, Inmarsat AMS(R)S.

DATES: The meeting will be held February 20, 2013, from 1:00 p.m.—4:00 p.m.

ADDRESSES: The meeting will be held at the RTCA Headquarters, 1150 18th Street NW., Suite 910, Washington DC 20036.

FOR FURTHER INFORMATION CONTACT: The RTCA Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 330–0662/(202) 833–9339, fax (202) 833–9434, or Web site at *http://www.rtca.org.* In addition, Jennifer Iversen may be contacted directly at email: *jiversen@rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of Special Committee 222. The agenda will include the following:

February 01, 2013

- Greetings & Attendance.
- Review summary of 11th Plenary (November 2012) meeting.
- Finalize comment resolution for new DO-xxx, *Minimum Aviation System Performance Standard for AMS(R)S Data and Voice Communications Supporting Required Communications Performance (RCP) and required surveillance performance (RSP) in Procedural Airspace*.
- Status, update and review of SSB-specific material for DO 262A.
- Other items as appropriate.
- Review action items from 11th Plenary.
- Schedule 13th Plenary.
- Adjourn.

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC on December 14, 2012.

Paige Williams,

Management Analyst, Business Operations Group, NextGen, Management Services, Federal Aviation Administration.

[FR Doc. 2013–02596 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Noise Exposure Map Notice; Receipt of Noise Compatibility Program and Request for Review: Tweed New Haven Regional Airport, New Haven, CT

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure map for Tweed New Haven Regional Airport, as submitted by the Tweed New Haven Airport Authority under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96–193) and 14 CFR Part 150, is in compliance with applicable requirements. The FAA also announces that it is reviewing a proposed noise compatibility program that was submitted for Tweed New Haven Regional Airport under Part 150 in conjunction with the noise exposure map, and that this program will be approved or disapproved on or before May 25, 2013.

DATES: *Effective Date:* The effective date of the FAA's determination on the noise exposure map and of the start of its review of the associated noise compatibility program is November 26, 2012. The public comment period ends on March 29, 2013.

FOR FURTHER INFORMATION CONTACT: Richard Doucette, Federal Aviation Administration, New England Region, Airports Division, ANE–600, 12 New England Executive Park, Burlington MA 01803.

Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure map submitted for Tweed New Haven Regional Airport is in compliance with applicable requirements of Part 150, effective November 26, 2012. Further, FAA is reviewing a proposed noise compatibility program for that airport which will be approved or disapproved on or before May 25, 2013. This notice also announces the availability of this program for public review and comment.

Under Section 103 of Title I of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as ''the Act''), an airport operator may submit to the FAA a noise exposure map which meets applicable regulations and which depicts non compatible land uses as of the date of submission of such map, a description of projected aircraft operations, and the ways in which such operations will affect such map. The Act requires such map to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport. An airport operator who has submitted a noise exposure map that is found by FAA to be in compliance with the requirements of Federal Aviation Regulation (FAR) Part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken, or proposes, for the introduction of additional non-compatible uses.

The Tweed New Haven Airport Authority submitted to the FAA, on November 26, 2012, a noise exposure map, descriptions, and other documentation that were produced during the Airport Noise Compatibility Planning (Part 150) study at Tweed New Haven Regional Airport from July 2011 to November 2012. It was requested that the FAA review this material as the noise exposure map, as described in Section 103 (a)(1) of the Act, and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under Section 104(b) of the Act.

The FAA has completed its review of the noise exposure maps and related descriptions submitted by Tweed New Haven Airport Authority. The specific maps under consideration were:

Figure 1: Existing (2012) Baseline Noise Exposure Map, page xix.

Figure 2: Future (2017) Baseline Noise Exposure Map, page xx.

The FAA has determined that the maps for Tweed New Haven Regional Airport are in compliance with applicable requirements. This determination is effective on November 26, 2012.

FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in Appendix A of FAR Part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program. If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under Section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure map to resolve questions concerning, for example, which properties should be covered by the provisions of Section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under Part 150 or through FAA's review of a noise exposure map. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator

that submitted the map, or with those public agencies and planning agencies with which consultation is required under Section 103 of the Act. The FAA has relied on the certification by the airport operator, under Section 150.21 of FAR Part 150, that the statutorily required consultation has been accomplished.

The FAA has formally received the noise compatibility program for Tweed New Haven Regional Airport, also effective on November 26, 2012. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before May 25, 2013. The FAA's detailed evaluation will be conducted under the provisions of 14 CFR Part 150, Section 150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing non compatible land uses and preventing the introduction of additional non-compatible land uses.

Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure map, the FAA's evaluation of the map, and the proposed noise compatibility program are available for examination at the following locations:

Tweed New Haven Regional Airport, New Haven, Connecticut

Federal Aviation Administration, New England Region, Airports Division, ANE–600, 16 New England Executive Park, Burlington, Massachusetts 01803

Questions may be directed to the individual named above under the heading: **FOR FURTHER INFORMATION CONTACT**.

Issued in Burlington, Massachusetts, on November 26, 2012.

Richard Doucette,

Manager, Environmental Programs, FAA Airports Division, New England Region.

[FR Doc. 2013–02608 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Surplus Property Release at Manchester-Boston Regional Airport in Manchester, NH

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for Public Comments.

SUMMARY: Under the provisions of Title 49, U.S.C. Section 47153(d), notice is being given that the FAA is considering a request from Manchester-Boston Regional Airport in Manchester, NH to waive the surplus property requirements for approximately 19 acres of airport property located at Manchester-Boston Regional Airport in Manchester, NH. The subject parcels have been used for non-aeronautical purposes for over 30 years under temporary relief of surplus property requirements. It has been determined through study and master planning that the subject parcels will not be needed for aeronautical purposes as they are not contiguous to the airport proper. Full and permanent relief of the surplus property requirements on these specific parcels will allow the airport and its tenants on these parcels to make the necessary and aviation-compatible improvements to the parcels. All revenues through the leasing of the parcels will continue to be subject to the FAAs revenue-use policy and dedicated to the maintenance and operation of the Manchester-Boston Regional Airport.

DATES: Comments must be received on or before March 8, 2013.

ADDRESSES: Send comments on this document to Mr. Barry J. Hammer at the Federal Aviation Administration, 12 New England Executive Park, Burlington, Massachusetts 01803, Telephone 781–238–7625.

FOR FURTHER INFORMATION CONTACT: Documents are available for review by appointment by contacting Mr. David Bush, Telephone 603–624–6539 or by contacting Mr. Barry J. Hammer, Federal Aviation Administration, 16 New England Executive Park, Burlington, Massachusetts, Telephone 781–238–7625.

Issued in Burlington, Massachusetts on January 29, 2013.

Mary T. Walsh,

Manager, Airports Division, New England Region.

[FR Doc. 2013–02599 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Establishment of the National Freight Network

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice.

SUMMARY: This notice defines the planned process for the designation of the national freight network as required by Section 1115 of the Moving Ahead for Progress in the 21st Century Act (MAP–21). This notice defines the process for the initial designation of the primary freight network, the designation of additional miles critical to future efficient movement of goods on the primary freight network, and how data on the State-designated critical rural freight corridors will be collected.

FOR FURTHER INFORMATION CONTACT: For questions about the program discussed herein, contact Ed Strocko, FHWA Office of Freight Management and Operations, (202) 366–2997, or via email at *ed.strocko@dot.gov.* For legal questions, please contact Michael Harkins, FHWA Office of the Chief Counsel, (202) 366–4928, or via email at *Michael.Harkins@dot.gov.* Business hours for the FHWA are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may retrieve a copy of the notice through the Federal eRulemaking portal at: *http://www.regulations.gov.* The Web site is available 24 hours each day, every day of the year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded from Office of the Federal Register's home page at: *http://www.archives.gov/federal_register* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov.*

Background

Freight in America travels over an extensive multimodal network of highways, railroads, waterways, pipelines, and airways. Freight moves throughout the United States on 985,000 miles of Federal-aid highways, 141,000 miles of railroads, 11,000 miles of inland waterways, and 1.6 million miles of pipelines. There are over 19,000 airports in the United States, with approximately 540 serving commercial operations, and over 5,000 coastal, Great Lakes, and inland waterway facilities moving cargo.

A significant portion of the freight moved in the United States travels on multiple modes of transportation to reach its final destination. While specific commodities are likely to use a particular mode or series of modes to be moved, a complex multimodal system is required to fully meet the growing volume of bulk and high velocity/high value goods in the United States. Each component of the freight transportation system must work in concert with each other to meet the day-to-day demands of commerce.

Section 167(c) of title 23 United States Code (U.S.C.), which was established in Section 1115 of MAP–21, directs the Secretary to establish a national freight network to assist States in strategically directing resources toward improved system performance for efficient movement of freight on the highway portion of the Nation's freight transportation system. This includes the National Highway System, freight intermodal connectors, and aerotropolis [1] transportation systems.

Under 23 U.S.C. 167(c), the national freight network will consist of the primary freight network, the portions of the Interstate System not designated as part of the primary freight network, and critical rural freight corridors. The designation of the primary freight network will be based on an inventory of national freight volume conducted by the Administrator of the Federal Highway Administration, in consultation with stakeholders, including system users, transport providers, and States. The primary freight network will be comprised of not more than 27,000 centerline miles of existing roadways that are most critical to the movement of freight, but the 27,000 mile cap may be increased by an additional 3,000 centerline miles of existing and planned roadways that the Secretary deems critical to the future efficient movement of goods on the primary freight network.

The MAP–21 also establishes the policy of the United States to improve the condition and performance of this national freight network to ensure that it provides the foundation for the United States to compete in the global economy and achieve the goals of the national freight policy. Consistent with the national freight policy, strategies to improve system performance on the national freight network should consider solution sets that effectively integrate the entire freight transportation system, including non-highway modes of freight transport, in order to maximize the efficiency of the national freight network.

Purpose of This Notice

The purpose of this notice is threefold: (1) To provide to stakeholders the planned process and criteria for the designation of not more than 27,000 centerline miles for the primary freight network, (2) to describe the principles and factors to be used for the designation of up to 3,000 additional centerline miles critical to future efficient movement of goods on the primary freight network, and (3) to establish how data for the State-designated critical rural freight corridors will be collected.

Primary Freight Network Designation

The designation of the primary freight network will be based on measureable and objective data, including: origins and destinations of freight movements; total freight tonnage and value of freight moved by highways; percentage of annual average daily truck traffic (AADTT) in the annual average daily traffic (AADT) on principal arterials; AADTT on principal arterials; land and maritime ports of entry; access to energy exploration, development, installation, or production areas; population centers; and network connectivity. The analysis will primarily use data from the Freight Analysis Framework maintained by the U.S. Department of Transportation (DOT). Other DOT modal agencies including the Federal Railroad Administration, Maritime Administration, Pipeline and Hazardous Materials Safety Administration, Federal Aviation Administration, and Bureau of Transportation Statistics will be consulted and other data will be incorporated into the analysis. Multiple scenarios will be analyzed using various weighting configurations to identify a primary freight network of up to 27,000 centerline miles. Such scenarios may target a range of tonnage or commodity values which are transported, a range of truck traffic volumes, or a range of percentages of truck traffic on principal arterials. Scenarios will also analyze: ranges of service and access to significant ports of entry/exit for international trade; access to energy areas; access to population centers; and network connectivity that includes multimodal aspects of the freight transportation system, such as rail lines parallel to principal arterials that carry trailer-on-flatcar, container-on-flatcar, and doublestack payloads of typically high-value, time-sensitive cargo, and rail lines and waterways that carry significant bulk cargo.

The following table denotes the factors, data sources, and parameters that may be used for designation of the primary freight network:

Factor	Data source	Parameters
Origins/destinations of freight movements.	FAF 3.4 ..... *http://faf.ornl.gov/fafweb/Extraction0.aspx*	Connect top origins/destinations
Freight tonnage and value by highways.	FAF 3.4 ..... *http://faf.ornl.gov/fafweb/Extraction0.aspx*	Include top routes by weight of freight transported; Include top routes by value of commodity transported
Percentage of AADTT on principal arterials.	HPMS 2010 AADTT ..... *http://www.fhwa.dot.gov/policyinformation/hpms.cfm*	Include top routes by percentage of AADTT on principal arterials
AADTT on principal arterials	HPMS 2010 AADTT ..... *http://www.fhwa.dot.gov/policyinformation/hpms.cfm*	Include top routes by AADTT on principal arterials
Land & maritime ports of entry.	USACE ..... U.S. Army Corps, Navigation Data Center, special request, October 2012 via BTS.	Connect top water ports ranked by weight and values
	MARAD ..... *http://www.marad.dot.gov/documents/Container_by_US_Customs_Ports.xls.*	Connect top water ports ranked by number of TEUs
	BTS Transborder data ..... *http://www.bts.gov/programs/international/transborder/TBDR_QuickSearch.html.*	Connect top water ports ranked by weight and values

[1] Aerotropolis transportation systems means a planned and coordinated multimodal freight and passenger transportation network that, as determined by the Secretary, provides efficient, cost-effective, sustainable, and intermodal connectivity to a defined region of economic significance centered around a major airport.

Factor	Data source	Parameters
Access to energy exploration, development, installation or production areas.	EIA (US Energy Information Admin.) ..... *http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/maps/maps.htm#geodata.*	Include access to coal basins, top coal mines, coalbed methane fields, natural gas production locations, gas and oil plays (exploration areas)
	Pennwell Mapsearch data via Pipeline and Hazardous Materials Safety Administration (PHMSA). *http://www.mapsearch.com*	Include access to oil refineries and distribution centers
	Pennwell Mapsearch data via Pipeline and Hazardous Materials Safety Administration (PHMSA). *http://www.mapsearch.com*	Include access to biodiesel and ethanol plants
Population centers	2010 Census *http://www.census.gov/cgi-bin/geo/shapefiles2010/main*	Connect top urbanized areas; Utilize Census Urbanized Area Boundary for geographic areas
Network connectivity	FAF 3.4 ..... *http://faf.ornl.gov/fafweb/Extraction0.aspx*	In order to reduce gaps in the network, connect PFN segments to one another, to the Interstate System, or begin/end at access point

The following table denotes the other factors, data sources, and parameters that may be considered in the designation of the primary freight network:

Factor	Data source	Parameters
Major intermodal connectors	NHS Intermodal Connectors ..... *http://www.fhwa.dot.gov/planning/national_highway_system/intermodal_connectors/.*	Connect major airport facilities, rail hubs, pipeline terminals, and port terminals
	FHWA research report ..... Distribution centers and warehouse locations.	
Air ports of entry	FAA ..... *http://www.faa.gov/airports/planning_capacity/passenger_allcargo_stats/passenger/.*	Connect top air ports of entry by landed weight
	U.S. Department of Commerce, U.S. Census Bureau, Foreign Trade Division, USA Trade Online, August 2012.	Connect top air ports of entry by value
For routes off the Interstate System, designation on the National Network of highways that can safely and efficiently accommodate the large vehicles authorized by the State.	FAF 3.4 ..... *http://faf.ornl.gov/fafweb/Extraction0.aspx*	Where there are parallel routes to consider, avoidance of routes on the National Network that are 'restricted' or 'low clearance'
For routes off the Interstate System, availability of truck facilities.	FHWA research report	Where there are parallel routes as alternatives, consider presence of truck stops, rest areas, and weigh stations as factors

Primary Freight Network Additional Miles

Title 23 U.S.C. 167(d)(2) allows for up to 3,000 additional miles to be designated for the primary freight network that are critical to the future efficient movement of goods on the primary freight network, which may include existing or planned roads. In determining whether a route is critical to the future efficient movement of good on the primary freight network, the Secretary will consider the factors identified above for the designation of the initial 27,000 centerline miles as well as one or more additional factors, which may include, but are not limited to: supply chain/distribution network considerations including flows of key commodities; connections to major intermodal connectors; global and national economic and growth trends and growth areas; length of haul and its effect on tonnage on the primary freight network; designation on the National Network, as defined in 23 CFR part 658, without restrictions or clearance issues; availability of truck amenities; current or planned waterway, rail, port or intermodal terminal infrastructure developments that may impact future freight flows; freight bottlenecks; connection to international border crossings; and consideration of planned unbuilt highway facilities. Additional miles may also be reserved for future designation, as appropriate.

The following table denotes the factors and parameters that may be considered in designation of up to 3,000 additional miles to the primary freight network:

Factor	Parameters
National growth needs and growth areas, including routes used by commodities identified in the National Export Initiative.	Target growth areas for additional mileage
Waterway, rail, port and intermodal terminal infrastructure developments.	Consider future infrastructure impacts on freight patterns and capacity of other modes to carry additional freight
Changes to global/national economies and population centers	Consider future infrastructure impacts on freight patterns
Customs and border crossing areas	Consider current/future border crossing impacts on freight patterns

Factor	Parameters
Planned unbuilt NHS facilities	Add in significant planned facilities –10 year window

Rural freight corridors

The State-designation of critical rural freight corridors is described in 23 U.S.C. 167(e), and provides that a State may designate a road within the borders of the State as a critical rural freight corridor if the road is a rural principal arterial roadway and has at least 25 percent of the AADT of the road measured in passenger vehicle equivalent units from trucks (FHWA vehicle class 8 to 13); provides access to energy exploration, development, installation or production areas; or connects the primary freight network, a roadway described above, or the Interstate System to facilities that handle more than 50,000 20-foot equivalent units per year, or 500,000 tons per year of bulk commodities. The designation of critical rural freight corridors will be performed by State DOTs and provided to DOT after designation of the primary freight network is complete. Further guidance and technical assistance for identifying these corridors will be provided. The FHWA will make an initial request for the States to identify rural freight corridors and will maintain route information for the rural freight corridors thereafter.

Planned Schedule

The following is the approximate schedule for designation of the national freight network. Key milestones include:

1. Publication of analysis results and draft designation of the primary freight network—February 2013

2. Guidance/technical assistance available to States to begin analysis of potential critical rural freight corridors—May 2013

3. Final designation of the primary freight network, including any additional mileage designated by DOT—October 2013

4. Request to States to identify critical rural freight corridors—October 2013

5. Initial designation of full national freight network (including primary freight network, rest of the Interstate system, critical rural freight corridors)—December 2013

Issued on: January 23, 2013.

Victor M. Mendez,

Administrator.

[FR Doc. 2013–02580 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2000–7363; FMCSA–2002–13411]

Qualification of Drivers; Exemption Applications; Vision

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

ACTION: Notice of renewal of exemptions; request for comments.

SUMMARY: FMCSA announces its decision to renew the exemptions from the vision requirement in the Federal Motor Carrier Safety Regulations for 11 individuals. FMCSA has statutory authority to exempt individuals from the vision requirement if the exemptions granted will not compromise safety. The Agency has concluded that granting these exemption renewals will provide a level of safety that is equivalent to or greater than the level of safety maintained without the exemptions for these commercial motor vehicle (CMV) drivers.

DATES: This decision is effective March 4, 2013. Comments must be received on or before March 8, 2013.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) numbers: Docket No. [FMCSA–2000–7363; FMCSA–2002–13411], using any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Fax: 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *http://www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, 202–366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may renew an exemption from the vision requirements in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce, for a two-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The procedures for requesting an exemption (including renewals) are set out in 49 CFR part 381.

Exemption Decision

This notice addresses 11 individuals who have requested renewal of their

exemptions in accordance with FMCSA procedures. FMCSA has evaluated these 11 applications for renewal on their merits and decided to extend each exemption for a renewable two-year period. They are:

Howard K. Bradley (VA) Kirk G. Braegger (UT) Ambrosio E. Calles (NM) Jose G. Cruz (TX) Harry P. Henning (PA) Christopher L. Humphries (TX) Ralph J. Miles (OR) Thomas C. Rylee (GA) Stanley B. Salkowski, III (PA) Michael G. Thomas (PA) William H. Twardus (DE)

The exemptions are extended subject to the following conditions: (1) That each individual has a physical examination every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the requirements in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provides a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file and retains a copy of the certification on his/her person while driving for presentation to a duly authorized Federal, State, or local enforcement official. Each exemption will be valid for two years unless rescinded earlier by FMCSA. The exemption will be rescinded if: (1) The person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315.

Basis for Renewing Exemptions

Under 49 U.S.C. 31315(b)(1), an exemption may be granted for no longer than two years from its approval date and may be renewed upon application for additional two year periods. In accordance with 49 U.S.C. 31136(e) and 31315, each of the 11 applicants has satisfied the entry conditions for obtaining an exemption from the vision requirements (65 FR 45817; 65 FR 77066; 67 FR 71610; 67 FR 76439; 68 FR 10298; 70 FR 7545; 72 FR 7812; 74 FR 6689; 76 FR 9859). Each of these 11 applicants has requested renewal of the exemption and has submitted evidence showing that the vision in the better eye continues to meet the requirement specified at 49 CFR 391.41(b)(10) and that the vision impairment is stable. In addition, a review of each record of safety while driving with the respective vision deficiencies over the past two years indicates each applicant continues to meet the vision exemption requirements. These factors provide an adequate basis for predicting each driver's ability to continue to drive safely in interstate commerce. Therefore, FMCSA concludes that extending the exemption for each renewal applicant for a period of two years is likely to achieve a level of safety equal to that existing without the exemption.

Request for Comments

FMCSA will review comments received at any time concerning a particular driver's safety record and determine if the continuation of the exemption is consistent with the requirements at 49 U.S.C. 31136(e) and 31315. However, FMCSA requests that interested parties with specific data concerning the safety records of these drivers submit comments by March 8, 2013.

FMCSA believes that the requirements for a renewal of an exemption under 49 U.S.C. 31136(e) and 31315 can be satisfied by initially granting the renewal and then requesting and evaluating, if needed, subsequent comments submitted by interested parties. As indicated above, the Agency previously published notices of final disposition announcing its decision to exempt these 11 individuals from the vision requirement in 49 CFR 391.41(b)(10). The final decision to grant an exemption to each of these individuals was made on the merits of each case and made only after careful consideration of the comments received to its notices of applications. The notices of applications stated in detail the qualifications, experience, and medical condition of each applicant for an exemption from the vision requirements. That information is available by consulting the above cited **Federal Register** publications.

Interested parties or organizations possessing information that would otherwise show that any, or all, of these drivers are not currently achieving the statutory level of safety should immediately notify FMCSA. The Agency will evaluate any adverse evidence submitted and, if safety is being compromised or if continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136(e) and 31315, FMCSA will take immediate steps to revoke the exemption of a driver.

Issued on: January 29, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–02649 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[FTA Docket No. FTA–2013–0007]

Notice of Request for Revision of Information Collections

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Federal Transit Administration (FTA) to request the Office of Management and Budget (OMB) to approve the revisions of the following information collections:

49 U.S.C. 5307—Capital Assistance Program and Section 5309—Urbanized Area Formula Program

49 U.S.C. 5310—Capital Assistance Program for Elderly Persons and Persons with Disabilities and Section 5311—Nonurbanized Area Formula Program

DATES: Comments must be submitted before April 8, 2013.

ADDRESSES: To ensure that your comments are not entered more than once into the docket, submit comments identified by the docket number by only one of the following methods:

1. *Web site: www.regulations.gov.* Follow the instructions for submitting comments on the U.S. Government electronic docket site. (**Note:** The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments.) All electronic submissions must be made to the U.S. Government electronic docket site at *www.regulations.gov.* Commenters should follow the directions below for mailed and hand-delivered comments.

2. *Fax:* 202–493–2251.

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

4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

Instructions: You must include the agency name and docket number for this

notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to www.regulations.gov. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit *www.regulations.gov.* Docket: For access to the docket to read background documents and comments received, go to *www.regulations.gov* at any time. Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M–30, West Building, Ground Floor, Room W12–140, Washington, DC 20590–0001 between 9:00 a.m. and 5:00 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT:

49 U.S.C. 5307—Capital Assistance Program and Section 5309 Urbanized Area Formula Program—Vanessa Williams, FTA Office of Program Management (202) 366–4818, or email *Vanessa.Williams@dot.gov.*

49 U.S.C. 5310—Capital Assistance Program for Elderly Persons and Persons with Disabilities and Section 5311—Nonurbanized Area Formula Program—Elan Flippin, FTAOffice of Program Management (202) 366–3800, or email *Elan.Flippin@dot.gov.*

SUPPLEMENTARY INFORMATION:

Interested parties are invited to send comments regarding any aspect of these information collections, including: (1) The necessity and utility of the information collections for the proper performance of the functions of the FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection.

Title: 49 U.S.C.—5307 Capital Assistance Program and Section 5309—Urbanized Area Formula Program

(OMB Number: 2132–0502)

Background: 49 U.S.C. 5307—Capital Assistance Program and Section 5309—Urbanized Area Formula Program authorize the Secretary of Transportation to make grants to State and local governments and public transportation authorities for financing mass transportation projects. In response to requirements authorized by the new legislation, Moving Ahead for Progress in the 21st Century (MAP–21), a Passenger Ferry Grant Program has been added under 49 U.S.C. 5307. The Passenger Ferry Grant Program is a new discretionary grant program that will award funding on a competitive selection basis. Grant recipients for 49 U.S.C. 5307 and 5309 are required to make information available to the public and publish a program of projects for affected citizens to comment on the proposed program and performance of the grant recipients at public hearings. Notices of hearings must include a brief description of the proposed project and be published in a newspaper circulated in the affected area. FTA also uses the information to determine eligibility for funding and to monitor the progress of the grantee in implementing and completing project activities. The information submitted ensures FTA's compliance with applicable federal laws, OMB Circular A–102 and 49 CFR Part 18, ''Uniform Administrative Requirements for Grants and C9ooperative Agreements with State and Local Governments.''

Respondents: State and local government, business or other for-profit institutions and non-profit institutions.

Estimated Annual Burden on Respondents: Approximately 50 hours for each of the 3,345 respondents.

Estimated Total Annual Burden: 167,250 hours.

Frequency: Annual.

Title: 49 U.S.C. 5310—Capital Assistance Program for Elderly Persons and Persons with Disabilities and Section 5311—Nonurbanized Area Formula Program

(OMB Number 2132–0500)

Background: 49 U.S.C. 5310—Capital Assistance Program for Elderly Persons and

Persons with Disabilities provides financial assistance for the specialized transportation service needs of elderly persons and persons with disabilities in all areas, urbanized, small urban and rural. 49 U.S.C. 5311—Nonurbanized Area Formula Program provides financial assistance for the provision of public transportation services in nonurbanized areas. Both programs are administered by the State. The Tribal Transit Program, which was approved as a separate program under the American Recovery and Reinvestment Act (ARRA), is now being added under 49 U.S.C. 5311. Under the new legislation, Moving Ahead for Progress in the 21st Century (MAP–21), the Tribal Transit Program continues to be a set-aside from the rural area formula program (Section 5311), but now consists of a $25 million formula program and a $5 million discretionary grant program. This program no longer provides a single apportionment to the State. It now provides apportionments specifically for large urbanized, small urbanized and rural areas and will require new designations in large urbanized areas. MAP–21 also expands the eligibility provisions to include operating expenses.

49 U.S.C. 5310 and 5311authorize FTA to review applications for federal financial assistance to determine eligibility and compliance with statutory and administrative requirements. The applications must contain sufficient information to enable FTA to make the findings required by law to enforce the requirements of the programs. Information collected during the project management stage provides a basis for monitoring approved projects to ensure timely and appropriate expenditure of federal funds by grant recipients.

Respondents: State and local government, business or other for-profit institutions and non-profit institutions and small business organizations.

Estimated Annual Burden on Respondents: Approximately 111 hours for each of the 178 respondents.

Estimated Total Annual Burden: 20,775 hours.

Frequency: Annual.

Issued: January 30, 2013.

Matthew M. Crouch,

Deputy Administrator for Administration.

[FR Doc. 2013–02664 Filed 2–5–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Notice of Availability of Emergency Relief Funds in Response to Hurricane Sandy

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability of emergency relief funds.

SUMMARY: The Federal Transit Administration (FTA) announces the availability of funds under the Public Transportation Emergency Relief Program (Emergency Relief Program) for States, local governmental authorities, Indian tribes and other FTA recipients impacted by Hurricane Sandy, which

affected mid-Atlantic and northeastern states in October 2012, and particularly devastated transit operations in New Jersey and New York. FTA will distribute these funds in a manner consistent with the eligibility requirements of this program on a non-competitive basis, subject to the priorities set forth below.

The Disaster Relief Appropriations Act of 2013 (Pub. L. 113–2) was enacted on January 29, 2013, and provides $10.9 billion for FTA's Emergency Relief Program for recovery, relief and resiliency efforts in areas affected by Hurricane Sandy. The law provides that not more than $2 billion shall be made available no later than March 30, 2013. The remainder of the appropriated funds shall be made available only after FTA enters into a Memorandum of Agreement with the Federal Emergency Management Agency (FEMA) as required by section 20017(b) of the Moving Ahead for Progress in the 21st Century Act (MAP–21, Pub. L. 112–141), and FTA issues interim regulations for the Emergency Relief Program, both of which are underway.

MAP–21 authorized the Emergency Relief Program at 49 U.S.C. 5324. With the authorization of this program, Congress provided FTA with primary responsibility for reimbursing emergency response and recovery costs after an emergency or major disaster that affects public transportation systems. The Emergency Relief Program allows FTA to make grants for eligible public transportation capital and operating costs in the event of a natural disaster, such as a hurricane, that affects a wide area. Beginning in late October, President Obama issued major disaster declarations for the following States: Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and West Virginia, as well as the District of Columbia. Numerous counties in these States have been designated as eligible for FEMA assistance under the major disaster declarations. Public transportation agencies in the affected areas as defined by these Presidential declarations, including any declarations related to Hurricane Sandy made after the date of this notice, are eligible for Emergency Relief funding.

This notice announces grant funding for the $2 billion made available immediately by the Disaster Relief Appropriations Act to States, local governmental authorities, Indian tribes, and other FTA grant recipients that provide public transportation service in the above impacted States for reimbursement of capital costs to repair, reconstruct, or replace equipment and facilities of a public transportation system that has suffered serious damage as a result of Hurricane Sandy. In addition, costs eligible for reimbursement include emergency operating costs incurred for evacuations, rescue operations, moving rolling stock to higher ground in order to protect it from storm surges, temporary public transportation service, and reestablishing, expanding or relocating public transportation service before, during, or after Hurricane Sandy.

FTA has identified three categories of projects for funding for this notice: Category One projects will reimburse eligible expenses affected FTA recipients incurred and disbursed on or before January 29, 2013, in preparation for or response to Hurricane Sandy. Category Two projects will fund existing contractual commitments and contracts for which an affected recipient issued requests for proposals or invitations to bid for hurricane response and recovery projects on or before January 29, 2013. Category Three projects will fund ongoing force account work for hurricane response and recovery for which the recipient can submit documentation showing the expense was in the recipient's budget on or before January 29, 2013.

The application process will occur in two stages. First, applicants will submit proposals requesting reimbursement of eligible costs for the categories of projects described in this notice. Since funds must be made available no later than March 30, 2013, applications for funding must be submitted between the date of publication of this notice and March 8, 2013 through *GRANTS.GOV.* FTA encourages affected recipients to submit their requests for reimbursement expeditiously, as FTA intends to allocate funds on a rolling basis. Second, upon allocation of funds, FTA will notify recipients that they can enter a grant application in FTA's Transportation Electronic Award Management system (TEAM). Subsequent to receipt of applications for the above project categories, and prior to March 30, 2013, FTA will issue a notice in the **Federal Register** showing the allocation of the initial $2 billion.

Prior to the Disaster Relief Appropriations Act, affected recipients may have received funding from FEMA for operating or capital costs incurred in response to the hurricane. Section 5324(d) of title 49 United States Code provides that a grant awarded under section 5324 may be made only for expenses that are not reimbursed under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, 42 U.S.C. 5121–5207). Accordingly, FTA will not fund project expenses that FEMA has already funded. Additionally, prior to the Disaster Relief Appropriations Act, affected recipients may have received insurance proceeds to repair or replace damaged capital items. FTA will not fund project expenses for which a recipient has already received insurance proceeds. Affected recipients may apply for Emergency Relief funds in advance of expected insurance proceeds; when the affected recipient receives those insurance proceeds, the funds must be applied to an Emergency Relief grant to offset the Federal share.

This notice includes a description of eligible projects, the criteria FTA will use to identify projects for funding, and a description of how to apply for funding. This announcement is available on the FTA Web site at: *http://www.fta.dot.gov.* A synopsis of the funding opportunity will be posted in the FIND module of the government-wide electronic grants Web site at *http://www.GRANTS.GOV.* FTA intends to announce funding allocations on a rolling basis and will notify applicants directly of allocations made under the program. In addition, FTA will announce final allocations on the FTA Web site.

Pursuant to the requirement in the Disaster Relief Appropriations Act that FTA publish interim regulations before additional funds beyond the initial $2 billion will be available, FTA is in the process of drafting interim regulations for the Emergency Relief Program. If FTA subsequently establishes criteria or conditions for grants made under the Emergency Relief Program that are different from those in this notice of availability of emergency relief funds, the different criteria or conditions will not be applied retroactively to applications submitted or grants awarded consistent with this notice, unless the change benefits the applicant.

DATES: Since funds must be made available no later than March 30, 2013, complete proposals requesting reimbursement of eligible costs must be submitted between the date of publication of this notice and March 8, 2013 by 11:59 p.m. EST. All proposals must be submitted electronically through the *GRANTS.GOV* ''APPLY'' function. Any prospective applicant intending to submit a proposal should initiate the process of registering on the *GRANTS.GOV* site immediately to ensure completion of registration before the submission deadline. Instructions for submitting a proposal can be found on FTA's Web site at *http://*

www.fta.dot.gov and in the ''FIND'' module of *GRANTS.GOV.*

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office found at *http://www.fta.dot.gov* for application-specific information and other assistance needed in preparing a complete proposal or TEAM grant application. For program-specific questions about applying for the funds as outlined in this notice, please contact Adam Schildge, Office of Program Management, 1200 New Jersey Ave, SE., Washington, DC 20590, phone: (202) 366–0778, or email, Adam.Schildge@dot.gov. For legal questions, Bonnie Graves, Office of Chief Counsel, same address, phone: (202) 366–4011, or email, *Bonnie.Graves@dot.gov.*

SUPPLEMENTARY INFORMATION:

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I. Overview of FTA Public Transportation Emergency Relief Program as It Applies to Hurricane Sandy Relief

A. Authority

Section 5324(a)(2) of title 49, United States Code, defines an ''emergency'' as follows:

The term 'emergency' means a natural disaster affecting a wide area (such as a flood, hurricane, tidal wave, earthquake, severe storm, or landslide) or a catastrophic failure from any external cause, as a result of which—

(A) The Governor of a State has declared an emergency and the Secretary has concurred; or

(B) The President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170).

Section 5324(b) of title 49, United States Code, authorizes the Secretary to make awards for FTA's Emergency Relief Program as follows:

General authority.—The Secretary may make grants and enter into contracts and other agreements (including agreements with departments, agencies, and instrumentalities of the Government) for—

(1) Capital projects to protect, repair, reconstruct, or replace equipment and facilities of a public transportation system operating in the United States or on an Indian reservation that the Secretary determines is in danger of suffering serious damage, or has suffered serious damage, as a result of an emergency; and

(2) Eligible operating costs of public transportation equipment and facilities in an area directly affected by an emergency during—

(A) The 1-year period beginning on the date of a declaration described in subsection (a)(2); or

(B) if the Secretary determines there is a compelling need, the 2-year period beginning on the date of a declaration described in subsection (a)(2).

In addition, section 5324(d) provides that a grant awarded under section 5324 shall be subject to the terms and conditions the Secretary determines are necessary; and made only for expenses that are not reimbursed under the Stafford Act. Accordingly, FTA will not fund project expenses that FEMA has already funded.

B. Policy Priorities for Hurricane Sandy Relief

The Emergency Relief Program is intended to assist recipients and subrecipients in restoring public transportation service and in repairing and reconstructing public transportation assets to a state of good repair as expeditiously as possible following an emergency or major disaster. With regard to the $2 billion available immediately under the Disaster Relief Appropriations Act of 2013, FTA has identified three categories of projects: Category One projects will reimburse eligible expenses already incurred and disbursed by affected recipients on or before January 29, 2013, in preparation for or response to Hurricane Sandy. Category Two projects will fund existing contractual commitments and contracts for which an affected recipient issued requests for proposals (RFP) or invitations to bid (ITB) for hurricane response and recovery projects on or before January 29, 2013, as evidenced by a signature/date page for each contract, RFP and ITB. Category Three projects will fund ongoing force account work for hurricane response and recovery for which the recipient can submit documentation, such as Board approval or budget documents, showing the expense was in the recipient's budget on or before January 29, 2013.

Section 5324(b) provides that funds are available for capital projects to ''protect * * * equipment and facilities of a public transportation system * * * the Secretary determines is in danger of suffering serious damage.'' Steps taken to protect equipment and facilities in preparation or response to Hurricane Sandy are eligible expenses under this notice. However, FTA has prioritized recovery and response activities for the first $2 billion of the funds available in the Disaster Relief Appropriations Act. Therefore, projects related to reducing the risk of damage from future disasters in areas impacted by Hurricane Sandy are not eligible for funding under this notice, but will be eligible in future notices.

In the event the total costs of the three categories of projects identified in this notice do not reach $2 billion, FTA reserves the right to fund additional recovery and response projects identified by affected recipients, without issuing a supplemental notice of availability of emergency relief funds.

C. Definitions for Use in This Notice

The following terms are used in this notice:

Applicant. An entity that operates or allocates funds to operate public transportation service and applies for a grant under 49 U.S.C. 5324.

Affected recipient. An FTA recipient that operates public transportation service in an area impacted by Hurricane Sandy.

Emergency. A natural disaster affecting a wide area or a catastrophic failure from any external cause, as a result of which: (a) The Governor of a State has declared an emergency and the Secretary of Transportation has concurred; or (b) the President has declared a major disaster under the Stafford Act. 49 U.S.C. 5324.

Emergency operations. The net project cost of temporary service that is outside the scope of an affected recipient's normal operations, including but not limited to: Evacuations; rescue operations; moving rolling stock to higher ground in order to protect it from storm surges; additional bus or ferry service to replace inoperable rail service or to detour around damaged areas; returning evacuees to their homes after Hurricane Sandy; and the net project costs related to reestablishing, expanding, or relocating public transportation service before, during, or after Hurricane Sandy.

Emergency repairs. Those repairs undertaken immediately before, during, or following Hurricane Sandy for the purpose of:

(1) Minimizing the extent of the damage,

(2) Protecting remaining facilities, or

(3) Restoring service.

Heavy maintenance. Work usually done by a recipient or subrecipient in repairing damage normally expected from seasonal and occasionally unusual natural conditions or occurrences, such as routine snow removal, or debris removal from seasonal thunderstorms. This may include work required as a direct result of a disaster, but which can reasonably be accommodated by a recipient or subrecipient's maintenance, emergency or contingency program.

Major Disaster. Any natural catastrophe (including any hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby. 42 U.S.C. 5122.

Net project cost. The part of a project that reasonably cannot be financed from revenues. 49 U.S.C. 5302.

Permanent repairs. Those repairs undertaken following the occurrence of Hurricane Sandy for the purpose of repairing, replacing or reconstructing seriously damaged public transportation system elements, including rolling stock, equipment, facilities and infrastructure, as necessary to restore the elements to a state of good repair.

Recipient. An entity that operates or allocates funds to operate public transportation service and receives federal transit funds directly from FTA.

Serious damage. Heavy, major or unusual damage to a public transportation facility that severely impairs the safety or usefulness of the facility. Serious damage must be beyond the scope of heavy maintenance.

Subrecipient. An entity that operates public transportation service and receives FTA funding through a recipient.

II. Emergency Relief Program Information for Hurricane Sandy Relief

A. Description and Purpose

For purposes of this notice, eligible activities include eligible emergency operating costs and capital projects to repair, reconstruct, or replace equipment and facilities of a public transportation system that the Secretary determines has suffered serious damage as a result of Hurricane Sandy, including projects undertaken prior to the storm to minimize or prevent serious damage. Section 5324 funds are in addition to a recipient's formula funds and the receipt of section 5324 funds does not preclude the receipt of funds from FEMA.

B. Pre-award Authority

FTA grants pre-award authority to affected recipients for expenses incurred in preparation for Hurricane Sandy (*e.g.,* evacuation, relocation, protecting and safeguarding assets) and for immediate disaster-response and recovery expenses incurred as a result of Hurricane Sandy. Pre-award authority allows affected recipients to incur certain project costs before grant approval and retain the eligibility of those costs for subsequent reimbursement after grant approval.

The conditions under which pre-award authority may be utilized are specified below:

(i) Pre-award authority is not a legal or implied commitment that the subject project will be approved for FTA assistance or that FTA will obligate Federal funds. Furthermore, it is not a legal or implied commitment that all items undertaken by the applicant will be eligible for inclusion in the project.

(ii) All FTA statutory, procedural, and contractual requirements must be met, except as provided for the three project categories in this notice. See section II.D of this notice.

(iii) The recipient must take no action that prejudices the legal and administrative findings that the Federal Transit Administrator must make in order to approve a project.

(iv) The Federal amount of any future FTA assistance awarded to the recipient for the project will be determined on the basis of the overall scope of activities and the prevailing statutory provisions with respect to the Federal/non-Federal match ratio at the time the funds are obligated.

(v) When a grant for the project is subsequently awarded, the Financial Status Report in TEAM-Web must indicate the use of pre-award authority.

In addition to the pre-award authority described above, affected recipients are permitted to submit grant amendments for existing section 5307 and 5311 grants in order to utilize available unexpended balances for eligible disaster-related project costs. Use of formula funds for these purposes is at the discretion of the affected recipient. Section 5324 funds may not be used to replenish formula funds spent in response to an emergency.

C. Eligibility Information

1. Eligible Applicants

FTA recipients affected by Hurricane Sandy, including States, local governmental authorities, and Indian tribes that provide public transportation service may apply for section 5324 Emergency Relief funds on behalf of themselves and their subrecipients. As of the date of this notice, the President has declared a major disaster for the following States: Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Virginia, and West Virginia, as well as the District of Columbia. The affected transit system must be located in or serving an area that was impacted by Hurricane Sandy, as defined by the presidential declaration of major disaster or declaration of emergency for that State. *See http://www.fema.gov/disasters/.* In addition, public transportation agencies in areas that receive a major disaster declaration related to Hurricane Sandy after the date of this notice are eligible for Emergency Relief funding.

Entities that provide public transportation service and are not current recipients of FTA funding may be eligible to receive Emergency Relief funding as a subrecipient of an FTA recipient. These entities should contact the appropriate FTA Regional Office, the contact information of which is available at *www.fta.dot.gov,* to find a direct FTA recipient in their area to apply on their behalf.

2. Eligible Costs

New York, New Jersey and Connecticut Operating Assistance

On October 31, 2012, the President amended the cost-sharing arrangements for the States of New York, New Jersey and Connecticut regarding Federal funds provided under the authority of the Stafford Act as follows:

> I authorize a one hundred percent (100%) Federal cost share for ten days for emergency power restoration assistance and emergency public transportation assistance, including direct Federal assistance, for those areas within counties designated for Public Assistance [in New York, New Jersey and Connecticut]. I authorize this cost-share adjustment beginning October 30, 2012 through November 9, 2012.

On November 9, 2012, the President authorized continuation ''until 11:59 p.m. on Wednesday, November 14, 2012, of the 100 percent Federal cost share for emergency power restoration assistance and emergency public transportation assistance (including emergency protective measures to

secure public transportation infrastructure), including direct Federal assistance, for those areas within counties designated for Public Assistance [in New York, New Jersey and Connecticut].'' [1]

Section 5324 provides that the Federal share for operating expenses and capital projects for the Emergency Relief Program is 80 percent; however, the Secretary may waive, in whole or in part, the non-Federal share. Therefore, consistent with the President's authorization and what FEMA would fund under section 419 of the Stafford Act (Emergency Public Transportation), FTA will fund the net project costs of emergency operations in specified counties in New York, New Jersey and Connecticut from October 30 to November 14, 2012, at a 100 percent Federal share, that FEMA has not already funded. All of New Jersey's counties qualify for the 100 percent Federal share under this authorization. In New York, the following counties may apply for emergency operating assistance at a 100 percent Federal share: Bronx, Kings, Orange, Nassau, New York, Putnam, Queens, Richmond, Rockland, Suffolk, Sullivan, Ulster, and Westchester. *See http://www.fema.gov/disaster/4085/affected-counties.* In Connecticut, the following counties may apply for emergency operating assistance at a 100 percent Federal share: Fairfield, Litchfield, Middlesex, New Haven, New London, Tolland, Windham and the Mashantucket Pequot and Mohegan Tribal Nations in New London County. *See http://www.fema.gov/disaster/4087/affected-counties.* The President's authorizations include the costs of emergency public transportation service provided in affected counties in New York, New Jersey and Connecticut for that 16-day period. Affected recipients in New York, New Jersey and Connecticut may apply for the full net project cost of temporary service that is outside the scope of the affected recipient's normal operations provided between October 30 and November 14, 2012, including but not limited to: Evacuations; rescue operations; moving rolling stock to higher ground in order to protect it from storm surges; additional bus or ferry service to replace inoperable rail service or to detour around damaged areas; returning evacuees to their homes after the hurricane; and the net project costs related to reestablishing, expanding, or relocating public transportation service before, during, or after the hurricane. Lost revenue as a result of Hurricane Sandy is not an eligible cost.

In addition, the costs incurred for any emergency protective measures to secure public transportation infrastructure taken between October 30 and November 14, 2012, are eligible for 100 percent Federal share if not already funded by FEMA.

Other Operating Assistance

Section 5324 provides that the Federal share for operating expenses and capital projects for the Emergency Relief Program is 80 percent; however, the Secretary may waive, in whole or in part, the non-Federal share. The Administration's December 7, 2012, request to Congress for emergency relief funds acknowledged that the ''level of damage caused by Hurricane Sandy is expected to meet the regulatory threshold necessary to increase the Federal share of most disaster programs to 90 percent.'' [2] Therefore, the Secretary has determined that the Federal share for operating and capital projects undertaken in response to Hurricane Sandy will be 90 percent, thus waiving part of the non-Federal share. The following operating costs are eligible at a 90 percent Federal share: The net project cost of temporary service that is outside the scope of an affected recipient's normal operations, including but not limited to: evacuations; rescue operations; moving rolling stock to higher ground in order to protect it from storm surges; additional bus or ferry service to replace inoperable rail service or to detour around damaged areas; returning evacuees to their homes after the hurricane; and the net project costs related to reestablishing, expanding, or relocating public transportation service before, during, or after the hurricane. The non-Federal share of the net project cost may be provided from an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital.

FTA notes that some States entered into agreements or mission assignments with FEMA to fund operating costs immediately after the storm. If those States are seeking operating funds from FTA and have already received funding from FEMA, they must submit a copy of the agreement with FEMA, including the scope of the agreement, the amount funded, and the dates that FEMA agreed to fund operating costs, as well as the scope and dates of service for which the applicant is seeking FTA funding, in order to ensure that an application submitted to FTA for project costs has not already been funded by FEMA. FTA will not fund project expenses for which a recipient has already received insurance proceeds. Loss of operating revenue is not an eligible expense. However, the cost of providing fare-free emergency public transportation service in the days immediately following the storm is eligible if FEMA has not already funded the service.

Capital Projects

As stated above, FTA will fund all projects eligible for the Emergency Relief Program in response to Hurricane Sandy at a 90 percent Federal share. The non-Federal share of the net project cost may be provided from an undistributed cash surplus, a replacement or depreciation cash fund or reserve, or new capital. Eligible capital projects include those projects to repair, reconstruct, or replace equipment and facilities of a public transportation system that has suffered serious damage as a result of Hurricane Sandy.

It is not the intent of the Emergency Relief Program to provide substitute funding for regular capital maintenance that is not a result of an emergency or major disaster. Therefore, heavy maintenance and projects for which funds were obligated in a grant prior to Hurricane Sandy are not eligible expenses under the Emergency Relief Program. Further, projects funded by the Federal Highway Administration's Emergency Relief program are not eligible for FTA funding.

Both emergency repairs and permanent repairs are eligible for Emergency Relief funding. When repairing or replacing facilities and infrastructure damaged or destroyed by Hurricane Sandy, the following activities are eligible for Emergency Relief funding: (1) Replacement of older features with new ones; (2)

[1] See the following **Federal Register** notices for details of the authorizations:

New York adjustment: Amendment No. 1 to Notice of a Major Disaster Declaration, 77 FR 66862 (Nov. 7, 2012), available at *http://www.gpo.gov/fdsys/pkg/FR-2012-11-07/pdf/2012--27269.pdf.*

New York extension: Amendment No. 4 to Notice of a Major Disaster Declaration, 77 FR 73489 (Dec. 10, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR-2012-12-10/pdf/2012-29652.pdf.*

New Jersey adjustment: Amendment No. 1 to Notice of a Major Disaster Declaration, 77 FR 66861 (Nov. 7, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR-2012-11-07/pdf/2012--27273.pdf.*

New Jersey extension: Amendment No. 5 to Notice of a Major Disaster Declaration, 77 FR 73488 (Dec. 10, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR-2012-12-10/pdf/2012–29654.pdf.*

Connecticut adjustment: Amendment No. 1 to Notice of a Major Disaster Declaration, 77 FR 66860 (Nov. 7, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR–2012–11–07/pdf/2012–27275.pdf.*

Connecticut extension: Amendment No. 2 to Notice of a Major Disaster Declaration, 77 FR 73487 (Dec. 10, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR–2012–12–10/pdf/2012–29656.pdf.*

[2] *http://www.whitehouse.gov/sites/default/files/supplemental__december_7_2012_hurricane_sandy_funding_needs.pdf.pdf.*

incorporation of current design standards; (3) replacement of a destroyed facility at a different location when replacing at the existing location is not practical or feasible; and (4) additional required features resulting from the NEPA process.

Grants awarded with section 5324 funds, as well as section 5307 and 5311 grants made for emergency relief purposes, may be made only for expenses that are not reimbursed by another Federal agency or by insurance proceeds. If an applicant has already received funding from another Federal agency, the applicant may not apply for FTA emergency relief funding for the same project expenses. However, partial compensation for a loss by other sources will not preclude FTA participation for the part of the loss not compensated. For example, insurance proceeds may only cover the remaining Federal interest of a vehicle that was destroyed before the end of its useful life, and not the cost to replace that vehicle. Consistent with FTA Circular 5010.1D, FTA may participate in the replacement cost beyond the insurance proceeds. Rolling stock and other equipment used in public transportation that was damaged or destroyed before the end of its useful life may be replaced with new rolling stock and equipment. FTA advises applicants to review FTA Circular 5010.1D, chapter IV, (*http://www.fta.dot.gov/legislation_law/12349_8640.html*) for additional information on how to determine the remaining Federal interest and how to apply insurance proceeds to the cost of replacing the damaged or destroyed property.

Any compensation for damages or insurance proceeds recovered by the recipient or subrecipient for repair or replacement of the public transit equipment or facility must be used upon receipt to reduce emergency relief fund participation in the project. In other words, affected recipients may apply for Emergency Relief funds in advance of expected insurance proceeds; when the affected recipient receives those insurance proceeds, the funds must be applied to an Emergency Relief grant to offset the Federal share.

As with operating expenses, if a recipient has already received FEMA funding for repairs and replacement of capital assets, and also intends to apply for FTA funding, the recipient must submit a copy of any agreement with or funding request from FEMA, including the scope of the agreement or funding request (*e.g.,* a list of projects), the amount funded, and the disposition of the request.

3. Ineligible Activities

The following expenses are not eligible under the emergency relief program:

(1) Heavy maintenance;

(2) Project costs for which the recipient has received funding from another Federal agency;

(3) Project costs for which the recipient has received funding through payments from insurance policies;

(4) Projects that change the function of the original infrastructure;

(5) Projects for which funds were obligated in a grant prior to Hurricane Sandy;

(6) Reimbursements for lost revenue due to service disruptions caused as a direct result of the hurricane;

(7) Project costs associated with the replacement or replenishment of damaged or lost material not incorporated into a public transportation system such as stockpiled materials or items awaiting installation; and

(8) Other project costs FTA determines are not appropriate for the Emergency Relief Program.

Projects included under item (4) above that change the function of the original infrastructure would be projects, for example, that change a bus rapid transit system to light rail, or that replace bus shelters with intermodal facilities, or that significantly upgrade a maintenance facility. Replacing damaged diesel buses with compressed natural gas buses is eligible under the Emergency Relief Program, but any costs associated with new alternative fueling stations or maintenance facilities is not eligible for Emergency Relief funds. However, those associated costs are eligible under FTA's formula programs, and recipients may use funds apportioned under sections 5307 or 5311 formula funds for those costs.

D. Grant Requirements

Section 904(c) of the Disaster Relief Appropriations Act provides that grant funds awarded under the Act must be expended within 24 months following FTA's obligation of funds in a grant. Any unexpended balances remaining in a grant must be returned to FTA 24 months after obligation of grant funds. FTA will include this term in all grants made with funds appropriated by the Disaster Relief Appropriations Act.

Section 5324(d)(1) provides that grants awarded under the Emergency Relief Program to address an emergency shall be subject to the terms and conditions the Secretary determines are necessary. Affected recipients responded quickly to Hurricane Sandy in an effort to restore public transportation service as quickly as possible. For the three categories of projects described in this notice, FTA has determined the following:

1. Planning requirements. Operating and capital projects do not need to be included in a Statewide Transportation Improvement Program (STIP) or a metropolitan Transportation Improvement Program (TIP) in order to be reimbursed by FTA.

2. Buy America. Because of extensive damage to public transportation systems impacted by Hurricane Sandy and the exigent need to rebuild those systems in order to restore service, FTA finds that applying its Buy America requirements at 49 U.S.C. 5323(j) would have resulted in undue delay in service restoration. Therefore, FTA will reimburse those purchases that are included in projects funded under Categories One, Two, and Three as described in this notice, even if the recipient did not follow FTA Buy America requirements.

3. Procurement and contracting guidelines. Recipients may have extended existing contracts and taken other actions necessary to complete response and recovery projects expeditiously. Therefore, FTA will reimburse existing contractual commitments and contracts for which an affected recipient issued requests for proposals or invitations to bid for hurricane response and recovery projects on or before January 29, 2013, even if the recipient did not follow FTA procurement and contracting requirements. Amendments to existing contracts and bid requests after January 29, 2013, are subject to all FTA requirements, including procurement and contracting requirements.

The above conditions apply only to this notice and have no applicability to future notices. Further, these conditions should not be construed as indicative of the conditions FTA may grant in future emergencies or disasters. FTA's Public Transportation Emergency Relief Program was recently authorized by Congress and FTA had not yet had the opportunity to publish guidance or a rule for implementing the program when Hurricane Sandy impacted the eastern seaboard. Setting the above conditions for this disaster is an acknowledgement that affected recipients had to act quickly in order to restore service and may not have met all FTA requirements when making those efforts. FTA expects that all Federal requirements as outlined in FTA's Master Agreement will apply to all grants made in response to Hurricane Sandy that do not meet the description

of the three categories of projects described in this notice.

In the event an affected recipient or subrecipient finds that FTA requirements other than those listed above limit the recipient's or subrecipient's ability to respond to Hurricane Sandy, the affected recipient or subrecipient may request that applicable administrative requirements be waived in accordance with the emergency relief docket process as outlined below.

Under 49 CFR part 601, subpart D, FTA establishes an emergency relief docket each calendar year. The purpose of the docket is to allow recipients affected by national or regional emergencies to request relief from FTA administrative requirements set forth in FTA policy statements, circulars, guidance documents, and regulations. As stated above, section 5324(d) of title 49, United States Code provides that a grant awarded under section 5324 that is made to address an emergency shall be subject to the terms and conditions the Secretary determines are necessary. Effective with calendar year 2013, recipients affected by an emergency or major disaster may request FTA Administrator determination that certain terms and conditions not apply when the requirement(s) will limit a recipient's or subrecipient's ability to respond to an emergency or major disaster. Recipients must follow the procedures as set forth in 49 CFR part 601, subpart D when requesting such a determination or seeking a waiver of administrative requirements. The docket is available on *www.regulations.gov,* and the docket number for calendar year 2013 is FTA–2013–0001.

E. Application Content and Allocation of Program Funds Under This Notice

1. Application Content

FTA will evaluate applications based on information requested below. FTA encourages applicants to demonstrate the responsiveness of their application with the most relevant information the applicant can provide, regardless of whether FTA has specifically requested such information in this notice. FTA will assess the extent to which the application addresses each of the three criteria below.

There are three project categories for this notice of availability of emergency relief funds: (1) Reimbursement for expenses already incurred and disbursed by FTA recipients on or before January 29, 2013; (2) existing contractual commitments and contracts for which an affected recipient issued requests for proposals (RFP) or invitations to bid (ITB) for hurricane response and recovery projects on or before January 29, 2013, as evidenced by a signature/date page for each contract, RFP and ITB; and (3) ongoing force account work for hurricane response and recovery for which the recipient budgeted the expense, as evidenced by Board approval or budget documents, on or before January 29, 2013.

Documentation to Support Emergency Operating Requests. Applications to *GRANTS.GOV* must include the purpose of the emergency public transportation service provided, which may include: evacuations; rescue operations; moving rolling stock to higher ground in order to protect it from storm surges; additional bus or ferry service to replace inoperable rail service or to detour around damaged areas; returning evacuees to their homes after the hurricane; and the net project costs related to reestablishing, expanding, or relocating public transportation service before, during, or after the hurricane. The application must include the dates, hours, number of buses, ferries, and/or trains, and information relating to fares charged. Only net project costs may be reimbursed.

Documentation to Support Capital Requests. Applications to *GRANTS.GOV* must include copies of detailed damage assessments to support the request for assistance for capital projects. FTA and FEMA have engaged in a significant effort to conduct damage assessments and validate repair/replacement cost estimates in New York and New Jersey. Specifically, FTA and FEMA have worked with the New York Metropolitan Transportation Authority, the Port Authority for New York and New Jersey, New Jersey Transit, and the New York City Department of Transportation. When submitting applications for the three categories of projects described in this notice, these agencies may include the damage assessments developed with FTA and FEMA. Typically, a damage assessment involves on-the-ground visits to the damage sites to verify the extent of the damage and to estimate the cost of repairs eligible for Emergency Relief funding. The damage assessment should document: (1) The specific location, type of facility or equipment, nature and extent of damage; (2) the most feasible and practical method of repair or replacement; and (3) the estimated repair and replacement cost.

Other Relevant Items. Applicants must provide supporting documentation showing other sources of funding available, including insurance policies, agreements with FEMA, and any other source of funds available to address the damage resulting from the hurricane. Applicants from all States that have received funding from FEMA for emergency operating expenses and also seek funding from FTA for emergency operating costs must include a copy of the agreement with FEMA, including the scope of the agreement, the amount funded, and the dates that FEMA agreed to fund operating costs, as well as the scope of service and dates for which the applicant is seeking FTA funding. Applicants that have received funding from FEMA for capital projects and also seek funding from FTA for capital projects must include a copy of the agreement with FEMA, including the scope of the agreement, the amount funded, and a list of projects included in the FEMA application or equivalent document. In addition, applicants must provide supporting documentation for Category Two and Category Three projects, including a signature/date page for each existing contract, RFP and ITB; and Board approval or budget documents showing the applicant budgeted ongoing force account work in response to the hurricane on or before January 29, 2013.

2. Allocation of Program Funds

FTA will allocate funds on a non-competitive basis for the three categories of eligible expenses described above. The FTA Administrator will determine the final allocation of funding for each applicant after validating damage assessments and cost estimates. FTA reserves the right to request additional information prior to making a determination as to Emergency Relief funding eligibility of any particular project. FTA may also seek clarification from any applicant about any statement in its proposal that FTA finds ambiguous. FTA intends to announce funding allocations on a rolling basis and will notify applicants directly of allocations made under the program. In addition, FTA will announce final allocations on the FTA Web site.

III. Application and Submission Information for this Notice

A. Application Submission Instructions

Proposals requesting reimbursement must be submitted electronically through *http://www.GRANTS.GOV* by March 8, 2013 by 11:59 p.m. EST. Mail and fax submissions will not be accepted.

A complete proposal submission will consist of at least two files: (1) The SF 424 Mandatory form (downloaded from *GRANTS.GOV*) and (2) the Hurricane Sandy-specific supplemental form found on the FTA Web site: *http://*

www.fta.dot.gov/emergencyrelief. The supplemental form provides guidance and a consistent format for applicants to respond to the information required as outlined in this notice. Once completed, the supplemental form must be placed in the attachments section of the SF 424 Mandatory form.

Applicants must attach the Hurricane Sandy-specific supplemental form to their submission in *GRANTS.GOV* to successfully complete the application process. A proposal submission may contain additional supporting documentation as attachments. Within 24–48 hours after submitting an electronic application, the applicant should receive three email messages from *GRANTS.GOV:* (1) Confirmation of successful transmission to *GRANTS.GOV,* (2) confirmation of successful validation by *GRANTS.GOV* and (3) confirmation of successful validation by FTA. If an applicant does not receive confirmations of successful validation and receives a notice of failed validation or incomplete materials, the applicant must address the reason for the failed validation, as described in the notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated. Complete instructions on the application process can be found on FTA's Web site at http://www.fta.dot.gov/emergencyrelief. FTA urges applicants to submit their applications at least 72 hours prior to the due date to allow time to receive the validation message and to correct any problems that may have caused a rejection notification. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* Web site http://www.GRANTS.GOV. Deadlines will not be extended due to scheduled maintenance or outages.

B. Proposal Content

Applicants may submit one proposal which can include multiple projects. Additional projects may be added within the Hurricane Sandy-specific supplemental form by clicking the ''add project'' button in Section II of the supplemental form.

Information such as applicant name, Federal amount requested, non-Federal match amount, description of areas served, etc. may be requested in varying degrees of detail on both the SF 424 form and supplemental form. All fields are required unless stated otherwise on the forms. Use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields on the forms. Ensure that the Federal and non-Federal amounts specified are consistent.

IV. Award Administration

Once FTA allocates Emergency Relief funds to a recipient, the recipient will be required to submit a grant application electronically via FTA's Transportation Electronic Award Management system (TEAM). Recipients should work with their FTA Regional Office to develop and submit their application in TEAM so that funds can be obligated expeditiously. Grant applications in TEAM may only include eligible activities under the Emergency Relief program. Upon award, payments to recipients will be made by electronic transfer to the recipient's financial institution through FTA's Electronic Clearing House Operation (ECHO) system.

Post-award reporting requirements include submission of the Federal Financial Report and Milestone reports in TEAM consistent with FTA's grants management Circular 5010.1D, as well as any other reporting requirements FTA determines are necessary.

Dated: Issued in Washington, DC, this 1st day of February 2013.

Peter Rogoff,

Administrator.

[FR Doc. 2013–02729 Filed 2–4–13; 11:15 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0005]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel COOL BEANS; 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 March 8, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0005. 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 COOL BEANS is:

Intended Commercial Use of Vessel: Sightseeing and sunset cruises.

Geographic Region: Florida.

The complete application is given in DOT docket MARAD–2013–0005 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: January 31, 2013.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–02508 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2013 0006]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel UNTITLED; 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 March 8, 2013.

ADDRESSES: Comments should refer to docket number MARAD–2013–0006. 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 UNTITLED is:

Intended Commercial Use of Vessel: Long range overnight sport fishing charters.

Geographic Region: Florida

The complete application is given in DOT docket MARAD–2013–0006 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR Part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

Dated: January 31, 2013.

By Order of the Maritime Administrator.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2013–02506 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No PHMSA–2013–0003]

Pipeline Safety: Information Collection Activities, Revision to Annual Report for Hazardous Liquid Pipeline Systems

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Pipeline and Hazardous Materials Safety Administration (PHMSA) invites comments on its intention to revise form PHMSA F 7000–1.1—Annual Report for Hazardous Liquid Pipeline Systems, and its intention to request approval from the Office of Management and Budget (OMB) for revised information collection burdens.

DATES: Interested parties are invited to submit comments on or before April 8, 2013.

ADDRESSES: Comments may be submitted in the following ways:

E-Gov Web Site: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the docket number, PHMSA–2012–0024, at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. You should know that 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.). Therefore, you may want to review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or visit *http://www.regulations.gov* before submitting any such comments.

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: ''Comments on PHMSA–2012–0024.'' The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons

consider an alternative method (Internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

FOR FURTHER INFORMATION CONTACT: Angela Dow by telephone at 202–366–1246, by fax at 202–366–4566, or by mail at DOT, PHMSA, 1200 New Jersey Avenue SE, PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

A. Background

Section 1320.8 (d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies a revised information collection request that PHMSA will be submitting to OMB for approval. The information collected from hazardous liquid operators' annual reports is an important tool for identifying safety trends in the hazardous liquid pipeline industry.

B. Proposed Changes to the Annual Report for Hazardous Liquid Pipeline Systems

PHMSA is proposing to revise the Annual Report for Hazardous Liquid Pipeline Systems (PHMSA F 7000–1.1, hazardous liquid annual report form) to:

(1) Remove sections A3, A6, and A8 which are of limited value (PART A);

(2) Obtain additional information on a by-state basis (PARTS D and E);

(3) Improve information collection on mileage of older pipe (PART I); and

(4) Require reporting of actionable anomalies removed due to pipe replacement or abandonment (PART F).

Background for these revisions, including the PART location on the hazardous liquid annual report, is as follows:

(1) Remove Sections A3, A6, and A8 (PART A)

Removal of section A3: Section A3-''Individual Where Additional Information May be Obtained'' is of limited value since similar information is available in PARTS N and O. This change will only result in an amendment to the form without any burden hour impacts.

Removal of sections A6 and A8: Section A6 of the hazardous liquid annual report allows each submitter to characterize its pipelines and/or the pipeline facilities covered by its Operator Identification (OPID) and commodity group that are included in an integrity management program under 49 CFR 195.452. Section A8 allows for submitters to identify whether they had any changes from last year's filing. PHMSA has determined that these sections provide limited value and should be removed. This change will only result in an amendment to the form without any burden hour impacts.

(2) Obtain Additional Information on a By-State Basis (Parts D and E)

Currently, the annual report information is collected on a by-state basis for PARTS H, I, J, K, L and M. PHMSA proposes to additionally collect information in PART D ''Miles of Steel Pipe by Corrosion Protection'' and PART E ''Miles of Electric Resistance Welded (ERW) Pipe'' by state. PHMSA believes that most of the regulated hazardous liquid pipeline industry already collects this information on a by-state basis so the burden for providing it would be minimal. The information in these two PARTs is currently collected from gas transmission pipeline operators who have about twice the mileage as hazardous liquid operators. This information is essential for PHMSA's response to state regulators, Congress, state officials, and the public following pipeline incidents. This information also helps state pipeline safety agencies carry out their oversight responsibilities.

(3) Improve Information Collection on Mileage of Older Pipe (Part I)

In PART I- Miles of Pipe by Decade Installed, the form asks for ''Pre-20's or Unknown'' decades in one category. Recent accidents on older pipe continue to emphasize the need for information about the age of the pipeline infrastructure; thus, PHMSA believes the information for pipe installed prior to the 1920s should not be comingled with pipe installed at an unknown period. Therefore, PHMSA is proposing to have a category for ''Pre-20's'' and a category for ''Unknown'' decade of installation.

(4) Require Reporting of Actionable Anomalies Removed Due to Pipe Replacement or Abandonment (Part F)

The annual report currently collects information about the number of anomalies repaired in response to integrity assessments in PART F. During data quality checks of the 2010 data, PHMSA learned that many anomalies are eliminated from hazardous liquid pipeline systems by pipe replacement or abandonment. This data is crucial to demonstrating the benefits of integrity management programs.

C. Summary of Impacted Collection

PHMSA consulted industry and trade association representatives of the American Petroleum Institute and state pipeline safety representatives through the National Association of Pipeline Safety Representatives in considering revisions to the hazardous liquid pipeline operator annual report form to make the information collected more useful to industry, government, and the public.

PHMSA has revised burden estimates, where appropriate, to reflect revisions to the annual report form since the information collection was last approved. PHMSA estimates that ten percent of reporting companies will abandon or replace pipe in high-consequences areas in any given year and 30 additional minutes would be required to collect and report the information, resulting in an increase in burden of 16.75 hours (335 reports × .10 affected × .5 hours). For the purpose of calculating burden hours, this amount has been rounded up to 17 additional hours for a total reporting burden of 8,063 (8,046 + 17) hours.

The following information is provided for each information collection:

(1) Abstract for the affected annual report form; (2) title of the information collection; (3) OMB control number; (4) affected annual report form; (5) description of affected public; (6) estimate of total annual reporting and recordkeeping burden; and (7) frequency of collection. PHMSA will request a three-year term of approval for each information collection activity and, when approved by OMB, publish notice of the approval in the **Federal Register**.

PHMSA requests comments on the following information collection:

Title: Transportation of Hazardous Liquids by Pipeline: Recordkeeping and Annual Reporting.

OMB Control Number: 2137–0614.

Current Expiration Date: 1/31/2014.

Type of Request: Revision.

Abstract: To ensure adequate public protection from exposure to potential hazardous liquid pipeline failures, PHMSA collects information on reportable hazardous liquid pipeline accidents. Additional information is also obtained concerning the characteristics of an operator's pipeline system on the Annual Report for Hazardous Liquid Pipeline Systems form (PHMSA F 7000–1.1). This information is needed for normalizing the accident information to provide for adequate safety trending. The Annual Report for Hazardous Liquid Pipeline Operators form is required to be filed annually by June 15 of each year for the preceding calendar year.

Affected Public: Hazardous liquid pipeline operators.

Annual Reporting and Recordkeeping Burden:

Total Annual Responses: 447.

Total Annual Burden Hours: 8,063 (8,046 + 17).

Frequency of collection: Annually.

Comments are invited on:

(a) The need for the proposed collection of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Issued in Washington, DC, on February 1, 2013.

Alan K. Mayberry,

Deputy Associate Administrator for Field Operations.

[FR Doc. 2013–02610 Filed 2–5–13; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant To Executive Order 12978

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of three individuals whose property and interests in property have been unblocked pursuant to Executive Order 12978 of October 21, 1995, ''Blocking Assets and Prohibiting Transactions With Significant Narcotics Traffickers''.

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the three individuals identified in this notice whose property and interests in property were blocked pursuant to Executive Order 12978 of October 21, 1995, is effective on January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202)622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's web site (*www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On October 21, 1995, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 12978 (60 FR 54579, October 24, 1995) (the ''Order''). In the Order, the President declared a national emergency to deal with the threat posed by significant foreign narcotics traffickers centered in Colombia and the harm that they cause in the United States and abroad.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The foreign persons listed in an Annex to the Order; (2) any foreign person determined by the Secretary of Treasury, in consultation with the Attorney General and the Secretary of State: (a) To play a significant role in international narcotics trafficking centered in Colombia; or (b) to materially assist in, or provide financial or technological support for or goods or services in support of, the narcotics trafficking activities of persons designated in or pursuant to the Order; and (3) persons determined by the Secretary of the Treasury, in consultation with the Attorney General and the Secretary of State, to be owned or controlled by, or to act for or on behalf of, persons designated pursuant to the Order.

On January 30, 2013, the Director of OFAC removed from the SDN List the three individuals listed below, whose property and interests in property were blocked pursuant to the Order:

1. ESQUIVEL PENA, William, c/o UNIPAPEL S.A., Cali, Colombia; c/o BANANERA AGRICOLA S.A., Santa Marta, Colombia; c/o J. FREDDY MAFLA Y CIA. S.C.S., Cali, Colombia; Cedula No. 16641631 (Colombia); Passport 16641631 (Colombia) (individual) [SDNT].

2. LOZANO ESCOBAR, Enrique Alejandro, c/o GRANJA LA SIERRA LTDA., Cali, Colombia; DOB 05 Aug 1961; POB Cali, Valle, Colombia; Cedula No. 16657902 (Colombia); Passport 16657902 (Colombia) (individual) [SDNT].

3. VALENCIA OBANDO, William, c/o GRAN MUELLE S.A., Buenaventura, Colombia; DOB 28 Oct 1969; Cedula No. 79245681 (Colombia); Passport 79245681 (Colombia) (individual) [SDNT].

Dated: January 30, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–02614 Filed 2–5–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of one individual and one entity whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the one individual and one entity identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Office of Foreign Assets Control, U.S. Department of the Treasury, Washington, DC 20220, Tel: (202) 622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's web site at *http://www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on-demand service at (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a

worldwide basis. It provides a statutory framework for the imposition of sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury, in consultation with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security may designate and block the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On January 30, 2013, the Director of OFAC designated the following individual and entity whose property and interests in property are blocked pursuant to section 805(b) of the Kingpin Act.

Individual

1. PEREZ HENAO, Diego (a.k.a. VILLEGAS GOMEZ, Diego; a.k.a. ''DIEGO RASTROJO''); DOB 07 Apr 1971; POB Bolivar, Valle de Cauca, Colombia; nationality Colombia; citizen Colombia; Cedula No. 94369359 (Colombia); Passport AI729787 (Colombia) (individual) [SDNTK] (Linked To: LOS RASTROJOS).

Entity

1. LOS RASTROJOS, Colombia; Ecuador; Venezuela [SDNTK].

Dated: January 30, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2013–02621 Filed 2–5–13; 8:45 am]

BILLING CODE 4811–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Unblocking of Specially Designated Nationals and Blocked Persons Pursuant to the Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (''OFAC'') is publishing the names of 22 individuals and 13 entities whose property and interests in property have been unblocked pursuant to the Foreign Narcotics Kingpin Designation Act (''Kingpin Act'') (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The unblocking and removal from the list of Specially Designated Nationals and Blocked Persons (''SDN List'') of the 22 individuals and 13 entities identified in this notice whose property and interests in property were blocked pursuant to the Kingpin Act, is effective on January 30, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance & Evaluation, Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, Tel: (202) 622–2420.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's web site at *www.treasury.gov/ofac* or via facsimile through a 24-hour fax-on demand service at (202) 622–0077.

Background

On December 3, 1999, the Kingpin Act was signed into law by the President of the United States. The Kingpin Act provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and to the benefits of trade and transactions involving U.S. persons and entities.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property or interests in property, subject to U.S. jurisdiction, of persons or entities found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the Kingpin Act; and/or (3) playing a significant role in international narcotics trafficking.

On January 30, 2013, the Director of OFAC removed from the SDN List the 22 individuals and 13 entities listed below, whose property and interests in property were blocked pursuant to the Kingpin Act:

Individuals

1. VARGAS RUEDA, Nelson (a.k.a. ''ALFREDO''; a.k.a. ''HUGO''); DOB 27 Apr 1970; Cedula No. 77130763 (Colombia) (individual) [SDNTK].

2. AGUILAR TORRES, Evangelina, c/o CASA DE EMPENO RIO TIJUANA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 02 May 1956; POB Tijuana, Baja California, Mexico (individual) [SDNTK].

3. ALVAREZ HERNANDEZ, Maria Teresa, c/o CONSULTORIA DE OCCIDENTE, S.A. DE C.V., Guadalajara, Jalisco, Mexico; c/o GS PLUS CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 25 Jul 1960; POB Guadalajara, Jalisco, Mexico; R.F.C. AAHT–600725–4L7 (Mexico) (individual) [SDNTK].

4. ARMENTA ZAVALA, Arnoldo Humberto, Av. Pte. A. de Sta. Na. 21741, Colonia Infonavit Presidentes, Tijuana, Baja California CP 22576, Mexico; c/o CASA DE EMPENO RIO TIJUANA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 12 Nov 1971; R.F.C. AEZA–711112–AA5 (Mexico) (individual) [SDNTK].

5. BECERRA RODRIGUEZ, Mario Alberto, Calle del Creston 334, Colonia Playas de Tijuana, Tijuana, Baja California CP 22300, Mexico; c/o CASA DE EMPENO RIO TIJUANA, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS DEL NOROESTE DE MEXICO, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 17 Sep 1954; POB Tijuana, Baja California, Mexico; R.F.C. BERM–540917–181 (Mexico) (individual) [SDNTK].

6. CARRILLO CUEVAS, Mario Alberto, Calle Lago Chaira 323, Colonia Vista Dorada, Ensenada, Baja California CP 22800, Mexico; c/o CASA DE EMPENO RIO TIJUANA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 11 Sep 1980; POB Navojoa, Sonora, Mexico (individual) [SDNTK].

7. DELGADO GUTIERREZ, Elias, Calle Ramon Lopez Velarde 36, Colonia Reforma, Tijuana, Baja California CP 22620, Mexico; c/o CENTRO CAMBIARIO KINO, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o CONSULTORIA DE INTERDIVISAS, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o GS PLUS CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o M Q CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 26 Feb 1964; R.F.C. DEGE–640226–3W9 (Mexico) (individual) [SDNTK].

8. DONO MORALES, Edman Manuel, Privada Niza 3617 Int. 2, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; c/o GRUPO GAMAL, S.A. DE C.V., Guadalajara, Jalisco, Mexico; c/o GS PLUS CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 20 Jul 1966; POB Guadalajara, Jalisco, Mexico (individual) [SDNTK].

9. ESCOBEDO MORALES, Sandra Angelica, c/o CENTRO CAMBIARIO KINO, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o CONSULTORIA DE INTERDIVISAS, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS ALPHA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 25 Dec 1966; POB Guadalajara, Jalisco, Mexico (individual) [SDNTK].

10. MARTINEZ PLAZA, Omar Axel, c/o MULTISERVICIOS SIGLO, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 04 Aug 1972; POB Irapuato, Guanajuato, Mexico (individual) [SDNTK].

11. PEREIRA BERUMEN, Luis Miguel, Calle Relampago 1136 Secc. Dorado, Tijuana, Baja California, Mexico; c/o MULTISERVICIOS GAMAL, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 10 Sep 1975 (individual) [SDNTK].

12. PEREZ ELIAS, Sofia, Calle Oslo 3692, Colonia Playas Costa Azul, Tijuana, Baja California CP 22250, Mexico; c/o HACIENDA DE DON JOSE RESTAURANT BAR, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS ALPHA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 10 Oct 1973; POB Tijuana, Baja California, Mexico (individual) [SDNTK].

13. QUINTERO HERNANDEZ, Miguel Angel, Calle Ventisca 2359 Secc. Dorado, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; c/o M Q CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 22 Oct 1970; POB Guadalajara, Jalisco, Mexico; R.F.C. QUHM–701022–TL3 (Mexico) (individual) [SDNTK].

14. RUELAS MARTINEZ, Jose Manuel, 402 Milagrosa Circle, Chula Vista, CA 91910; Av. Pque. Mexico Nte. 824, Colonia Playas de Tijuana, Tijuana, Baja California CP 22200, Mexico; Esmeralda 3091, Colonia Residencial Victoria CR 45051, Zapopan, Jalisco CP 44550, Mexico; c/o GLOBAL FILMS, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o HACIENDA DE DON JOSE RESTAURANT BAR, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS ALPHA, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS GAMAL, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS SIGLO, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 16 Jun 1960; POB Talpa de Allende, Jalisco, Mexico; alt. POB Guadalajara, Jalisco, Mexico; Passport 036182282 (United States); SSN 622–18–0486 (United States); R.F.C. RUMM–600616–G69 (Mexico) (individual) [SDNTK].

15. RUELAS MARTINEZ, Felipe, Calle Saino 5, Colonia Hacienda del Tepeyac, Zapopan, Jalisco CP 45053, Mexico; Calle Ventisca 2359 Secc. Dorado, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; DOB 06 Jun 1962 (individual) [SDNTK].

16. RUELAS MARTINEZ, Jose de la Cruz, Calle de la Ventisca 640, Colonia Playas Seccion Dorado, Tijuana, Baja California CP 22205, Mexico; Calle Ventisca 2359 Secc. Dorado, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; c/o CONSULTORIA DE INTERDIVISAS, S.A. DE C.V., Tijuana, Baja California, Mexico; c/o MULTISERVICIOS ALPHA, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 30 Mar 1965; POB Guadalajara, Jalisco, Mexico; Passport 01020023629 (Mexico) (individual) [SDNTK].

17. RUELAS TOPETE, Carlos Antonio, Calle de la Bahia 3178, Colonia Playas Costa Hermosa, Tijuana, Baja California CP 22240, Mexico; Calle Ventisca 2359 Secc. Dorado, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; c/o HACIENDA DE DON JOSE RESTAURANT BAR, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 12 Aug 1968; POB Guadalajara, Jalisco, Mexico; R.F.C. RUTC–680812–PS6 (Mexico) (individual) [SDNTK].

18. RUELAS TOPETE, Eduardo, Ave. Pque. Mexico Sur 910, Colonia Playas de Tijuana, Tijuana, Baja California CP 22200, Mexico; Calle del Volcan 682, Colonia Playas de Tijuana, Tijuana, Baja California CP 22200, Mexico; c/o CONSULTORIA DE OCCIDENTE, S.A. DE C.V., Guadalajara, Jalisco, Mexico; c/o HACIENDA DE DON JOSE RESTAURANT BAR, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 20 Feb 1967; POB Guadalajara, Jalisco, Mexico; R.F.C. RUTE–670220–DVO (Mexico) (individual) [SDNTK].

19. RUELAS TOPETE, Jose Luis, c/o CONSULTORIA DE OCCIDENTE, S.A. DE C.V., Guadalajara, Jalisco, Mexico; DOB 13 Aug 1970; POB Guadalajara, Jalisco, Mexico; R.F.C. RUTL–700813–L31 (Mexico) (individual) [SDNTK].

20. SANCHEZ CURIEL, Silvia Patricia, c/o M Q CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 28 Sep 1976; POB Guadalajara, Jalisco, Mexico (individual) [SDNTK].

21. VELAZQUEZ HERNANDEZ, Juan Gabriel, Callejon Revolucion 1050, Colonia Zona Centro, Tijuana, Baja California, Mexico; c/o GS PLUS CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 20 Mar 1975; POB Tijuana, Baja California, Mexico (individual) [SDNTK].

22. VILLASENOR COVARRUBIAS, Jorge Miguel, Av. de las Rocas 1548, Fracc. Playas de Tijuana, Tijuana, Baja California, Mexico; Av. Via Rapida S/N, Colonia Zona Rio, Tijuana, Baja California, Mexico; Prv. Montecarlo 12106, Colonia Res. Agua Caliente, Tijuana, Baja California CP 22480, Mexico; c/o MULTISERVICIOS BRAVIO, S.A. DE C.V., Tijuana, Baja California, Mexico; DOB 31 May 1948; POB Distrito Federal, Mexico; R.F.C. VICJ–480531–RJ7 (Mexico) (individual) [SDNTK].

Entities

1. CASA DE EMPENO RIO TIJUANA, S.A. DE C.V., Paseo de los Heroes, No. 98 Loc. 14 D C, Colonia Zona Urbana Rio Tijuana, Tijuana, Baja California CP 22010, Mexico [SDNTK].

2. CENTRO CAMBIARIO KINO, S.A. DE C.V. (a.k.a. GAMAL–MULTISERVICIOS), Av. Independencia 1 Plaza Padre Kino, Local 11, Zona Rio, Tijuana, Baja California CP 22320, Mexico; Carretera Aeropuerto 1900, Local G–16, Tijuana, Baja California CP 22510, Mexico; R.F.C. CCK–010928–5C0 (Mexico) [SDNTK].

3. CONSULTORIA DE INTERDIVISAS, S.A. DE C.V., Carretera Aeropuerto 1900, Centro Comercial Otay, Local G–16, Tijuana, Baja California CP 22500, Mexico; R.F.C. CIN–010123–MX9 (Mexico) [SDNTK].

4. CONSULTORIA DE OCCIDENTE, S.A. DE C.V., Paseo de Ensenada 170, Tijuana, Baja California CP 22200, Mexico; Guadalajara, Jalisco, Mexico [SDNTK].

5. GLOBAL FILMS, S.A. DE C.V., Blvd. Fundadores 104–11A, Colonia Valle del Rubi, Tijuana, Baja California, Mexico; R.F.C. GFI–961219–9J4 (Mexico) [SDNTK].

6. GRUPO GAMAL, S.A. DE C.V., Av. La Paz 1951, Guadalajara, Jalisco CP 44160, Mexico [SDNTK].

7. GS PLUS CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; R.F.C. GPC–011226–4A5 (Mexico) [SDNTK].

8. HACIENDA DE DON JOSE RESTAURANT BAR, S.A. DE C.V., Av. del Rocio 1193, Tijuana, Baja California CP 22200, Mexico [SDNTK].

9. M Q CONSULTORES, S.A. DE C.V., Tijuana, Baja California, Mexico; R.F.C. MQC–020611–6Y9 (Mexico) [SDNTK].

10. MULTISERVICIOS ALPHA, S.A. DE C.V., Paseo Playas 24–2, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; Av. Allende 1197, Colonia Independencia, Tijuana, Baja California, Mexico; R.F.C. MAL–960401–I35 (Mexico) [SDNTK].

11. MULTISERVICIOS GAMAL, S.A. DE C.V. (a.k.a. CASA DE CAMBIO RUBI), Av. Federico Benitez 6400–52, Colonia Yamille, Tijuana, Baja California, Mexico; Blvd. Fundadores 5343–22, Colonia El Rubi, Tijuana, Baja California CP 22180, Mexico; Paseo Ensenada S/N D11, Colonia Playas de Tijuana, Tijuana, Baja California, Mexico; Paseo Estrella Del Mar 359, Colonia Playas de Tijuana, Tijuana, Baja California CP 22200, Mexico; Paseo Playas 24–2, Colonia Playas de Tijuana, Tijuana, Mexico, Mexico; R.F.C. MGA–940615–SC3 (Mexico) [SDNTK].

12. MULTISERVICIOS SIGLO, S.A. DE C.V., Carretera Aeropuerto 1900–16G, Colonia Otay, Tijuana, Baja California, Mexico; Paseo Tijuana 10126–A, Colonia Zona Rio, Tijuana, Baja California, Mexico; R.F.C. MSI–960220–Q84 (Mexico) [SDNTK].

13. COMERCIALIZADORA ITAKA, S.A. DE C.V., Calle Deza y Ulloa Numero 2102A, Colonia San Felipe, Chihuahua, Chihuahua 31240, Mexico; Avenida Paseo Triunfo de la Republica 6610 2, Colonia Alamos de San Lorenzo, Juarez, Chihuahua, Mexico; Fresno No. 1116, Col Granjas, Chihuahua, Chihuahua 31000, Mexico; R.F.C. CIT030305FQ3 (Mexico) [SDNTK].

Dated: January 30, 2013.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

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40 CFR Part 52

Approval and Promulgation of Air Quality Implementation Plans; States of Minnesota and Michigan; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2010–0954; EPA–R05–OAR–2010–0037; FRL–9773–1]

Approval and Promulgation of Air Quality Implementation Plans; States of Minnesota and Michigan; Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a Federal Implementation Plan (FIP) to implement emission limits that represent Best Available Retrofit Technology (BART) for certain taconite ore processing facilities in Minnesota and Michigan. The Clean Air Act (CAA or the ''Act'') and the regional haze rule require implementation plans to contain BART emission limits for sources subject to BART in order to meet the national goal of preventing any future and remedying any existing impairment of visibility in mandatory class I Federal areas arising from manmade air pollution.

DATES: This final rule is effective on March 8, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID Nos. EPA–R05–OAR–2010–0954 and EPA–RO5–OAR–2010–0037. All documents are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Steven Rosenthal, Environmental Engineer, at (312) 886–6052 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Steven Rosenthal, Environmental Engineer, Attainment Planning & Maintenance Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052, *rosenthal.steven@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, wherever ''we,'' ''us,'' or ''our,'' is used, we mean the United States Environmental Protection Agency (EPA).

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I. Background Information

A. EPA's Regional Haze Rule and Best Available Retrofit Technology

The regional haze rule required states to submit State Implementation Plans (SIPs) to implement the rule's requirements by no later than December 17, 2007. Neither Minnesota nor Michigan submitted regional haze SIPs by the required date. The Act requires EPA to promulgate a FIP within two years after EPA finds that a state has failed to make a required SIP submission unless the state corrects the deficiency and EPA subsequently approves the SIP. On January 15, 2009, EPA formally found that both Minnesota and Michigan had failed to timely submit SIPs addressing the regional haze requirements. This finding triggered EPA's duty to either promulgate a regional haze FIP for Minnesota and Michigan or approve subsequently submitted regional haze SIPs.

Minnesota subsequently submitted to EPA a regional haze SIP on December 30, 2009, a draft supplement to the SIP on January 5, 2012, and a final supplement to the SIP on May 8, 2012. Michigan submitted to EPA a regional haze SIP on November 5, 2010. In previous rulemakings, EPA approved in part the states' regional haze SIPs for addressing most regional haze requirements. However, EPA deferred action on the states' BART determinations for taconite facilities in order to further evaluate the sufficiency of those determinations. On August 15, 2012, EPA proposed to disapprove in part the states' regional haze SIPs with regards to their BART determinations for taconite facilities, while simultaneously proposing to promulgate a FIP. In response to comments received related to the sufficiency of EPA's reasoning for proposing disapproval of the Michigan and Minnesota BART determinations, EPA is issuing a separate supplemental notice of proposed rulemaking to solicit additional comments on that issue. Nonetheless, despite the fact that EPA has not finalized its disapproval of the states' BART determinations, EPA has the continuing authority and obligation to promulgate a FIP based on its earlier finding that Minnesota and Michigan had failed to timely submit regional haze SIPs. EPA's duty to promulgate a FIP ends only when it has fully approved a state submission. EPA has determined that the FIP satisfies the requirements of the Act and the regional haze rule.

As described in greater detail in the proposal to this rulemaking (77 FR 49308, August 15, 2012), section 169A of the 1977 Amendments to the CAA created a program for protecting visibility in the nation's national parks and wilderness areas. On December 2, 1980, EPA promulgated regulations to address visibility impairment in Class I areas that is ''reasonably attributable'' to a single source or small group of sources (45 FR 80084, December 2, 1980). In 1990, Congress added section 169B to the Act to address regional haze issues. Accordingly, EPA promulgated a rule to address regional haze on July 1, 1999 (64 FR 35714), which is codified at 40 CFR part 51, subpart P (''the regional haze rule''). On July 6, 2005, EPA published guidelines to assist states, or EPA when implementing a FIP, in determining which of their sources should be subject to the BART requirements and in determining appropriate emission limits for each applicable source (70 FR 39104), codified at 40 CFR part 51, appendix Y (''BART Guidelines'').

Among other things, section 169A of the Act and 40 CFR 51.308 of the regional haze rule require that states, or EPA when implementing a FIP, assure reasonable progress toward the national goal of achieving natural visibility conditions in Class I areas by submitting an implementation plan that contains emission limits representing BART for certain BART-eligible sources. 40 CFR 51.308(d) and (e). Pursuant to 40 CFR 51.308(e), BART must be determined based upon an analysis of the best

system of continuous emission control technology available and associated emission reductions achievable for each BART-eligible source that is subject to BART. In this analysis, the state, or EPA when implementing a FIP, must take into consideration the technology available, the costs of compliance, the energy and air quality environmental impacts of compliance, any pollution control equipment in use at the source, the remaining useful life of the source, and the degree of visibility improvement reasonably anticipated to result from the use of such technology. CAA section 169A(g)(2); 40 CFR 51.308(e)(1)(ii)(A).

The process of establishing BART emission limits consists of three steps. First, states or EPA identify those sources that meet the definition of ''BART-eligible source'' set forth at 40 CFR 51.301. Second, states or EPA determine whether such sources ''emit any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area,'' and is therefore ''subject to BART.'' Third, for each source subject to BART, states or EPA then identify the appropriate type and level of control for reducing emissions by conducting a five-step analysis: step 1: identify all available retrofit control technologies; step 2: eliminate technically infeasible options; step 3: evaluate control effectiveness of remaining control technologies; step 4: evaluate impacts and document the results; step 5: evaluate visibility impacts. See BART Guidelines.

The regional haze rule required all states to submit an implementation plan for regional haze meeting the requirements of 40 CFR 51.308(d) and (e) by no later than December 17, 2007. 40 CFR 51.308(b). Neither Minnesota nor Michigan submitted regional haze SIPs to EPA by the required date.

B. EPA's Legal Authority To Promulgate a FIP

Section 110 of the Act requires states to develop implementation plans with enforceable emission limitations and other control measures to meet the applicable requirements of the Act. A state submits its SIPs and SIP revisions to EPA for approval. Congress crafted the Act to provide for states to take the lead in developing SIPs, but balanced that decision by requiring EPA to review the plans to determine whether a SIP meets the requirements of the Act. EPA is required to determine whether the state's submittal meets the requirements of the Act based on information and data available at the time of EPA's review. See *Sierra Club* v. *EPA,* 671 F.3d 955 (9th Cir. 2012).

Pursuant to section 110(c)(1)(A) of the Act, if EPA finds that a state has failed to make a required SIP submittal or if EPA finds that a state's required submittal is incomplete, then EPA is required to promulgate a FIP to fill this regulatory gap. Section 110(c)(1)(A) of the Act requires EPA to promulgate a FIP within two years of its finding that a state failed to make a required SIP submission. Further, EPA has a continuing duty to promulgate a FIP even where EPA fails to promulgate a FIP within the required two-year period. EPA's duty to promulgate a FIP continues unless the state corrects the deficiency, and EPA approves the plan or revision before EPA promulgates the FIP.[1]

In this rulemaking action, EPA has the authority to promulgate a FIP addressing the BART determinations of certain taconite facilities in Minnesota and Michigan based upon the failure of both Minnesota and Michigan to timely submit regional haze SIPs. As discussed above, the regional haze rule required all states to submit a regional haze implementation plan by December 17, 2007. 40 CFR 51.308(b). Neither Minnesota nor Michigan submitted regional haze SIPs to EPA by the required date. Therefore, on January 15, 2009, EPA found that Michigan and Minnesota, as well as certain other states, had failed to submit SIPs addressing the regional haze requirements (74 FR 2392). Based upon that finding, pursuant to section 110(c)(1)(A) of the Act, EPA was under a continuing duty to promulgate FIPs for Minnesota and Michigan to address the regional haze requirements of the Act and the regional haze rule. This FIP is promulgated pursuant to the requirements of section 110(c)(1)(A) of the Act.

[1] It should be noted that in addition to the requirements of section 110(c)(1)(A) of the Act, section 110(c)(1)(B) of the Act requires EPA to promulgate a FIP where EPA has specifically disapproved a state's SIP submittal. Correspondingly, EPA has a continuing duty to promulgate the FIP unless a state corrects the deficiency and EPA approves the plan or revision before EPA promulgates the FIP. Many of the commenters to the proposed FIP assumed that the statutory basis for EPA's authority in promulgating this FIP is section 110(c)(1)(B) of the Act. We acknowledge that the proposed FIP, in identifying potential inadequacies in the Minnesota and Michigan regional haze SIPs, may have given the impression that the authority for promulgating the FIP was a specific determination by EPA that the States' SIPs failed to meet the requirements of the Act and the regional haze rule. However, as clarified in this section, the authority for the promulgation of the FIP arises from section 110(c)(1)(A) of the Act.

C. Minnesota and Michigan's Regional Haze SIP Submittals

Minnesota subsequently submitted to EPA a regional haze SIP on December 30, 2009, a draft supplement to the SIP on January 5, 2012, and a final supplement to the SIP on May 8, 2012. Michigan submitted to EPA a regional haze SIP on November 5, 2010. In general, with regard to the subject-to-BART taconite facilities identified in the respective plans, each State identified Good Combustion Practices (GCP) as the primary control method representing BART for NO_X.

On January 25, 2012, EPA proposed approval of the Minnesota regional haze plan in which EPA, among other things, proposed to approve BART for the subject-to-BART taconite facilities (77 FR 3681). However, prior to EPA's final action on Minnesota's regional haze plan on June 12, 2012, EPA learned through public comment that Minnesota and Michigan had each failed to thoroughly analyze all feasible BART control technologies for the taconite facilities, and that the SO_2 and NO_X emission limits set forth in each State's SIP might not reflect BART. Therefore, in light of the uncertainty pertaining to the States' BART determinations for taconite facilities, EPA deferred action on emission limits that Minnesota intended to represent BART for taconite facilities in the final rule approving the Minnesota regional haze SIP (77 FR 34801, June 12, 2012). Correspondingly, EPA proposed approval of certain provisions of the Michigan regional haze SIP, while deferring any action on those provisions of the SIP that addressed the requirement for BART for the one taconite plant in Michigan to which BART applies (77 FR 46912, August 6, 2012). Pursuant to section 110(k)(3) of the Act, EPA may approve a SIP revision in part when only a portion of a SIP revision meets all applicable requirements of the Act.

D. EPA's Regional Haze FIP and Related Actions

EPA proposed a FIP on August 15, 2012 (77 FR 49308) pursuant to section 110(c)(1)(A) of the Act, based on EPA's finding that Minnesota and Michigan failed to timely submit a regional haze SIP, and EPA's continuing duty to promulgate a FIP to address such failure. At the same time, EPA proposed disapproval of the BART determinations for the subject-to-BART taconite facilities made by Minnesota and Michigan for failing to meet the requirements of the Act and the regional haze rule. However, in regards to the proposed disapproval, several

commenters raised concerns that EPA did not provide adequate notice of its rationale for disapproving the States' BART determinations.

Therefore, EPA is taking two separate but related actions. In this rulemaking action, EPA is finalizing the FIP for BART for the subject taconite plants in Michigan and Minnesota. Secondly, in a separate action, EPA is issuing and seeks comment on a supplemental notice of proposed rulemaking elaborating upon the Agency's rationale for proposing partial disapproval of the Minnesota and Michigan SIPs as they pertain to the requirement for BART for taconite plants. The full basis for the partial disapproval is set forth in the separate action.

II. Comments and Responses

On August 15, 2012, EPA published a **Federal Register** Notice entitled ''Approval and Promulgation of Implementation Plans; States of Minnesota and Michigan; Regional Haze Federal Implementation Plan'' (77 FR 49308). In this notice, the EPA requested comment on EPA's proposed BART determinations and FIP for taconite ore processing facilities located in Minnesota and Michigan. Public comments were accepted at both a public hearing held in St. Paul, Minnesota, on August 29, 2012, and in writing until September 28, 2012.

EPA received comments from Cliffs Natural Resources Inc., ArcelorMittal Minorca Mine Inc., the United States National Park Service (NPS), the Michigan Department of Environmental Quality (MDEQ), the United States Forest Service, the National Parks Conservation Association (NPCA), the Fond du Lac Band of Lake Superior Chippewa, the Leech Lake Band of Ojibwe, the National Tribal Air Association, the Red Cliff Band of Lake Superior Chippewas, U.S. Steel Corporation, and more than 1,000 private citizens.

A. General Comments in Support of the Proposed Rule

Commenter: National Parks Conservation Association.

Comment: NPCA supports finalization and implementation of the proposed controls, which will significantly benefit the air quality in the parks, wilderness areas, and communities surrounding these plants.

Commenter: 1,244 private citizens provided similar comments.

Comment: As a resident of the upper Midwest and a national parks supporter, I want to see natural air quality restored to Voyageurs and Isle Royale National Parks and Boundary Waters Canoe Area Wilderness just as Congress intended. That's why I support EPA's proposal to reduce haze-causing pollution from taconite plants. These large industrial polluters should clean up their air pollution under the Regional Haze Rule.

Reducing haze pollution in our parks will bring healthier air to surrounding communities as well as more visitors who support our local economies. That's why I want EPA to require the most effective methods for reducing air pollution from taconite plants in Michigan and Minnesota. In addition to the emission reductions outlined in EPA's proposed plan, I encourage EPA to evaluate pollution controls that would lead to cleaner air.

Commenter: Fond du Lac Band of Lake Superior Chippewa.

Comment: The Band strongly supports the FIP proposed by Region 5, particularly with regard to Region 5's determination that low NO_X burners are BART for taconite facilities. This option is technically feasible as these burners have already been installed on Minntac's grate-kiln furnaces and are being installed on Essar's straight-grate kiln furnaces. Low NO_X burners have been shown to be affordable with control costs at roughly $500 per ton, which is well within the range of costs deemed affordable for BART by states and EPA. Low NO_X burners are a wise choice because they prevent NO_X from ever being formed. This is a key concept in pollution prevention. Collection and disposal of pollutants can lead to secondary environmental problems, as well as increased energy consumption. The Band contends that installation of these burners is an equity issue. It would be unfair to allow other facilities to operate indefinitely without having to install low NO_X burners.

Commenter: Red Cliff Band of Lake Superior Chippewa.

Comment: Red Cliff supports EPA's proposed requirement for low NO_X burners for all subject taconite furnaces in Michigan and Minnesota.

Commenter: Leech Lake Band of Ojibwe.

Comment: Low NO_X burners have been installed voluntarily, previous to this action, by two taconite facilities with different furnace systems commonly utilized in the taconite industry. These system installs have shown substantial reductions, up to 60 to 70 percent, can be achieved with a minimal cost of $500 per ton or less. The Band also agrees that taking a preemptive approach by preventing the formation of NO_X makes sense versus an after-production control technology that is less effective and more costly, both economically and environmentally.

Commenter: National Tribal Air Association.

Comment: The Association agrees that using low NO_X burners as BART for both straight and grate-kilns is a good approach. Not only is the cost to remove NO_X inexpensive, but these burners can reduce NO_X by up to 70 percent. Therefore, placing a limit on NO_X of 1.20 pounds per million British Thermal Units on a 30-day rolling average for facility lines is very reasonable.

Commenter: National Park Service.

Comment: NPS agrees with EPA's conclusions that control of emissions from taconite plants in Minnesota and Michigan can be expected to yield significant benefits in reducing visibility impairment in the Class I area in the two states; and that technically feasible controls are available at a reasonable cost for taconite plants that can be expected to provide a visibility benefit that makes those controls warranted.

Commenter: U.S. Forest Service.

Comment: The Forest Service supports the proposed FIP to require BART for the taconite plants in Minnesota and Michigan. According to technical analyses by the State of Minnesota and others, the highest contributors to haze in the Boundary Waters from all sources in the U.S. are the taconite industry and power plants. We support the emission controls that the taconite plants would be required to install under the proposed FIP. The FIP demonstrates that these controls are technically feasible and available for the taconite industry to reduce emissions and are already being used by some within the industry. The implementation of the Minnesota regional haze plan is nearly five years past due. Considerable effort and resources have been spent over the past ten years developing the technical information necessary to complete implementation. Much of the technical work was done by states, Tribes, and FLMs working together through multi-state regional planning organizations. The Forest Service has monitored visibility in the Boundary Waters since 1985. The results of this technical work and monitoring support the requirement for BART to reduce impacts to the Boundary Waters.

Response: EPA acknowledges these commenters' support of the Agency's efforts in developing a FIP for the taconite industry and agrees.

B. Comments Concerning the Adequacy of the Public Comment Period

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs stated that EPA provided inadequate opportunity to

comment on the proposed FIP. Cliffs alleged that 45 days was not a reasonable time period to complete the task of preparing an appropriate response to the proposed FIP given the highly technical concerns surrounding EPA's BART determinations for the taconite industry.

Response: EPA disagrees that the Agency did not provide an adequate opportunity for public comment. Section 307(h) of the CAA requires EPA to provide ''a reasonable period for public participation of at least 30 days'' when promulgating a FIP. Here, EPA chose to provide a significantly longer 45-day public comment period in light of the many technical issues surrounding EPA's proposed BART determinations for the taconite industry. EPA believes that 45 days was a reasonable amount of time for Cliffs and others to comment on EPA's proposed FIP.[2] Cliffs' assertion that it should have been granted an extension to conduct a new BART analysis is without merit. Cliffs had several years to conduct a thorough BART analysis, and its failure to timely do so does not bear upon the reasonableness of the length of EPA's comment period. Indeed, the fact that Cliffs was able to prepare an extensive 61-page comment document within the allotted time supports EPA's contention that 45 days was a reasonable period for third parties to comment on the proposed FIP.

C. Comments Questioning EPA's Authority To Issue a Federal Implementation Plan

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs stated that EPA has not met the threshold requirements for issuing a FIP. EPA's proposed FIP did not provide a critique of Minnesota and Michigan's BART determinations for the taconite industry or explain why those determinations were inadequate. As a result, Cliffs argued that EPA does not have the legal authority to issue a FIP.

Response: EPA believes that it has a strong basis for proposing disapproval of Minnesota and Michigan's BART determinations for the taconite industry. Nonetheless, EPA agrees that the proposed rule did not provide a sufficiently detailed critique of the state determinations' inadequacies. As a result, EPA has chosen to issue a supplemental notice of proposed rulemaking providing additional rationale for the Agency's proposed disapproval. Contrary to Cliffs' assertion, however, EPA was not required to make a finding that Minnesota and Michigan's BART determinations were deficient before issuing a FIP. Section 110(c)(1)(A) of the CAA provides that EPA ''shall promulgate a [FIP] within 2 years after the Administrator finds that a State has failed to make a required submission * * * unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal Implementation plan.''

Pursuant to the regional haze rule, states were required to submit regional haze SIPs no later than December 17, 2007 (64 FR 35714, July 1, 1999). Neither Minnesota nor Michigan made the required submission by this date. Consequently, EPA issued a finding on January 15, 2009 that Minnesota and Michigan, as well as certain other states, had failed to submit SIPs addressing the regional haze requirement (74 FR 2392). This finding triggered EPA's statutory duty to either approve a subsequent state SIP submission or issue a FIP. While it is true that Minnesota and Michigan subsequently submitted regional haze SIPs to EPA, the Agency has not approved either of these plans with respect to the states' BART determinations for the taconite industry. On the contrary, EPA has proposed to disapprove the states' BART determinations for failure to meet the minimum requirements of the CAA. Thus, EPA had both the authority and the continuing obligation to issue a FIP for the taconite industry in Minnesota and Michigan based on the Agency's January 15, 2009 finding of the states' failure to submit.

Commenter: Michigan Department of Environmental Quality (MDEQ).

Comment: MDEQ commented that Section 110(c)(1) of the Act authorizes EPA to promulgate a FIP within two years after making a finding that a state's SIP submittal does not satisfy the CAA. However, the CAA does not allow EPA to propose a FIP and simultaneously propose disapproval of the state's SIP.

Response: MDEQ's interpretation of section 110(c)(1) is incorrect. Once EPA has made a finding of a state's failure to submit, EPA's authority and continuing obligation to issue a FIP does not end until the state has corrected the deficiency and EPA has approved a subsequently submitted SIP. Nowhere in the CAA is there language that limits EPA's authority to simultaneously propose a FIP and propose disapproval of a state's SIP where there has been a prior finding of a failure to submit.

Commenter: Cliffs Natural Resources, ArcelorMittal Minorca Mine, and Michigan Department of Environmental Quality (MDEQ).

Comment: Cliffs and MDEQ stated that EPA failed to afford the Minnesota and Michigan SIP proposals the requisite deference. Under the visibility program, states have the primary responsibility for establishing standards, including BART. Thus, Cliffs and MDEQ argued that EPA can disapprove a SIP only where it fails to meet minimum CAA requirements.

Response: While Congress intended states to take the lead in developing regional haze SIPs, it balanced that decision by requiring EPA to review state plans to determine whether they meet the requirements of the CAA. EPA's review is not limited to a ministerial type of automatic approval of a state's decisions. Rather, EPA must consider not only whether the state considered the appropriate factors, but whether the state acted reasonably in doing so. In undertaking such a review, EPA does not ''usurp'' the state's authority, but ensures that such authority is reasonably exercised.

Here, EPA firmly maintains that neither state's regional haze SIP met the minimum requirements of the CAA. Among other things, EPA takes issue with the states' assertions that low NO_X burners are not technically feasible control options for indurating furnaces and that good combustion practices represent BART. Nonetheless, EPA acknowledges that its August 15, 2012 proposed action (77 FR 49308) did not provide a sufficiently detailed analysis of the deficiencies of the states' BART determinations for the taconite industry. Therefore, EPA is publishing a supplemental notice of proposed rulemaking that further addresses the Agency's rational for proposing disapproval of the states' choices regarding taconite BART.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that Minnesota and Michigan engaged in extensive and proper rulemaking efforts. Cliffs then proceeded to provide a detailed history of each state's SIP-development process.

Response: EPA agrees that Minnesota and Michigan spent considerable time and effort preparing their regional haze SIPs. As stated previously, EPA intends to publish a supplemental notice of proposed rulemaking that further addresses the Agency's rationale for proposing disapproval of Minnesota and Michigan's BART determinations for taconite facilities. EPA reiterates, however, that the Agency had the

[2] In fact, Cliffs received a signed copy of the proposed FIP on July 17, 2012, nearly a full month before the formal start of the comment period. Thus, Cliffs had effectively 75 days to prepare its comments.

authority and continuing obligation to promulgate a FIP for the taconite industry based on the Agency's earlier finding that Minnesota and Michigan had failed to submit regional haze SIPs in a timely manner (74 FR 2392, January 15, 2009).

D. Comments Supporting EPA's Authority To Issue a Federal Implementation Plan

Commenter: National Parks Conservation Association.

Comment: At a public hearing on the proposed FIP, representatives for one taconite owner asserted that EPA lacked authority to issue the proposed FIP. The company's assertion has no merit. In fact, EPA has an obligation to develop a FIP under the CAA. The CAA provides states with initial responsibility for identifying sources and determining BART for purposes of regional haze. It is equally clear, however, that EPA retains authority to approve or disapprove the states' determinations and issue a FIP if necessary to correct state plan deficiencies.

EPA is not only well within its authority to promulgate the proposed FIP; it is required to do so because the state plans do not meet the requirements of the CAA. While commenters disagree with some of EPA's proposed BART determinations in the taconite FIP, the record plainly supports EPA's finding that neither the Minnesota nor the Michigan proposal met minimum CAA requirements. The National Park Service, the National Forest Service, and other commenters all submitted detailed technical reviews establishing the many deficiencies in the BART analysis and conclusions of Minnesota and Michigan's plans.

Response: EPA agrees with the commenter that EPA has the authority and obligation to issue a FIP.

E. Comments Concerning the Use of New Information To Evaluate Minnesota and Michigan's BART Determinations

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA cannot use new information regarding the technical feasibility of low NO_X burners as a control option for indurating furnaces to undermine the states' BART determinations. Cliffs argued that EPA is seeking to reject Minnesota and Michigan's BART determinations based on information that was not available to either state at the time of their SIP submissions to EPA for approval. To support its position, Cliffs pointed to EPA's BART Guidelines, which state that new technologies need only be considered by a state if they become available before the close of a state's public comment period. Cliffs alleged that low NO_X burners were not an ''available'' technology because testing at Minntac and Essar had either not yet commenced or was still ongoing at the time Minnesota and Michigan's periods for public comment had ended.

Commenter: Michigan Department of Environmental Quality (MDEQ).

Comment: MDEQ commented that there was not enough information available prior to the close of Michigan's public comment period on June 23, 2010 to indicate that low NO_X burners had been successfully utilized on indurating furnaces. MDEQ also argued that EPA's proposal to find that low NO_X burners represent BART for NO_X at Tilden was impermissibly based on information generated after the close of Michigan's public comment period.

Response: EPA disagrees with Cliffs and MDEQ's comments for several reasons. First, EPA again reiterates that the Agency had the authority and responsibility to promulgate a FIP for the taconite industry based on the Agency's earlier finding that Minnesota and Michigan had failed to submit regional haze SIPs in a timely manner (74 FR 2392, January 15, 2009). Thus, EPA was entitled to rely on whatever information was available regarding the technical feasibility of low NO_X burners at the time the Agency performed its BART analysis, including results from the testing at Minntac and Essar.

Nonetheless, even if EPA's authority to promulgate a FIP had been based solely on final disapproval of the states' BART determinations, the information regarding the technical feasibility of low NO_X burners was not ''new'' as Cliffs suggests. As the BART Guidelines make clear, technical feasibility encompasses two distinct concepts, ''availability'' and ''applicability.'' 40 CFR part 51, appendix Y. A technology is considered ''available'' if the source owner may obtain it through commercial channels, while it is considered ''applicable'' if it can reasonably be installed and operated on the source type under consideration. As Cliffs pointed out, only technologies that are ''available'' at the close of a state's public comment period need be considered as control options by the state.

However, Cliffs' argument that low NO_X burners were not an ''available'' technology at the time Minnesota and Michigan's periods for public comment had ended is incorrect. Testing at Minntac and Essar had nothing to do with the ''availability'' of low NO_X burners. Rather, the testing at those facilities concerned the ''applicability'' of low NO_X burners to the source type in question—indurating furnaces. There can be no dispute that low NO_X burners were ''available'' at the time that Minnesota and Michigan developed their regional haze SIPs because this technology has been obtainable through commercial channels as an option for the control of nitrogen oxide emissions for many years. Therefore, Minnesota and Michigan were required to consider low NO_X burners in their BART analyses, which both states did, albeit dismissively.

Consequently, the sole question presented to the states was one of ''applicability''—whether low NO_X burners could be successfully installed on indurating furnaces. In regards to this question, the BART Guidelines make clear that ''a commercially available control option will be presumed applicable if it has been used on the same or a similar source type.'' 40 CFR part 51, appendix Y. However, in contrast to the question of ''availability,'' the Guidelines make no mention of a cut-off date after which states may reject information regarding a technology's ''applicability.'' Even so, contrary to Cliffs' assertions, both states were aware that low NO_X burners had been successfully installed on two lines at U.S. Steel's Minntac facility prior to the end of their respective periods for public comment.[3] In a June 23, 2010 letter to the Michigan Department of Natural Resources and Environment regarding the state's draft regional haze SIP, EPA commented that ''a low-NO_X main burner firing solid fuels'' had been installed at Minntac and that ''work done by other companies had demonstrated that burner designs that lower flame temperature can reduce NO_X formation in taconite furnaces.'' [4] Similarly, in a February 10, 2012 letter to the Minnesota Pollution Control Agency responding to the state's draft regional haze SIP supplement for taconite facilities, EPA explained in detail that ''U.S. Steel has demonstrated the development and use of low NO_X main burners that achieve 70 percent NO_X reduction on its indurating

[3] The comment period for Michigan's regional haze SIP closed on June 23, 2010. The comment period for the Minnesota's regional haze SIP supplement regarding BART at taconite facilities closed on February 3, 2010, but EPA was granted an extension to submit comments. EPA's comments were submitted on February 10, 2010, and were received and considered by MPCA.

[4] See Michigan Regional Haze plan: EPA Letter to Michigan Department of Environmental Quality Regarding BART, May 24, 2012 (Docket # EPA–R05–OAR–2010–0954–0008).

lines.'' [5] In addition to these comments, both states received comments regarding the technical feasibility of low NO_X burners from the Forest Service as well. Therefore, both Michigan and Minnesota were aware that low NO_X burners had been successfully applied to indurating furnaces, and Cliffs' arguments that the results of these studies somehow constitute ''new'' information are without merit.

Finally, even if information regarding the technical feasibility of installing low NO_X burners to indurating furnaces was not available to Minnesota or Michigan, EPA nonetheless had a duty to consider any new information that subsequently arose when reviewing the states' SIPs. The Ninth Circuit recently held that ''if new information indicates to EPA that an existing SIP or SIP awaiting approval is inaccurate or not current, then, viewing air quality and scope of emissions with public interest in mind, EPA should properly evaluate the new information and may not simply ignore it without reasoned explanation of its choice.'' *Sierra Club* v. *EPA,* 671 F.3d 955, 967 (9th Cir. 2012). Thus, EPA is required, at a minimum, to take new information into account during the SIP approval process and, if necessary, alter its final decision accordingly.

Commenter: Fond du Lac Band of Lake Superior Chippewa.

Comment: At the public hearing held in Saint Paul, Minnesota, on August 29, 2012, some commenters voiced the opinion that low NO_X burners should not be considered as BART because the technology was brought forward after the comment period on the Minnesota regional haze SIP supplement had closed. This is incorrect. Low NO_X burners were in use and under consideration both before and during the comment period of December 19, 2011 to February 3, 2012. Discussions concerning the installation of low NO_X burners at Minntac began in 2008, and the burners themselves were installed in 2010, several months before the regional haze SIP supplement was proposed. U.S. Steel's report to MPCA on the performance to-date of their low NO_X burners at Minntac was submitted in December of 2011, around the time that Minnesota's SIP supplement went on public notice. Additionally, Essar Steel committed to the use of low NO_X burners in its new plant near Nashwauk in 2010. The record indicates that discussions took place between MPCA and the taconite facilities around the time that the SIP supplement public comment period was open. Because of the timing of U.S. Steel's reports and the fact that no other economically-feasible technology offered more than 15 percent control of NO_X, those discussions almost certainly included the possibility of requiring low NO_X burners on taconite furnaces.

In light of the emerging use of low NO_X burners, the U.S. Steel report, and the discussions indicated in the record, there is no basis for the claim that low NO_X burners were only brought forward after the comment period. Low NO_X burner technology was not a surprise and there is no procedural unfairness in the EPA considering it. Furthermore, to the extent that low NO_X burners can somehow be construed as new information, there is precedent for considering new information while promulgating regulations. For example, on July 20, 2012, EPA informed petitioners that it would reconsider its Mercury and Toxics Standards based on the availability of new technical information.

Commenter: National Parks Conservation Association.

Comment: During the public hearing on this matter, a taconite company asserted that EPA's FIP was based on ''new information'' that is ''outside the record'' and that the company's ''due process'' rights were somehow jeopardized by EPA's proposal. As a legal matter, the company's argument has no merit. Likewise, as a practical matter, the company's complaints are unavailing.

Response: EPA agrees with these commenters that it was appropriate for EPA to rely on whatever information was available regarding the technical feasibility of low NO_X burners at the time the Agency performed its BART analysis. For a more detailed discussion of this issue, see EPA's previous response to comments from Cliffs, ArcelorMittal, and MDEQ.

F. Comments Concerning EPA's Best Available Retrofit Technology Analysis

Commenter: National Parks Service.

Comment: NPS agrees with EPA and with Michigan and Minnesota on the BART-eligibility determinations with respect to the taconite facilities and the states' determination that BART for direct PM is satisfied by the taconite MACT rule.

Response: EPA acknowledges NPS's support.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs objected to EPA's reference to conversations with industry competitors and their vendors in determining the feasibility of controls for Cliffs' indurating furnaces. Cliffs asserted that EPA ignored information provided by Cliffs and its process engineering firms.

Response: EPA spent significant time with all affected sources and thoroughly considered all information. EPA acknowledges that it relied heavily upon documented information from Cliffs' competitors in the taconite industry because these companies have experience with low NO_X burner technology and provided data from actual experience with such technology. It would have been inappropriate for EPA to have ignored substantive information based upon actual experience.

1. Comments Asserting That EPA's BART Analysis Did Not Assess all Available Technologies

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs claimed that EPA's BART determinations were arbitrary because they ignored good combustion practices (GCP) as a BART alternative. Cliffs stated at the MPCA March Citizens Board meeting that ''GCP is already required under other federal regulations, including the taconite MACT rule.''

Response: Cliffs' support of GCP as BART lacks merit because GCP is neither defined by the Minnesota Pollution Control Agency, nor is it typically considered a NO_X reduction technique. For example, the January 30, 2009 ''NO_X Reduction Analysis'' done by Hatch for U.S. Steel's Minntac Iron Ore Pelletizing Operation did not list GCP as a potential NO_X reduction technology for an indurating furnace.[6] Similarly, the 2008 BACT analysis for JEA—Greenland Energy Center Units 1 and 2 did not list GCP as a potential NO_X control.[7] In fact, these analyses state that GCP tends to increase NO_X emissions. This is because measures taken to minimize the formation of NO_X during combustion inhibit complete combustion, which increases emissions of carbon monoxide. Conversely, GCP aims to reduce carbon monoxide emissions. According to the September 2010 ''We Energies Biomass Energy Project Revised Control Technology Review for Carbon Monoxide Emissions for the Biomass-Fired Boiler,'' there is an inverse relationship between NO_X emissions and carbon monoxide emissions, which means that improving

[5] See MI Haze FIP, EPA 6–23–10 comments to MDEQ on MI Haze submittal (Docket # EPA–R05–OAR–2010–0954–0037).

[6] Docket # EPA–R05–OAR–2010–0037–0039.

[7] Docket # EPA–R05–OAR–2010–0037–0070.

combustion efficiency can increase NO_X emissions.[8]

Concerning the GCP requirement in the taconite MACT rule, GCP for the MACT is not the same as GCP for NO_X. GCP for MACT is aimed at reducing emissions of products of incomplete combustion (PIC). To minimize PICs, the operating conditions targeted are generally the opposite from those targeted for reducing NO_X. As explained in the taconite MACT rule (68 FR 61883, October 30, 2003), ''The basic method used in reducing NO_X emissions is a reduction in combustion temperature, which is the opposite strategy needed for minimizing PIC (i.e., increasing combustion temperature).'' In conclusion, GCP would be expected to increase NO_X emissions, not decrease them.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA is required to consider ''any existing pollution control technology at the source.'' Cliffs argued that EPA failed to adequately consider or consistently apply this threshold factor to the BART determinations in its proposed rule.

Response: To the extent that Cliffs is referring to its use of GCP as an existing pollution control technology, neither the operational practices that comprise GCP nor their impact on reducing emissions has been documented by Cliffs. As described in detail in the response to the previous comment, EPA does not consider Cliffs' use of GCP to constitute ''existing control technology'' on these furnaces.

Commenter: National Parks Conservation Association.

Comment: NPCA commented that EPA failed to consider fuel-blend alternatives, including greater or exclusive use of natural gas at grate-kiln furnaces, as part of the Agency's BART analysis for SO_2 and NO_X. Fuel-blend alternatives are a technically feasible control option because indurating furnaces can successfully be operated on alternative fuels, namely fuel blends that consist primarily of natural gas. Contrary to the taconite plant owners' assertions, consideration of alternative fuels is required for BART where changing to cleaner fuel would not necessitate significant changes at any existing facility. There is no legal rationale for excluding this viable pollution control. Additionally, the assertion that alternative fuel costs are uncertain has no merit. There is simply no factual support for price uncertainty being a basis to reject consideration of natural gas as an alternative to coal. Even if significant uncertainty existed, it can be dealt with appropriately in the BART analysis. Finally, the assertion that moving towards a more natural gas-based fuel blend would mean higher NO_X emissions in exchange for lower SO_2 emissions is a red herring. The existence of such potential secondary impacts is not a reason to discard a BART option prior to analysis. It is a reason to perform the analysis itself.

Response: Alternative fuels were not considered for the following reasons. The straight-grate furnaces at ArcelorMittal, Hibbing Taconite, and Northshore Mining already burn natural gas. Similarly, U.S. Steel's Keetac and Minntac facilities already burn a fuel mix of natural gas and low-sulfur coal. While fuel-blend alternatives could have been considered for the grate-kiln furnaces at United Taconite and Tilden, EPA proposed to require the most stringent control technology, flue-gas desulfurization (FGD), at these facilities. As the BART Guidelines make clear, where EPA or the states choose the most stringent control option as BART, other control options need not be considered. Therefore, EPA was not required to consider fuel-blend alternatives as part of the Agency's BART analysis. However, EPA notes that subsequent to the proposal, Tilden agreed to convert to natural gas, while United Taconite will be substantially reducing its emissions through the use of natural gas and low-sulfur coal.

Commenter: National Parks Conservation Association.

Comment: EPA's NO_X BART determinations conclude that significant reductions could be achieved cost-effectively by the installation of low NO_X burners at all taconite kilns. While NPCA concurred with this conclusion, it commented that EPA failed to fully consider the use of regenerative selective catalytic reduction (RSCR). For instance, although RSCR was noted as an available technology in Keetac's BART analysis, EPA's FIP made no note of it. For Tilden, on the other hand, EPA noted this option, but only to point out that the company found it to be infeasible. In fact, this technology appears to be feasible for indurating furnaces. At a minimum, a more thorough evaluation by EPA is necessary. In this case, EPA has not shown that circumstances preclude the application of RSCR to the units in question via evaluation of gas characteristics or demonstration of technical challenges. It has offered no evidence that RSCR is technically infeasible. A fuller evaluation of this technology is warranted as part of a BART determination.

Response: EPA did evaluate post-combustion NO_X-control options when it reviewed Minnesota's regional haze plan and agreed with the state's determination that post-combustion control of NO_X emissions from taconite facilities are not BART. For the proposed and now final rule, EPA evaluated new data on the use of low NO_X burners at taconite facilities and, after a five-factor BART analysis, determined that low NO_X burners are BART for these facilities. The BART analyses are fully described in section V of the proposed rule (77 FR 49308). EPA also considered RSCR and related selective catalytic reduction technologies at some of the subject taconite units. EPA concluded in its BART analyses that RSCR and other post-combustion controls do not represent BART for the subject taconite units because, after the installation of low NO_X burners, the incremental costs of installing further post-combustion controls are unreasonably high. Therefore, this final rule requires that taconite indurating furnaces meet NO_X emission limits consistent with low NO_X burner technology.

Commenter: National Parks Conservation Association.

Comment: EPA's analysis for SO_2 provides evidence that dry FGD is feasible for taconite facilities, and the Agency requires the use of this technology at the three highest emitting lines (at United Taconite and Tilden). We support these determinations. However, EPA fails to fully analyze the use of dry FGD on the lower-emitting units, instead concluding, without support, that it would not be ''economically reasonable.'' NPCA asks that EPA analyze whether dry FGD, clearly a feasible technology, could provide cost effective reductions at additional units.

Response: EPA's BART analysis demonstrated that dry FGD is feasible for the highest emitting lines when those lines are uncontrolled, but determined that the same technology has unreasonably high incremental costs for units with lower uncontrolled emissions. EPA notes, however, that while FGD was originally proposed as BART for the units at United Taconite and Tilden, those facilities have since agreed to operational limits on the types of fuels that may be burned As a result, FGD is no longer being required as BART. Additional discussion of this issue can be found in section III of the preamble.

Commenter: National Parks Service.

Comment: It appears that low temperature oxidation is technically and economically feasible for the entire

[8] Docket # EPA–R05–OAR–2010–0037–0069.

industry. In addition, tail-end SCR with natural gas reheat has been found technically feasible and borderline economically feasible based on a BACT analysis from several years ago when natural gas prices were much higher. Another form of SCR, RSCR looks promising, but as a new technology, would require trials.

While we would normally prefer to see all of the technically feasible control options evaluated, given the time constraints and the success of the low NO_X burner technology, it is likely that low NO_X burners will reduce NO_X so much that addition of the other technologies would become too expensive for this phase of the regional haze program. We therefore agree that low NO_X burners at 1.2 lbs NO_X/MMBTU represent BART for the taconite industry. By setting such a uniform limit, EPA is establishing a ''level playing field'' that is achievable by all of the taconite plants and will provide substantial (almost 16,000 TPY) NO_X reductions.

Response: EPA agrees with the commenter that post-combustion control technologies would likely be expensive for additional pollution reduction. EPA maintains that low NO_X burners are the appropriate control technology for the indurating furnaces at the taconite facilities. Thus, EPA is finalizing its determination that low NO_X burners represent BART.

Commenter: National Parks Service.

Comment: EPA proposes to determine that BART for SO_2 for straight-grate kilns is existing controls because these furnaces do not burn coal. While true, they burn fuel oil, which can have a high potential for emitting SO_2 depending on the fuel's sulfur content. Although the BART Guidelines do not mandate fuel switching, they encourage evaluation of lower sulfur content fuels. For example, limiting fuel sulfur was an option considered by EPA for oil-fired EGUs in a separate BART rule. We suggest that Minnesota consider use of lower sulfur fuels in future reasonable progress analyses.

Response: EPA's data indicate that the taconite facilities with straight-grate furnaces use natural gas as the primary fuel with fuel oil as a back-up fuel only. Given the limited use of fuel oil, emission reductions from using lower sulfur fuel would be limited. Nonetheless, EPA agrees with the commenter that the state should consider the impacts of using a lower sulfur fuel in its future reasonable progress analyses and is requiring that the taconite facilities keep records of any future use of fuel oil.

Commenter: National Parks Service.

Comment: NPS concurred with EPA's statement that ''[the Agency does] not agree that the MPCA and Minntac have adequately documented the infeasibility of all SO_2 controls described.'' This observation is especially pertinent with respect to the technical feasibility of spray drying absorption (SDA). According to the taconite industry consultant, SDA is not technically feasible because ''the high moisture content of the exhaust would lead to saturation of the baghouse filter cake and plugging of the filters and dust collection system.'' On the contrary, SDA requires moisture because a slurry of lime and water is injected into the spray dryer where the slurry reacts with SO_2 to form a dry sulfate power that is then collected in the baghouse. As long as the moisture content of the gas stream is not excessive and the temperature is not too low, SDA becomes a preferred and highly effective SO_2 control option. It is expected that retrofitting the facilities with SDA would eliminate the need for the existing Venturi rod scrubbers used to control PM on most of the taconite furnaces, thus reducing water consumption, gas stream moisture content, and PM emissions due to the higher efficiency of the baghouse.

Response: In the proposed rule, EPA stated that while the state's documentation for determining the technical feasibility of all SO_2 controls was inadequate, EPA did agree with Michigan's conclusion that additional SO_2 controls, including SDA, were not cost effective and therefore not BART. EPA has not changed its position on this issue in the final rule.

2. Comments Asserting That EPA's Baseline NO_X Emissions Are Arbitrary

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA's baseline NO_X assumptions are arbitrary. EPA failed to even consider the actual emissions from each taconite furnace, let alone use them as the starting point for calculating furnace-specific baseline emissions.

Response: EPA disagrees. In the case-by-case BART analysis for each subject taconite facility, EPA clearly listed the baseline actual annual emissions for each taconite furnace (see, e.g., Table V–B.24 for Hibbing Taconite (77 FR 49321)). In the initial stages of the BART development process, there was a significant lack of emissions data for the taconite facilities, as acknowledged by MPCA. However, additional monitoring and emission reporting from the taconite facilities enabled EPA to determine baseline NO_X emissions for each facility.

G. Comments Concerning EPA's Analysis of Low NO_X Burner Technology as NO_X BART

1. Comments Supporting EPA's Determination That Low NO_X Burners Are Technically Feasible

Commenter: National Parks Conservation Association.

Comment: NPCA commented that EPA's documentation of low NO_X burners demonstrated that significant, cost-effective emission reductions are afforded by their use on both straight-grate and grate-kiln furnaces. Despite this record, a taconite company raised several concerns about EPA's determination during the public hearing. The concerns were that a given control technology will not transfer between indurating furnaces of the same type, low NO_X burners will impact processing (product quality, fuel use, etc.), and there has been insufficient time to study various aspects or impacts of this technology.

These concerns are either misplaced or incorrect. As to the first point, low NO_X burners have been successfully applied to a wide variety of units, including power plants, refineries, chemical companies, and other industrial settings, which burn a wide variety of fuels, including gas and coal. There may be individual differences between the burners at different taconite units. As is always the case, customization to the particular unit will be required. However, the differences among taconite furnaces of the same type are not significant enough to conclude that this clearly robust technology could not be applied to one as well as the others. Indeed, technology transfer would be impossible without such basic assumptions.

As to the impact of low NO_X burners on operational parameters, EPA's FIP includes information addressing the points of product quality and fuel use. Minntac's experience demonstrates no impact to pellet quality, and after some adjustment, no increase in fuel use.

Finally, far from having had insufficient time to analyze these controls, the taconite facilities have had years in which to contact vendors, do engineering studies and modeling, and perform testing. The regional haze process has been delayed by many years at this point.

Response: EPA agrees with the commenter that low NO_X burners can be used to control NO_X emissions from both straight-grate and grate-kiln indurating furnaces used in the taconite processing industry. EPA also agrees with the commenter that based on data from taconite facilities where low NO_X

burners are either in use or planned product, quality should not be compromised.

Commenter: National Park Service.

Comment: NPS commented that it agreed with EPA's proposal that BART for NO_X for the taconite industry is low NO_X burners achieving a 70 percent reduction from both straight-grate and grate-kiln furnaces. The proposal for grate-kiln lines is supported by research sponsored by U.S. Steel. The proposal for straight-grate kilns is supported by Essar's testing, which demonstrated a 95 percent reduction in NO_X emissions for its new kiln.

Response: As the commenter points out, EPA has determined that low NO_X burners represent BART. However, EPA is setting an emission limit for each indurating furnace, not a 70 percent control requirement.

2. Comments Asserting That Low NO_X Burners Are Not Technically Feasibility on Straight-Grate Kilns

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA made an unsupported presumption that the low NO_X burner technology tested in a ¼-scale pilot test by Essar for a new source could be translated to all straight-grate furnaces.

Response: As indicated in test reports, NO_X emissions from taconite facilities are generated primarily by the burner. As burner design is the main factor contributing to NO_X emissions, EPA carefully reviewed results of emission tests of low NO_X burners for the different taconite furnace types and concluded that low NO_X burners are technically feasible for straight-grate and grate-kiln furnaces.

Supporting the feasibility of low NO_X burners on straight-grate kilns is a September 19, 2011 summary of findings presented to the Minnesota Pollution Control Board entitled ''Results of Testing at ¼-Scale of LE Low NO_X Burner Prototype for Straight-Grate Pelletizing Furnaces'' by Fives North American Combustion, Inc. (Fives) for Essar.[9] After successful bench-scale testing of Fives' low NO_X LE burners that achieved NO_X reductions greater than 70 percent in a straight-grate pelletizing furnace, Essar and Fives proceeded with a joint $2 million investment in a test rig to simulate a straight-grate pelletizing furnace. In the ¼-scale test rig, the cross-sectional area scaling was very representative of actual furnace geometry, as were the energy inputs and flows. This testing demonstrated an emission rate of 0.25 lbs NO_X/MMBTU, which is well below the proposed limit of 1.2 lbs NO_X/MMBTU. Fives concluded that NO_X emissions in the actual straight-grate furnace should be consistent with those measured in the ¼-scale test conditions. The feasibility of low NO_X burners on straight-grate kilns was also confirmed during a June 20, 2012 call between EPA and a national low NO_X burner manufacturer, Fives North America. Representatives from the manufacturing company were highly confident of the technical feasibility and application of their technology in straight-grate taconite furnaces. EPA agrees with this assessment.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA failed to conduct an independent, case-by-case feasibility analysis as required by the Step 2 of the BART Guidelines. Minnesota and Michigan previously conducted an extensive case-by-case BART analysis, eliminating low NO_X burners as technically infeasible for every taconite indurating furnace. Cliffs asserted that EPA has adopted a ''one-size-fits-all'' approach that is arbitrary and capricious. According to Cliffs, a proper feasibility analysis demonstrates that the technologies selected by EPA are infeasible for Cliffs' indurating furnaces because low NO_X burners are not technically feasible for straight-grate furnaces and grate-kiln furnaces. Cliffs asserted that the Fives burner designed for Essar cannot be used without source-specific engineering and retrofit design. Cliffs claimed that U.S. Steel spent two years modifying the prototype low NO_X burners installed on Lines 6 and 7 at its Minntac facility in an attempt to reach desired emission rates while combusting solid fuel, such as coal and biomass, but were ultimately unsuccessful. ArcelorMittal asserted that a proper feasibility analysis demonstrated that the technologies selected by EPA are infeasible for Minorca's indurating furnace. The commenters submitted information describing indurating furnaces, including the different types of furnaces, and explained what they believe are the differences between furnace types.

Response: EPA believes that its finding that low NO_X burners are technically feasible for both straight-grate and grate-kiln furnaces is supported by test results on various kiln configurations. Taconite furnaces are all based on one of two technologies. Straight-grate kilns are based on a Dravo-Lurgi design system, while grate-kiln furnaces are based on an Allis-Chalmers design system. EPA understands that each specific taconite furnace has unique operating requirements and specialized equipment. However, all furnaces share the same fundamental design style, either grate-kiln or straight-grate.

In assessing control technologies for a source category, EPA's BART Guidelines state that ''control alternatives can include not only existing controls for the source category in question but also take into account technology transfer of controls that have been applied to similar source categories and gas streams.'' 40 CFR part 51, appendix Y. The Guidelines go on to explain that ''[c]ontrol technologies are technically feasible if either (1) they have been installed and operated successfully for the type of source under review under similar conditions, or (2) the technology could be applied to the source under review.'' *Id.*

EPA has concluded that there is a clear case for technology transfer of low NO_X burner technology from grate-kiln furnaces to straight-grate furnaces. First, low NO_X burner technology has been clearly and successfully demonstrated and applied across various industries for decades. Second, EPA does not consider taconite furnaces to be particularly unique given their similar fundamental designs. In the case of taconite applications, the Fives' testing of a low NO_X burner prototype on a straight-grate furnace test rig provides reasonable assurance that full-scale applications, given the appropriate time for engineering and shakedown, will be both feasible and effective. In addition, U.S. Steel has already installed and is successfully operating multi-fuel low NO_X burners on two unique grate-kiln indurating furnaces at their Minntac facility. Prior to the proposed rule, U.S. Steel had already submitted permit applications to install low NO_X burner technologies on two additional furnaces at Minntac as well. U.S Steel has not indicated any issues with technical feasibility that will prevent the company from applying low NO_X burners at either its Keetac facility or the remaining furnaces at Minntac. In response to questions from EPA concerning the installation at Minntac, U.S. Steel described the modifications it made allowing for the successful use of low NO_X burners when burning either coal or natural gas.[10] In EPA's view, this information obtained directly from U.S. Steel rebuts Cliffs' claim that the

[9] Docket # EPA–R05–OAR–2010–0037–0039.

[10] Email from U.S. Steel to EPA dated September 19, 2012 (Docket # EPA–R05–OAR–2010–0037–0071).

prototype low NO_X burner tests were unsuccessful.

Nor is EPA persuaded by Cliffs and ArcelorMittal's arguments that the taconite furnaces at their facilities are unique to the extent that low NO_X burner technology cannot be applied. While EPA understands that a complete engineering analysis will be required to design furnace-specific low NO_X burners and that a shakedown period will be required to understand and optimize operations, EPA does not believe that the uniqueness of each individual taconite furnace proves technical infeasibility. The compliance times being finalized for each facility in this action account for engineering and shakedown time.

Over the years, the taconite industry has demonstrated that it can re-engineer furnaces to adapt to market changes (such as fuel prices), process changes (to accommodate variation in the type of ore being mined), and new technologies (such as heat recuperation systems).[11] It is clear that depending on the needs and priorities of each company, changes to the furnaces have and can be made.

With respect to ArcelorMittal's comment that a proper feasibility analysis would demonstrate that the technologies selected by EPA are infeasible for Minorca's indurating furnace, EPA relies on a September 27, 2012 report submitted by the commenter and authored by Fives North American titled ''Retrofitting Low NO_X Burners on the ArcelorMittal Minorca Straight-Grate Pelletizing Furnaces.'' [12] After review, EPA concludes that this report supports the Agency's conclusion that low NO_X burners are feasible at the Minorca facility. EPA therefore disagrees with ArcelorMittal's assertion that such technology is infeasible. Fives North American was engaged to perform an engineering study and recommend best options for retrofitting low NO_X burners at the pelletizing furnace at the Minorca plant in order to achieve NO_X emission rates below 1.2 lbs NO_X/MMBtu under expected operating conditions. Fives expressed confidence that the company's experience in manufacturing low NO_X burners, coupled with the successful results of the ¼-scale test at Essar, provided sufficient assurance that the technology could be applied at Minorca while preserving pellet quality and energy efficiency.

3. Comments Concerning EPA's Cost Analysis for Low NO_X Burners

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA presumed that low NO_X burners will cost $500/ton at every Cliffs facility despite the fact that none of these facilities identified low NO_X burners as technically feasible. EPA's $500/ton across-the-board cost estimate for NO_X control was neither explained in the proposed rule nor supported by the record.

Response: EPA did not presume that low NO_X burners will cost $500/ton at every Cliffs facility. EPA's proposed rule stated that ''[b]ased on the range of cost-effectiveness values provided, a conservative value of $500/ton will be used as the cost-effectiveness value for low NO_X burners'' (77 FR 49308, 49312). Data made available by U.S. Steel indicate the cost-effectiveness of low NO_X burners on Minntac's Line 6 indurating furnace was $441/ton of NO_X reduced with burning a 60 percent coal/40 percent natural gas fuel mix and $221/ton of NO_X reduced when burning 100 percent natural gas. Barr Engineering and Essar Steel Minnesota have estimated a cost-effectiveness of $370/ton of NO_X reduced for low NO_X burner technology on a planned straight-grate natural gas-fired furnace.[13] This furnace is being designed to meet a much more stringent emission limit of 0.25 lbs NO_X/MMBtu, compared to EPA's proposed limit of 1.2 lbs NO_X/MMBtu. Thus, EPA's value of $500/ton represents a high-end estimate of expected cost-effectiveness of the selected NO_X BART controls and is based on itemized costs and annual NO_X emissions reductions.

4. Comments Concerning the Effectiveness of Low NO_X Burners

Commenter: U.S. Steel.

Comment: U.S. Steel commented that, based upon its experience, the appropriate emission factor when burning solid fuels is 1.5 lbs NO_X/MMBtu, as opposed to the proposed NO_X limit of 1.2 lbs NO_X/MMBtu. U.S. Steel supplemented its comment on October 15, 2012 with data that support a limit of 1.2 lbs NO_X/MMBtu while burning natural gas and 1.5 lbs NO_X/MMBtu while burning solid fuels. U.S. Steel proposed that it be subject to the solid fuel limit, unless it utilizes 100 percent natural gas as a fuel for 30 consecutive days. The natural gas limit would then apply and it would remain subject to that limit until such time that solid fuels were utilized.

Response: Based on a review of the data submitted by U.S. Steel, EPA agrees to revise the NO_X limits in the final rule to 1.2 lbs NO_X/MMBtu while an indurating furnace is burning 100 percent natural gas and 1.5 lbs NO_X/MMBtu when fuels other than natural gas are being used. This revision primarily affects U.S. Steel Keetac, U.S. Steel Minntac, and United Taconite.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA made an unsupported presumption that an emission limit of 1.2 lbs NO_X/MMBtu is equivalent to a 70 percent NO_X reduction at every Cliffs facility and that all taconite furnaces emit NO_X at an uncontrolled baseline rate of 4.0 lbs NO_X/mmBTU in disregard of furnace variability.

Response: The NO_X emission limit that EPA proposed was 1.2 lbs NO_X/MMBtu on a 30-day rolling average. This emission limit was not based on a percent reduction requirement, but rather was based on a demonstration by U.S. Steel that low NO_X burners installed at the Minntac facility could achieve this emission limit. This limit is further supported for straight-grate kilns by successful testing of a low NO_X burner prototype at a 1/4-scale test rig at Essar. It is standard industry practice to perform pilot tests, in which the results of a smaller unit are scaled up to a full production unit. Furthermore, in this case the company was extremely confident that, based upon the results with the 1/4-scale test rig, a limit much lower than 1.2 lbs NO_X/MMBtu could be achieved on the full production unit. However, based on additional test data of operational low NO_X burners submitted by U.S. Steel for Lines 6 and 7 at Minntac, EPA is revising its proposed limit of 1.2 lbs NO_X/MMBtu on a 30-day rolling average. In the final rule, taconite indurating furnaces are subject to a limit of 1.2 lbs NO_X/MMBtu when only natural gas is burned and 1.5 lbs NO_X/MMBtu when fuels other than natural gas are used. Both of these limits are based on a 30-day rolling average.

H. Comments Concerning Non-Air Quality Impacts of Low NO_X Burners

1. Effect on Pellet Quality

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

[11] For example, during the Society of Mining Engineers' Annual Meeting in New Orleans, Louisiana from March 2–6, 1986, a presentation was given titled ''Design and Performance of the National Steel Pellet Plant High Temperature Heat Recuperation System'' (Docket # EPA–R05–OAR–2010–0037–0077). The presentation discussed a high temperature heat recuperation system that was installed at the National Steel Pellet Company facility in Keewatin, Minnesota. The system was similar to those installed at Cliffs' Empire facility and U.S. Steel's Minntac facility.

[12] Docket # EPA–R05–OAR–2010–0037–0037.

[13] Essar and Barr Presentation for Society for Mining, Metallurgy and Exploration, Duluth, Minnesota, April 2012 (Docket # EPA–R05–OAR–2010–0037–0039).

Comment: Cliffs commented that pellet quality cannot be maintained after the installation of low NO_X burner technology.

Response: EPA disagrees. Based on data supplied by U.S. Steel, EPA has concluded that there will be no pellet quality challenges resulting from the installation and operation of low NO_X burner technology. In an email sent by U.S. Steel to EPA on September 19, 2012, U.S. Steel indicated that pellet quality specifications have not changed since the installation of low NO_X burners, with zero off-spec shipments to date.[14] There have been no adverse pellet quality issues related to the installation and operation of the low NO_X burners.

U.S. Steel is required to maintain four pellet quality parameters, after tumble, compressions, reducibility, and low temperature disintegration (LTD), to meet customer specifications. U.S. Steel supplied EPA with data confirming that pellet quality parameters were acceptable after the installation of the Line 6 low NO_X burner (Table 1). U.S. Steel also included more recent quality parameter data to show that quality continues to remain acceptable. U.S. Steel noted that while compressions have decreased, this has been observed on all process lines, including those without low NO_X burners, thus indicating an issue with the feed material and not the burners. As also shown, U.S. Steel saw an improvement in reducibility for their pellets after the installation, which U.S. Steel attributes to improved heat distribution in the kiln from the low NO_X burner.

TABLE 1—LINE 6 PELLET QUALITY BEFORE AND AFTER THE LOW NO_X BURNER INSTALLATION

(Higher values represent better quality)

	After tumble	Compression	Reducibility	LTD
Before (11/1/10–4/3/11)	96.0	416	1.15	87.30
After (4/20/11–10/31/11)	96.0	417	1.22	85.58
1/1/12–9/1/12	96.2	410	1.22	86.11

2. Fuel Penalty and Energy Penalty

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that a fuel penalty and an energy penalty will result from the operation of low NO_X burner technology at its facilities. Additional fans will be required to increase primary air flow through the furnaces because the cooler air that is injected into the burner to control peak flame temperature must be heated. EPA made an unsupported presumption that low NO_X burners will cause no fuel or energy penalties or other emissions increases at any of the facilities.

Response: EPA disagrees. The installation and use of low NO_X burners is not generally considered to result in an energy penalty because one burner is merely being replaced by another. EPA recognizes that there is an increase in electricity needed for the operation of low NO_X burner fans to assist in movement of air through the system or to heat cooler air that is injected into the burner. These costs can in most cases simply be factored into the cost impacts analysis as they were in this case for both NO_X and SO_2 controls.

EPA believes that a low NO_X burner installation that is properly engineered and optimized for a given process will not result in a fuel or energy penalty. EPA's conclusion is based on the U.S. Steel Minntac Line 6 Low NO_X Main Burner & Facility NO_X Management Final Report (December 1, 2011),[15] which documented that low NO_X burners did not cause fuel penalties or other emission impacts. In addition, EPA consulted with a burner manufacturer and reviewed information provided by U.S. Steel regarding potential fuel impacts potentially associated with the operation of low NO_X burners at a taconite facility.[16] In this correspondence, U.S. Steel Minntac stated that there was a temporary 10.5 percent fuel increase after initial installation of the low NO_X burner on Line 7. However, during the shakedown period, the fuel increase was alleviated by process optimization (there was a learning curve due to the fact that this was the first low NO_X burner installed on an iron ore processing line) and balancing the process airflow. The waste gas fan on Line 7 was running at maximum before the burner installation and with the addition of combustion air, the process efficiency decreased and safety issues were created. To alleviate this condition, the waste gas fan airflow capacity was increased in February 2011 on Line 7 to balance the airflow out of the process. In April 2011, the Line 6 low NO_X burner was installed at U.S. Steel's Minntac facility. After applying what was learned during the shakedown period on Line 7, no increase in process fuel occurred after the installation. U.S. Steel clearly states in its September 19, 2012 email to EPA, ''The end result is there is no increase in process fuel due to the installation of the Line 7 low NO_X burner.'' [17]

In summary, based on available data, EPA believes that with process optimization, proper balancing of process air flows, and proper engineering, Cliffs and ArcelorMittal will be able to achieve similar fuel usage to U.S. Steel and will not incur either a fuel or energy penalty. EPA understands that each company will require a shakedown period similar to that experienced at U.S. Steel and has set the compliance schedules each facility accordingly.

3. Increases in the Emission of Other Pollutants

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that emissions of other pollutants will increase due to the installation of low NO_X burner technology.

Response: EPA has determined that there will be no increases in collateral pollutants due to the installation of low NO_X burner technology. In making this determination, EPA relied on the information supplied by MPCA, U.S. Steel, Coen Company, Inc., and Hatch, as described below.

In a letter dated November 3, 2009 from Coen Company, Inc., Coen stated:

> As we have indicated, the kiln burner that we proposed to supply for the above referenced project will not produce more CO as compared with what is being produced by the existing burner. The reason is: carbon monoxide (CO) is formed from lack of fast mixing of NO and oxidant (O_2) and chemical kinetics of the reaction that is highly dependent on temperature and O_2 concentration. The Coen multi-fuel burner is being designed for higher stoichiometric air (1.00) as compared with the existing burner which has a stoichiometric air of about 0.3 only. Hence, the Coen burner design

[14] Docket # EPA–R05–OAR–2010–0037–0071.

[15] Docket # EPA–R05–OAR–2010–0037–0039.

[16] U.S. Steel email to EPA dated September 19, 2012 (Docket # EPA–R05–OAR–2010–0037–0071).

[17] Docket # EPA–R05–OAR–2010–0037–0071.

promotes a higher amount of premixing of O_2 (oxidant) with fuel to reduce CO production. The flame temperature in both cases is high enough so the oxidation of CO is not kinetically limited. So the new burner design is not kinetically-limited for CO oxidation and the increased premixing in the primary zone will reduce CO emissions.[18]

Similarly, in a letter dated November 6, 2009 from Hatch to U.S. Steel, Hatch stated: ''Since USS Minntac plans to continue using their current fuels, fuel mixes, and fuel firing rates in conjunction with the low NO_X burners, with the exception of NO_X, Hatch does not anticipate any change in the emissions of applicable pollutants. Substantial reduction of NO_X emissions is also anticipated.''[19]

Finally, in a letter to U.S. Steel dated November 20, 2009, Owen Seltz, Engineer, Metallic Mining Section, Industrial Division, MPCA, stated:

> Generally, when a reduction in NO_X emissions from fuel combustion is proposed, the pollutant of concern for potential increase is carbon monoxide (CO). However, due to the design of the proposed low NO_X main burner, CO emissions are not anticipated to increase. Furthermore, as explained in the manufacturers' letters dated November 3, 2009, and November 6, 2009 and submitted to the MPCA in Minntac's November 12, 2009 letter, due to the design and operation of the proposed burner, CO emissions are expected to decrease.[20]

Based on these assurances, EPA is confident that there will be no increases in other pollutants as a result of the installation of low NO_X burner technology as Cliffs claims.

I. Comments Concerning Sulfur Dioxide (SO_2) BART Emission Limits

Commenter: National Parks Conservation Association.

Comment: NPCA commented that the proposed limits for six of the units (at Northshore, ArcelorMittal, and Hibbing) specifically do not apply when burning fuel oil. This loophole undermines the purpose of a BART analysis and contradicts the CAA requirement for BART to be met on a continuous basis. The final determination must include a limit that encompasses the burning of fuel oil at these facilities.

Response: Northshore, ArcelorMittal, and Hibbing are straight-grate indurating furnaces and do not burn coal. The primary fuel at these facilities is natural gas. As a result, these facilities have inherently low SO_2 emissions. Fuel oil is used only as a backup fuel. Due to its limited use, there was insufficient test data to set a corresponding SO_2 emission limit for periods when fuel oil is being burned. EPA set the SO_2 emission limits based on available data. For the straight-grate facilities, data was only available for periods in which the furnaces were combusting natural gas. In order to address this issue, EPA has added a regulatory requirement for affected sources to track their use of fuel oil and the resulting SO_2 emissions. This information will be used as the basis for any restrictions that will need to be added, e.g. sulfur content, on the use of fuel oil. These requirements are contained in §§ 52.1183(k)(4) and 52.1235(b)(2)(7).

Commenter: Michigan Department of Environmental Quality (MDEQ).

Comment: MDEQ commented that it had based its acceptance of Tilden's BART submittal for SO_2 on the lack of visibility impairment due to SO_2 emissions.

Response: In the final rule, EPA is no longer requiring add-on controls at the Tilden facility because Tilden has agreed to switch fuels to natural gas within one year of the effective date of this rule.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA should use the methods proposed by Minnesota to set emission limits, citing the limits the state set for the Hibbing Taconite and ArcelorMittal facilities. Cliffs contended that EPA's proposed SO_2 emission limits are unsupported and arbitrary. Cliffs objected to the limits set by EPA because they appear to be based on results from a single stack test, which represents a snapshot in time. Further, the limits ignore a significant amount of available data and bypass the statistical analysis conducted by MPCA.

Response: In the Agency's review of Minnesota's regional haze SIP supplement, EPA concluded that the limits for taconite facilities proposed by Minnesota do not accurately represent the current level of controls at the facilities. For ArcelorMittal and Hibbing Taconite, Minnesota appears to have set the limit in pounds of SO_2 per long ton (LT) of pellets produced based on a 30-day rolling average, using the Upper Predictive Limit (UPL) approach for normally distributed data. Minnesota did not demonstrate an accurate method to track or record LT of pellets produced. Therefore, the limits proposed by Minnesota are unenforceable. EPA also concluded that the annual testing requirement proposed by the state is insufficient to determine compliance with a limit based on a 30-day rolling average. In this action, EPA is finalizing SO_2 limits for taconite facilities in terms of lbs SO_2/hr based on a 30-day rolling average, which can be easily and accurately measured using the continuous emissions monitoring system (CEMS) required by this rule.

EPA does agree that the UPL approach is an appropriate method for setting the SO_2 limits. However, the available SO_2 emissions data for the taconite sources generally do not follow a normal, logarithmic, or gamma distribution. For this reason, the UPL should be determined using a nonparametric method, as set forth below. EPA used available stack test and CEMS data from 1990 to the present to recalculate the SO_2 limits for ArcelorMittal and Hibbing, based on the appropriate UPL equation for nonparametric data, in terms of lbs SO_2/hr on a 30-day rolling average as follows:

$UPL = x_m$ and $m = (n + 1)*(1 - a)$

Where:

x_m = value of the mth data point, when the data is sorted smallest to largest
m = the rank of the ordered data point, when data is sorted smallest to largest
n = number of data points
a = 95th percentile or 0.95

If m is not a whole number, a linear interpolation is calculated from the following equation:

$$UPL = x_m = x_{m_i.m_d} = x_{m_i} + 0.m_d\left(x_{m_i+1} - x_{m_i}\right)$$

Where:

m_i = the integer portion of m, i.e., m truncated at zero decimal places, and
m_d = the decimal portion of m

In this final rule, EPA is setting a limit of 38.16 lbs SO_2/hr for indurating furnace EU026 at ArcelorMittal. This limit must be measured on a 30-day rolling average and does not apply when the subject unit is burning fuel oil. For Hibbing, EPA is finalizing an aggregate limit of 247.8 lbs SO_2/hr based on a limit of 82.60 lbs SO_2/hr for each of the three affected lines: EU020, EU021, and

[18] Docket # EPA–R05–OAR–2010–0037–0071.

[19] Docket # EPA–R05–OAR–2010–0037–0071.

[20] Docket # EPA–R05–OAR–2010–0037–0071.

EU022. This limit is also measured on a 30-day rolling average and does not apply when the subject unit is burning fuel oil.

Because of limited stack test data for Hibbing and ArcelorMittal, these sources may, within 20 months of the effective date of this rule, calculate a revised SO_2 limit based on one year of hourly CEMS data, reported in lbs SO_2/hr, and submit such limit, calculations, and CEMS data to EPA. This limit shall be set in terms of lbs SO_2/hr, based on the non-parametric UPL equations set forth above, with compliance to be determined on a 30-day rolling average.

Commenter: Cliffs Natural Resources.

Comment: Cliffs submitted alternate SO_2 limits for Hibbing based on the UPL equation for normally distributed data.

Response: While EPA agrees that the UPL approach is the appropriate method for setting the SO_2 limits, EPA disagrees with the alternate SO_2 limits submitted by the Cliffs for the Hibbing facility. Cliffs did not specify whether its suggested limit was daily, instantaneous, or on a 30-day rolling average. But in any case, the limit submitted by Cliffs for Hibbing appears to be calculated using the UPL equation for normally distributed data, a p-value of 0.01 (which would represent a 99.5 percent confidence interval) and m = 1. This is incorrect. According to the UPL method, m represents the number of future runs (i.e., the number of future data points). As the data sets being used in the analyses are one-hour CEMS averages, the value of m should be 720 (30 days times 24 hours) if the limit being set is a 30-day rolling average. Even if compliance is based on the average value of an annual performance test rather than a 30-day rolling average, Minnesota's annual performance testing requires 30 hourly data points, which would result in a value of 30 for *m.* Cliffs also appears to have combined all stacks for each line and averaged all test runs for each set of test data to arrive at one data point for each set of test data, resulting in only 10 data points rather than 720 to calculate the UPL.

In addition, although the raw test data provided SO_2 emissions levels in terms of lbs SO_2/hr, Cliffs calculated the UPL in terms of lbs SO_2/LT pellets and then converted the SO_2 limit back into lbs SO_2/hr by using the maximum design capacity of each line rather than the actual production data collected during testing.

Thus, EPA disagrees with this methodology. The alternate emission limit proposed by Cliffs is significantly higher than the limit that would result from the correct application of the UPL equation for normally distributed data. Further, some of the available data for the Hibbing facility are normally distributed, while other data are not. As noted previously, the available SO_2 emissions data for the taconite industry in general do not follow a normal, logarithmic, or gamma distribution. For this reason, EPA is using the nonparametric UPL equation to calculate the SO_2 emission limits.

Commenter: Cliffs Natural Resources.

Comment: Cliffs objected to the proposed 80 percent SO_2 reduction requirement for Northshore, noting that an SO_2 emission limit was also set for the facility. Cliffs contended that EPA failed to cite any justification for the requirement and failed to explain why an 80 percent reduction in SO_2 emissions should be required for Northshore when a similar reduction was not required for any other facility. Cliffs asserted that Northshore's SO_2 emissions have a de minimis impact on visibility, so imposing multiple layers of control requirements would be arbitrary and unnecessary.

Response: Northshore is subject to BART based on the visibility impacts that were described in the proposal rule. The document entitled ''Northshore Mining Company Analysis of Best Available Retrofit Technology (BART)'' submitted to MPCA on behalf of Northshore Mining states that ''WWESPs are currently in place on the furnace exhausts and are believed to remove 80 to 95 percent of the SO_2 in the exhaust.'' [21] Thus, 80 percent is on the low end of the removal efficiency range estimated by Northshore, not an arbitrary number selected by EPA. Further, in a CAA section 114 request to Cliffs and Northshore Mining, EPA requested copies of all stack tests conducted on any emissions unit for any reason, including all test runs, even if a full test series was not completed. In its response to EPA, Cliffs did not provide any SO_2 test data for the subject-to-BART furnaces at Northshore. Without this emissions data, EPA believes using Northshore Mining's prior estimate of 80 to 95 percent control efficiency on its furnace exhausts EPA to impose an 80 percent emissions reduction requirement on stacks SV101, SV102, SV103, SV104, SV105, SV111, SV112, SV113, SV114, and SV115 was appropriate.

Subsequent to the public comment period, Cliffs provided EPA with limited SO_2 emissions data for Northshore and proposed an aggregate limit of 39.0 lbs SO_2/hr based on a limit of 19.5 lbs SO_2/hr per line. Cliffs' proposed limit is slightly higher than the limit EPA calculated using the new data and the UPL equation for nonparametric data. However, EPA believes it is reasonable to set an aggregate limit of 39.0 lbs SO_2/hr, measured on a 30-day rolling average, and to require the source to recalculate this limit when CEMS data are available.

As stated previously, this limit does not apply when the facility is burning fuel oil. In order to address this issue, EPA has added a regulatory requirement for affected sources to track their use of fuel oil and the resulting SO_2 emissions. This information will be used as the basis for any restrictions that will need to be added, e.g. sulfur content, on the use of fuel oil. These requirements are contained in sections 52.1183(k)(4) and 52.1235(b)(2)(7).

In summary, this final rule establishes an aggregate SO_2 emission limit of 39.0 lbs SO_2/hour, measured on a 30-day rolling average, for Furnace 11 and Furnace 12 at Northshore. Within 20 months of the effective date of this rule, the owner or operator must calculate a revised SO_2 limit based on one year of hourly CEMS emissions data reported in lbs SO_2/hr and submit such limit, calculations, and data to EPA. This limit shall be set in terms of lbs SO_2/hr, based on the non-parametric UPL equations previously set forth by EPA, with compliance to be determined on a 30-day rolling average. EPA agrees with the commenter that an 80 percent reduction requirement is no longer needed because it is redundant in light of the final lbs SO_2/hr emission limit. Consequently, this final rule does not require an additional 80 percent emissions reduction requirement at Northshore.

Commenter: National Park Service and Cliffs Natural Resources.

Comment: NPS supported EPA's proposal to require FGD as BART for SO_2 at the United Taconite and Tilden facilities, agreeing with EPA's cost-effectiveness calculations.

Cliffs, on the other hand, disagreed with EPA's cost-effectiveness calculations for the United Taconite and Tilden facilities. Subsequent to the public comment period, Cliffs proposed switching fuels as an alternative to installing FGD scrubbers. Cliffs proposed a combined limit of 529 lbs SO_2/hr for Lines 1 and 2 at the United Taconite facility, with compliance to be determined on a 30-day rolling average, beginning in 54 months. To meet this limit, the United Taconite furnaces will burn low-sulfur fuels, including increased use of natural gas. For Tilden, Cliffs proposed switching operation to

[21] Docket # EPA–R05–OAR–2010–0037–0034 (p. 24).

100 percent natural gas within 12 months with an emissions limit to be set after a year of CEMS data become available.

Response: Subsequent to the proposed rule, Cliffs has agreed to a federally enforceable aggregate emission limit of 529 lbs SO_2/hr, based on a 30-day rolling average, at United Taconite, based on the use of low-sulfur fuels. Cliffs has also agreed to convert to the use of 100 percent natural gas at Tilden. Because Tilden will now be restricted to the use of 100 percent natural gas, requiring the installation of SO_2 controls is no longer economically feasible or necessary. Similarly, in light of the reduction in SO_2 emissions that will result from the use of low-sulfur fuels at United Taconite, the cost effectiveness of additional controls has increased to $12,021 per ton for Line 1 and $7,680 per ton for Line 2. Thus, EPA believes that the installation of such controls is no longer economically feasible. In addition to the emission limit proposed by Cliffs, to ensure the use of low-sulfur fuels and SO_2 reductions resulting from the use of low-sulfur fuels at United Taconite, EPA is also requiring that the facility burn either natural gas or a blend of natural gas and coal. EPA is also establishing a limitation on the coal to be used by requiring the coal have a sulfur content no greater than 0.60 percent sulfur by weight based on a monthly block average. The requirement for a sampling and calculation methodology for determining this value is contained within the monitoring plan as required in section 52.1235(e)(8)(x). In summary, EPA is no longer requiring FGD at United Taconite and Tilden as BART for SO_2 in this final rule.

Commenter: U.S. Steel.

Comment: U.S. Steel proposed several alternate lbs SO_2/hr limits for its Minntac facility. These limits were calculated by applying a 99 percent confidence interval utilizing three years of CEMS data. U.S. Steel also proposed alternate limits for producing flux versus acid pellets due to scrubber inefficiencies during acid pellet production.

U.S. Steel proposed, as its first choice, an aggregate limit of 498 lbs SO_2/hr, on a 30-day rolling average, when all five lines are producing flux pellets; an aggregate limit of 630 lbs SO_2/hr, on a 30-day rolling average, when Lines 3–5 are producing acid pellets and Lines 6 and 7 are producing flux pellets; and an aggregate limit of 800 lbs SO_2/hr, on a 30-day rolling average, when all five lines are producing acid pellets. U.S. steel also proposed partially aggregated limits and line-by-line limits for acid pellets and flux pellets. Finally, U.S. Steel proposed that the limit for acid pellets be in effect during acid production and for 30 days thereafter due to the 30-day rolling average.

Response: EPA compared the limits proposed by U.S. Steel to the limit EPA calculated with the non-parametric UPL method and found them to be comparable. EPA also agrees with the need for a higher limit for acid pellet production.

Therefore, in this final rule, the SO_2 emission limits for U.S. Steel's Minntac facility are 498 lbs SO_2/hr on Lines 3–7 when all lines are producing flux pellets; 630 lbs SO_2/hr when Lines 3–5 are producing acid pellets and Lines 6 and 7 are producing flux pellets; and 800 lbs SO_2/hr on Lines 3–7 when all lines are producing acid pellets. All limits are calculated on a 30-day rolling average.

However, EPA does not agree that the limit for acid pellets should apply during acid production and for 30 days thereafter and thus has not made this change in the final rule. The emission limit for a given 30-day rolling average period will be calculated using a weighted average as follows:

$$L_{30} = \frac{498n_f + 630n_{af} + 800n_a}{30}$$

Where:

L_{30} = the limit for a given 30-day averaging period

n_f = the number of days in the 30-day period that the facility is producing flux pellets on Lines 3–7

n_{af} = the number of days in the 30-day period that the facility is producing acid pellets on Lines 3–5 and flux pellets on Lines 6 and 7

n_a = the number of days in the 30-day period that the facility is producing acid pellets on Lines 3–7

Commenter: U.S. Steel and Cliffs Natural Resources.

Comment: Cliffs and U.S. Steel commented that it is inappropriate to use a seven percent oxygen correction for emission limits that are not concentration based.

Response: EPA agrees with the commenters that the use of a seven percent oxygen correction is not necessary when the subject-to-BART facilities elect to comply with an emission limit measured in pounds of pollutant per million British thermal units or pounds of pollutant per hour.

Commenter: U.S. Steel.

Comment: U.S. Steel requested that the pH and SO_2 removal efficiency limits for its Keetac facility be deleted because they are redundant with the lbs SO_2/hr limit.

Response: EPA agrees with U.S. Steel and has deleted the pH and SO_2 removal efficiency limits from the final rule.

Commenter: Leech Lake Band of Ojibwe.

Comment: At United Taconite and Tilden, limiting SO_2 to 5 parts per million by volume or requiring the facilities to meet a 95 percent reduction requirement, on a 30-day rolling average, using dry FGD is achievable and cost-effective.

Commenter: Red Cliff Band of Lake Superior Chippewas.

Comment: The Red Cliff Band supported EPA's proposed requirement for additional SO_2 controls in select facilities.

Commenter: National Tribal Air Association.

Comment: The Association agreed with using existing SO_2 controls for those taconite facilities where it would be cost prohibitive to convert to a different technology that would only achieve nominal SO_2 reductions. However, in the case of the United Taconite and Tilden facilities, the Association found it relatively inexpensive to use dry FGD to limit SO_2 to 5 parts per million by volume or to meet a 95 percent reduction requirement on a 30-day rolling average.

Commenter: National Park Service.

Comment: NPS supported EPA's proposal to require FGD as BART for SO_2 at the United Taconite and Tilden facilities, agreeing with EPA's cost effectiveness calculations and compliance schedule.

Response: EPA agrees with the commenters that under current operating conditions, FGD is a cost-effective control option for the grate-kiln furnaces at United Taconite and Tilden and represents BART. However, subsequent to the public comment period, Cliffs proposed switching fuels as an alternative to installing FGD scrubbers. Cliffs has since agreed to federally enforceable limits on the types of fuels that may be burned at these facilities. In this final rule, the United Taconite furnaces must burn a combination of natural gas and low-sulfur coal and Tilden will now burn 100 percent natural gas. Given these changes, EPA has determined that requiring the installation of SO_2 controls is no longer economically feasible or necessary.

J. Comments Concerning the Visibility Analysis and Visibility Impacts

Commenter: Fond du Lac Band of Lake Superior Chippewa.

Comment: Tables V–C.l0 to V–C.l5 of the FIP demonstrate the changes in visibility that could be expected from the use of low NO_X burners. While these are only predictions, the expected improvements in visibility in the

Boundary Waters Canoe and Wilderness Area, Voyageurs National Park, and Isle Royale National Park strongly support the use of this technology at the subject-to-BART taconite plants.

Response: EPA agrees that the BART emission limits have the potential to result in significant improvement in visibility at the affected Class I areas.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA did not conduct a proper analysis of visibility impacts.

Response: EPA disagrees. EPA's visibility estimates provide ample evidence that the visibility impacts of each subject-to-BART taconite facility are substantial enough to warrant the selected BART controls. EPA's responses to the individual criticisms raised by the commenters on our visibility analysis are discussed in further detail below.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that the proposed rule directly contravened the instructions given to EPA in *American Corn Growers* v. *EPA.* In particular, Cliffs asserted that EPA's method is a ''bifurcated'' approach to visibility that was rejected in that decision. In Cliffs' view, the *American Corn Growers* court rejected a bifurcated approach in which visibility impacts are treated differently than the other four BART factors. Cliffs noted that for each taconite source, EPA separated its analysis into two distinct sections. Section V.B. of the proposed rule analyzed the first four factors, while EPA separately analyzed visibility improvement in Section V.C. for whichever technology emerged from the four-factor analysis in Section V.B. Thus, in Cliffs' view, the real-world visibility impacts were, at most, a secondary consideration that could not have influenced the evaluation of BART alternatives.

Response: EPA disagrees. The ''bifurcation'' referred to in the *American Corn Growers* decision related to EPA's use of a regional, multi-source, group approach to determining the degree of visibility improvement, while analyzing the other four statutory factors on a source-specific basis. The *American Corn Growers* court held that the visibility analysis must not be treated differently and must be a source-specific analysis. Since that decision, EPA and states have consistently conducted the visibility prong of the five-factor analysis on a source-specific basis. In this instance, although EPA presented its visibility analysis in a separate section of the proposed rule, the Agency conducted the analysis on a source-specific basis consistent with the holding in *American Corn Growers.*

EPA also disagrees that visibility was a secondary consideration in its analysis. EPA's analysis shows that based on the all of the BART factors, including visibility, the selected controls are warranted. If highly reasonable and cost-effective controls had been available but visibility benefits were slight, EPA would have rejected those controls. Section V.B. of the proposed rule demonstrated that reasonable and cost-effective controls were available. Section V.C. then showed that the visibility benefits to be obtained by requiring controls at each source were significant. Site-specific visibility improvement estimates for each source, derived from regional modeling conducted by the state of Minnesota on a variety of sources in the area, demonstrated that the significant reductions EPA proposed will produce significant visibility improvement in affected Class I areas.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that the approach EPA used in the proposed rule to estimate visibility impacts was arbitrary because it was not site-specific. Rather than extrapolating results from other facilities, EPA should have conducted modeling for the specific sources being regulated. The BART Guidelines instruct EPA to conduct modeling using CALPUFF or other appropriate dispersion models for each source and highlight the importance of source-specific features, such as stack flow rate and release height. EPA's use of ''visibility impact ratios'' derived from other sources is not consistent with EPA's own guidelines and provides results that are too unreliable for the purpose of a BART visibility analysis. In using the visibility impact ratio approach, EPA is holding itself to a lower standard than it would expect from a state air quality agency conducting a similar BART review.

Response: EPA's proposed rule acknowledged that there is greater uncertainty associated with the visibility impact ratio approach. Nonetheless, EPA finds this approach to be consistent the BART Guidelines allowance for ''appropriate'' models and believes the approach provides adequate indication of the visibility benefits of the evaluated controls.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA's visibility analysis was inconsistent with the statutory obligation to consider the degree of visibility improvement that is ''reasonably anticipated.'' In Cliffs' view, the use of ''possible'' impacts from an approach extrapolated from other facilities does not satisfy this statutory requirement to consider ''reasonably anticipated'' visibility impacts. In support of this view, Cliffs noted that EPA extrapolated visibility results from facilities other than taconite plants, such as an electric generating unit. Moreover, Cliffs found EPA's use of sources in the ''general area'' as unacceptable for the visibility analysis given that wind conditions would affect the taconite facilities differently than the facilities EPA relied upon. Additionally, the commenter noted differences in stack conditions between the taconite facilities being regulated and the sources that EPA relied upon.

Response: EPA's proposed rule acknowledged the uncertainty associated with the visibility impact ratio approach, but noted that despite the uncertainties, the Agency was confident that the information was adequate to assess potential visibility improvements due to emissions reductions at the specific facilities. While the results obtained from this approach are not expected to be as precise as source-specific CALPUFF modeling, they are based on visibility improvements derived from existing regional scale modeling that was conducted on sources in and around the northern Minnesota area. Given the geographic proximity of the taconite facilities to those that were modeled, EPA believes that the ratio approach provided adequate assurance of the visibility improvements that can be expected from the proposed emission reductions.

The results EPA obtained from its analysis are presented in terms of deciview (DV) change and change in the number of days above the 0.5 DV threshold. In the proposed rule's summary of the impacts at Boundary Waters, Voyageurs, and Isle Royale, these values ranged from 1.3 to 7.1 DVs of improvement with between 17 and 93 fewer days above the 0.5 DV threshold. Therefore, even if the ratio approach was over-estimating visibility improvements by a factor of two or three, the expected benefits would still be significant.

For example, Cliffs submitted CALPUFF modeling that showed the visibility improvements expected from the proposed rule for two of the seven facilities—United Taconite and Tilden. This modeling was only performed at the most impacted of the four affected Class I areas. EPA also notes that these were the only facilities for which new

scrubbers were proposed as BART for SO_2.

The results of the Cliffs' modeling for United Taconite and Tilden are presented below. The first delta DV value is the subtraction of the two 98th percentile impacts (base minus FIP).

TABLE 2—UNITED TACONITE PREDICTED VISIBILITY RESULTS FOR THE MOST IMPACTED AREAS

Scenario/year	Boundary Waters days over 0.5 DV	Boundary waters 98th percentile delta DV	Voyageurs days over 0.5 DV	Voyageurs 98th percentile delta DV
Difference/2002	36	0.594	17	0.454
Difference/2003	39	0.579	14	0.649
Difference/2004	33	0.545	17	0.439

TABLE 3—TILDEN PREDICTED VISIBILITY RESULTS FOR THE MOST IMPACTED AREAS

Scenario/year	Isle Days over 0.5 DV	Isle 98th percentile delta DV	Seney days over 0.5 DV	Seney 98th percentile delta DV
Difference/2002	2	0.099	3	0.146
Difference/2003	8	0.160	3	0.099
Difference/2004	2	0.112	2	0.125

The baseline emissions associated with the runs above totaled approximately 3,344 tons per year of SO_2 and 3,129 tons per year of NO_X for United Taconite, and approximately 1,563 tons per year of SO_2 and 2928 tons per year of NO_X for Tilden. The post-control emissions totaled approximately 233 tons per year of SO_2 and 2,435 tons per year of NO_X for United Taconite, and approximately 174 tons per year of SO_2 and 2,414 tons per year of NO_X for Tilden. The United Taconite emissions were based on CEMS data collected under a 100-percent coal-firing scenario, while Tilden emissions were based on stack test information collected under a primarily coal-firing scenario.

EPA believes that Cliffs' modeled baseline emission rates are low based on previous BART modeling and figures from the proposed rule. Expected post-control emissions reductions also appear to be underestimated. The proposed rule identified baseline emissions of approximately 5,330 tons per year for NO_X and 4,043 tons per year for SO_2 for United Taconite, and approximately 1,153 tons per year of SO_2 and 4,613 tons per year of NO_X for Tilden. The BART Guidelines recommend that sources use the highest 24-hour average actual emission rate, for the most recent three or five year period of meteorological data, to characterize the maximum potential benefit. By using a low baseline emission rate, Cliffs' modeling underestimates the emissions reductions that will be achieved by the installation of BART controls and the resulting visibility improvements. However, even though the overall SO_2 and NO_X reductions modeled by Cliffs were over 50 percent lower than the reductions projected in the proposed rule,[22] the results still showed significant visibility improvement at the Boundary Waters. Consequently, EPA believes that Cliffs' modeling provides further evidence that the visibility improvements predicted by the ratio approach are reasonable.

Using the CALPUFF model input and meteorological data files submitted by Cliffs, EPA, with substantial assistance from the National Park Service, re-ran the baseline and control-case scenarios for United Taconite and Tilden with data from the proposed rule. For United Taconite, the baseline emissions of SO_2 and NO_X reflect the emissions presented in the proposed rule. The United Taconite control emissions for NO_X were based on a 1.2 lbs NO_X/MMBtu emission limit and heat inputs of 200 MMBtu/hr for line 1 and 260 MMBtu/hr for line 2. The United Taconite control emissions for SO_2 were based on an approximate 94-percent reduction from the base case.[23] For Tilden, the baseline emissions for both visibility pollutants were also based on those contained in the proposed rule. The Tilden control emissions for NO_X were based on a conversion to 100 percent natural gas, with an 80 percent reduction from the baseline for SO_2 and a 65 percent reduction for NO_X. The results of this modeling are shown below, but only for the most impacted Class I area.

TABLE 4—EPA MODELING—UNITED TACONITE PREDICTED VISIBILITY RESULTS FOR THE MOST IMPACTED AREA

Scenario/year	Boundary Waters days over 0.5 DV	Boundary Waters 98th percentile delta DV
Difference/2002	80	1.316
Difference/2003	71	1.223
Difference/2004	62	1.358

TABLE 5—EPA MODELING—TILDEN PREDICTED VISIBILITY RESULTS FOR THE MOST IMPACTED AREA

Scenario/year	Seney days over 0.5 DV	Seney 98th percentile delta DV
Difference/2002	0	0.320
Difference/2003	0	0.206
Difference/2004	1	0.165

Again, EPA's CALPUFF modeling shows significant visibility improvement can be expected due to the installation of BART controls at United Taconite and Tilden. EPA believes that these results lend additional support to the accuracy of the visibility analysis that was performed for all facilities in the proposed rule. EPA stands by the results of its ratio approach and believes that it produced reasonable results for the sources examined.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

[22] This 50 percent discrepancy applies to United Taconite.

[23] EPA notes that the control emissions for SO_2 at United Taconite differ between those modeled and those that will be achieved based on the final rule because EPA is no longer requiring FGD as a result of the switch to low-sulfur fuels at the facility. This change will result in higher controlled emissions and would be expected to lower the visibility improvements demonstrated in the model slightly.

Comment: Cliffs commented that the proposed rule failed to properly integrate the visibility analysis with cost considerations and that EPA should have identified the costs of controls relative to the visibility improvement using a $/DV metric. In support of this view, Cliffs provided data showing that the costs per DV improvement are very high at two of its facilities: $65 million per DV at United Taconite and $140 million per DV at Tilden. Finally, Cliffs noted that FLMs have cited a threshold of $20 million per DV in correspondence with states, and that any figure beyond this threshold constitutes excessively high costs for the degree of visibility improvement achieved.

Response: EPA disagrees that a cost per DV analysis was required. The BART Guidelines do not require EPA or the states to conduct such an analysis when evaluating the visibility improvement factor. While the BART Guidelines suggest cost per DV as a possible parameter for consideration, its use is entirely discretionary. There are numerous examples of BART analyses conducted by states and EPA that have not calculated this metric.

Moreover, EPA believes that Cliffs' comment underestimates the visibility impacts from the two facilities that were modeled, leading to erroneous cost per DV figures. As was explained in detail in the response to the previous comment, Cliffs substantially underestimated the baseline emission rates at United Taconite and Tilden, which in turn resulted in emissions reduction estimates that are also too low. The BART Guidelines recommend that the highest 24-hour average actual emission rate, for the most recent three or five-year period of meteorological data, be used to calculate the maximum potential benefit. Overall, the emissions reductions predicted by Cliffs' modeling analysis were less than 50 percent of the emissions reductions projected by EPA for United Taconite.

Finally, Cliffs' reference to the $20 million per DV threshold is misleading. The FLMs recommend that cost per DV be calculated cumulatively to include improvements at all affected Class I areas. Cliffs' analysis, on the other hand, only included visibility improvement at a single Class I area, thereby inflating its total cost per DV figures.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that NO_X-related visibility improvements should be discounted because nitrate visibility impacts peak in the winter and winter-time visitation at the affected Class I areas is significantly less than during other times of the year. Cliffs noted that the BART Guidelines allow for consideration as to whether impacts occur ''during the tourist season.''

Response: EPA agrees that nitrate impacts are more dominant in the winter. Nonetheless, daily nitrate impacts from April through October are not trivial. EPA also agrees that the BART Guidelines allow states to consider the timing of impacts in addition to other factors related to visibility impairment. However, states are not required to do so, and to our knowledge, neither Michigan nor Minnesota did so in their visibility analyses. EPA is not required to substitute a source's desired exercise of discretion for that of the states. Furthermore, when promulgating a FIP, EPA stands in the shoes of the state. In that capacity, EPA is not required to consider the seasonality of impacts and has chosen not to do so here. Taking into account visitation contradicts the goal of the regional haze rule of improving visibility on the 20 percent best and worst days. Indeed, EPA believes that the experiences of visitors who come to Class I areas during periods other than the peak visitation season are important and should not be discounted.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs cited a number of other flaws in EPA's overall approach to visibility that it believed led to unreliable or overstated impacts from the taconite facilities. First, Cliffs asserted that EPA used natural visibility conditions that were ''too clear, excluding conditions such as fires, which had the effect of overstating the impacts of the facilities modeled relative to natural conditions. Second, Cliffs asserted that the chemistry in the current EPA-approved version of CALPUFF, as well as regional photochemical models such as CAMx, overestimates the impact of NO_X emissions on visibility impairment. Cliffs argued that this is especially true for winter nitrate haze due to the models' static predictions of ammonia background concentrations that should vary seasonally to be in line with monitored observations. As a result, Cliffs concluded that the NO_X emission reductions that will accompany the installation of BART are being improperly credited with visibility improvements that will not occur in the Minnesota and Michigan Class I areas. Finally, Cliffs cited real-world monitor studies as evidence that large sources that curtailed or shut down operations had little effect on visibility monitors. The first of these studies evaluated the changes in visibility monitoring at the Boundary Waters during periods of low operation at the taconite facilities during 2009. The second study evaluated changes in visibility monitoring at the Grand Canyon after shutdown of the Mohave Power Plant.

Response: EPA disagrees with these purported flaws in our approach, many of which have been raised in the context of other states' BART determinations. Regarding the issue of natural background conditions, similar issues were addressed in EPA's action on the North Dakota regional haze SIP (77 FR 20909, April 6, 2012). EPA recognizes that variability in natural sources of visibility impairment cause variability in natural haze levels as described in the Agency's ''Guidance for Estimating Natural Visibility Conditions under the Regional Haze Rule.'' [24] Progress toward natural visibility in Class I areas includes improvement toward natural conditions for the 20 percent worst days and no degradation of visibility on the 20 percent best days. The use of the 20 percent worst days in the calculation of the uniform rate of progress takes into consideration visibility impairment from wild fires, windblown dust, and other natural sources of haze. For the evaluation of visibility impacts for BART sources, however, EPA recommends using the natural visibility baseline for the 20 percent best days for comparison to the ''cause or contribute'' applicability thresholds. This estimated baseline is reasonably conservative and consistent with the goal of attaining natural visibility conditions. While EPA recognizes that there are natural sources of haze, the use of the 20 percent worst days is inappropriate for the ''cause or contribute'' applicability thresholds. For example, if visibility impacts were evaluated in comparison to days with very poor natural visibility resulting from nearby wild fires or dust storms, the impacts of BART sources would be significantly reduced relative to these

[24] Guidance for Estimating Natural Visibility Conditions Under the Regional Haze Rule, U.S. Environmental Protection Agency (September 2003), available at *http://www.epa.gov/ttncaaa1/t1/memoranda/rh_envcurhr_gd.pdf.* ''Natural visibility conditions represent the long-term degree of visibility that is estimated to exist in a given mandatory Federal Class I area in the absence of human-caused impairment. It is recognized that natural visibility conditions are not constant, but rather they vary with changing natural processes (e.g., windblown dust, fire, volcanic activity, biogenic emissions). Specific natural events can lead to high short-term concentrations of particulate matter and its precursors. However, for the purpose of this guidance and implementation of the regional haze program, natural visibility conditions represents a long-term average condition analogous to the 5-year average best- and worst-day conditions that are tracked under the regional haze program.'' Guidance at 1–1.

poor natural visibility conditions and would not be protective of natural visibility on the 20 percent best days.[25]

In regards to Cliffs' comment on atmospheric chemistry, the approach used by EPA in the proposed rule relied on regional-scale modeling conducted by MPCA where ammonia values varied temporally and spatially. This is in contrast to the approach used in the CALPUFF modeling submitted by Cliffs where a constant 1 ppb monthly average ammonia value was used. While ammonia data is not available for the vicinity of the sources of interest, data is available for sites located in the Class I areas (Fernberg, MN) as well as for sites to the south more representative of northern Wisconsin and southern Minnesota.[26] The available Fernberg ammonia data includes several years of information and has an overall two-week average value of about 0.5 ppb with several two-week periods over 1 ppb. The Perkinstown site located in northern Wisconsin is in an area combining forest, grassland, and agricultural uses and has an overall two-week average ammonia concentration of about 1.5 ppb with several two-week periods over 1.5 ppb. Consequently, the value of 1 ppb used in the modeling submitted by Cliffs is most likely representative of the ammonia concentration in the vicinity of the sources of interest. However, EPA again reiterates that Cliffs' largely baseless criticism of CALPUFF does not apply to the Agency's ratio approach, which relied on regional-scale modeling conducted by the states that included temporal and spatial variations in ammonia concentrations.

Finally, regarding Cliffs' comment concerning the two monitoring studies, EPA does not find either of the studies to be persuasive with respect to the impacts of taconite sources on visibility. The first study asserts that the 2009 decline in taconite production and a negligible change in visibility are evidence that further controls are not warranted. EPA believes that that it is very difficult to discern any effect from a one-year study and points out that the production decline (as shown in Table 6 below) occurred during the spring and summer, seasons for which Cliffs recognized that nitrate formation is less important.

TABLE 6—MINNESOTA 2009 PELLET PRODUCTION BY MONTH

[Tons][27]

Month	Pellet production (tons)
January	2,205,578
February	1,900,003
March	1,620,343
April	958,479
May	181,739
June	340,707
July	849,363
August	1,158,447
September	1,723,336
October	2,008,864
November	2,038,844
December	2,093,403

The second study Cliffs cited, which reviewed visibility monitoring before and after the shutdown of the Mohave Power Plant in Nevada, is a paper by Terhorst and Berkman (Atmospheric Environment, 2010). This paper was subsequently examined and commented on in a paper by White et al. (Atmospheric Environment, January 2012). There, White et al. state: ''[Terhorst and Berkman]'s technical analysis is thoughtfully conceived and executed, but is misleadingly presented as discrediting previous studies and their interpretation by regulators. In reality the Terhorste Berkman analysis validates a consensus on MPP's (Mohave Power Project) visibility impact that was established years before its closure, in a collaborative assessment undertaken jointly by Federal regulators and MPP's owners.'' Additionally, EPA has responded to similar comments regarding the Mohave Power Project study and EPA's visibility modeling in our action on the North Dakota regional haze SIP (77 FR 20894, April 6, 2012).[28]

Finally, EPA believes that Cliffs, while identifying purported areas where EPA's models exaggerate visibility impacts, overlooks that there are aspects of the models that have been suggested by commenters on our regional haze actions as under-predicting impacts. Some examples include use of 24-hour average emissions impacts. Some examples include use of 24-hour average emissions rather than hourly emissions, use of monthly average relative humidity rather than daily humidity, and use of 98th percentile results to compare to the threshold instead of the highest day.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that certain control options should be rejected because visibility modeling does not indicate the installation of controls will result in a perceptible visibility improvement.

Response: EPA's disagrees. As explained in the proposed rule, EPA believes that the application of BART will result in perceptible improvements in visibility. Nonetheless, the perceptibility of visibility improvement is not a prerequisite to the selection of a control option as BART. The preamble to the BART Guidelines state, ''Even though the visibility improvement from an individual source may not be perceptible, it should still be considered in setting BART because the contribution to haze may be significant relative to other source contributions in the Class I area. Thus, we disagree that the degree of improvement should be contingent upon perceptibility'' (70 FR 39104, 39129, July 6, 2005).

Minnesota's regional haze SIP described the importance of the contribution of sources in northeastern Minnesota to visibility impairment in the Boundary Waters and Voyageurs national parks. Accordingly, Minnesota developed a special plan for the northeast region of the state. Minnesota explained:

This area was targeted for controls under the long-term strategy for several reasons. First, the MPCA's analysis of 2002 emissions from the top 18 emitting point sources within Minnesota show that sources from this region make up just ⅓ of the total emissions but provide ⅔ of the total visibility impact. (See Chapter 8, on modeling.) Therefore, they have a much larger impact on the Class I areas than emissions from farther away. In addition, the taconite facilities may be currently uncontrolled or under-controlled for SO_2 or NO_X, and on the books control strategies are projected to cause fewer

[25] As part of the settlement of a case brought by the Utility Air Regulatory Group challenging the BART Guidelines, EPA agreed to issue guidance clarifying that states may use either the 20 percent best days or the annual average in estimating natural visibility in the evaluation of a BART source's impacts. This guidance makes clear that states have the flexibility to use either approach in estimating natural background conditions. Here, the states were not required to use the annual average and did not. Similarly, in issuing a FIP, EPA is not required to use the annual average either and chose not to in this case.

[26] National Atmospheric Deposition Program, *http://nadp.sws.uiuc.edu/AMoN/sites/data/.*

[27] Source: Minnesota Department of Revenue, Minerals Tax Division, Eveleth, MN.

[28] There, EPA stated: ''In addition, the study by Terhorst and Berkman does not convince us that use of CALPUFF modeling is inappropriate for this action or that the CALPUFF modeling results should be ignored. A model such as CALPUFF essentially holds constant a number of factors in order to isolate the impacts of a single source. As acknowledged by the study's authors, it is extremely difficult in observational analyses to sufficiently control for all factors, including emissions from other sources, to be able to isolate the impacts of closure of a facility, especially one located over 100 km from the Class I area at issue. In fact, the paper notes that coarse soil mass impacts are an omitted variable in the analytical analysis and that changes in those emissions may have counteracted the visibility improvements expected from the source shutdown'' (77 FR 20894, 20910).

emission decreases in this region than in the remainder of the state.[29]

Thus, Minnesota's assessment supports the determination that taconite facilities contribute to regional haze even if individual impacts are modeled below thresholds for human perceptibility.

K. Comments Concerning Requirements for Continuous Emissions Monitoring

1. Comments in Support of Continuous Emissions Monitoring Requirements

Commenter: National Parks Conservation Association.

Comment: EPA's proposed rule includes the use of CEMS as a part of the monitoring, recordkeeping, and reporting necessary to ensure the continuous application of BART. Such monitors provide more accurate data about the emissions from taconite facilities than previous methods. As such, they are essential for tracking emissions and determining their impact on the surrounding communities. Moreover, CEMS can be used as pollution control tools by helping to fine-tune combustion and process controls in a way that periodic stack tests and predictive monitoring cannot. As such, we fully support the required application of CEMS on these sources.

Commenter: National Park Service.

Comment: NPS is especially pleased that EPA has proposed testing and CEMS requirements for the subject taconite plants. Our discussions with U.S. Steel, which has led the way in installation and operation of CEMS on indurating furnaces, have led to the mutual agreement that CEMS data is essential for the proper tuning and operation of combustion controls to reduce NO_X emissions. Minnesota's regional haze SIP discussed the need for requiring CEMS for the taconite industry to monitor NO_X for a number of reasons. These included setting BART limits, allowing facilities to efficiently manage combustion, resulting in less fuel use and fewer emissions, and tracking progress under the Northeast Minnesota Plan. CEMS data is also essential for assessing the effectiveness of SO_2 controls and should provide an indication of changes in fuel use or sulfur content for use in future regional haze planning.

Commenter: Leech Lake Band of Ojibwe.

Comment: The Band agreed with the implementation of CEMS. CEMS will provide the facility and regulators with real time data to ensure that the controls in place are operating at optimum levels, thus saving money for the facility and achieving the required control requirements.

Commenter: National Tribal Air Association.

Comment: The Association found requiring CEMS to be a good complement to the NO_X and SO_2 controls at taconite ore processing facilities. CEMS will provide these facilities with an accurate and timely emissions count of NO_X and SO_2 and will immediately alert owners to any deviations from such emissions that might require correction.

Response: EPA acknowledges the comments in support of the proposed CEMS requirements. EPA is finalizing the CEMS requirements as proposed.

2. Comments Questioning EPA's Continuous Emissions Monitoring Requirements

Commenter: U.S. Forest Service.

Comment: In the Minnesota regional haze SIP, a statement is made that CEMS ''would apply to NO_X emissions at the facilities burning natural gas and to SO_2 emissions at facilities burning high sulfur fuels.'' We do not understand why the NO_X CEMs are only being required at natural gas-fired furnaces. Those furnaces burning fuels other than natural gas will also investigate NO_X control strategies and therefore will need the CEMs.

Response: EPA is requiring CEMS for all seven subject-to-BART taconite facilities. Each taconite facility must monitor its NO_X and SO_2 emissions with CEMS.

Commenter: U. S. Steel and Cliffs Natural Resources.

Comment: Cliffs and U.S. Steel stated that it is inappropriate to require the use of a diluent monitor as part of the monitoring requirements under the proposed rule.

Response: The need to install a diluent monitor is source-specific and depends on a variety of factors, including the choice of monitors installed. While some subject-to-BART facilities may not need to install a diluent monitor, other facilities may because of their stack characteristics, operating conditions, and monitors chosen. Because the final rule covers a variety of facilities, EPA feels it is appropriate to require a diluent monitor only for those facilities needing such a unit. Therefore, the final rule has been revised to provide the facilities with an option to demonstrate in their monitoring plans whether a diluent monitor is needed or not.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that EPA failed to adequately support its CEMS requirements and that EPA should allow flexibility in the monitoring requirements. More specifically, EPA should require ''a comparable method of emission estimation,'' such as parametric emissions monitors, for each subject-to-BART source. Cliffs stated that EPA's unsupported generalized statements do not provide adequate justification for the Agency's burdensome monitoring determination.

Response: EPA clearly states in its technical support for the proposed rule that CEMS are the best method for demonstrating compliance because of the variability in furnace operations and variable fuel usage across the furnaces. The variable fuel feeds and feed material content can impact overall emissions from the process and thereby create the need for continuous monitoring of emissions that impact visibility. Parametric emissions monitor systems are an option for processes that operate at stable, non-variable conditions, but are not appropriate for taconite units. CEMS provide a continuous record of data that can also be used by the facility owner or operator to monitor emissions on a real-time basis. The installation and operation of CEMS and the real-time evaluation of the CEMS data provide several benefits to a facility that can directly lead to practices that reduce emissions during all periods of operation.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that CEMS do not constitute proven monitoring technology with respect to taconite furnaces.

Response: EPA disagrees. CEMS technology for NO_X and SO_2 is proven in multiple industries, including the taconite industry. U.S. Steel is successfully using CEMS at its Minntac and Keetac facilities currently, and any problems experienced with the initial installation of CEMS have been resolved. EPA expects facilities will need some time to learn CEMS operation and how it impacts process operations. EPA has incorporated additional time into the final rule before certification is required to allow each facility to learn how CEMS operates.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs asserted that the requirement to install CEMS should be limited to waste stacks. Cliffs proposed to use stack testing data to determine the percent distribution of NO_X between the hood-exhaust header and the waste-gas header to determine compliance. Cliffs also stated that the use of a single

[29] Minnesota's 2009 regional haze SIP submittal at 96 (Docket # EPA–R05–OAR–2010–0037–0002).

CEMS per furnace is consistent with Minntac, which currently utilizes NO_X and SO_2 CEMS only.

Response: EPA disagrees with Cliffs that the use of CEMS should be limited to waste stacks only. Available information shows that emissions from hood-exhaust stacks can equal about 29 percent of total furnace emissions. Given that nearly one-third of the furnace emissions are from hood exhausts (and can vary), EPA believes that it is appropriate to require CEMS on both waste stacks and hood-exhaust stacks.

Cliffs incorrectly assumed that CEMS are required at each stack venting to the atmosphere. EPA feels it is important to obtain continuous and representative measurements of emissions from subject-to-BART units. If representative measurements of total emissions from subject-to-BART units can be obtained by installing CEMS in a single vent just prior to the common header for the waste-gas stacks and hood-exhaust stacks, then this final rule requires only two CEMS on each stack (one NO_X CEMS and one SO_2 CEMS) for a total of four CEMS, not ten. The initial monitoring plans required by this final rule will be prepared by the facilities and will provide a means through which an effective monitoring program will be put into place. These plans should include proposals for CEMS types, CEMS numbers, CEMS installation locations, QA/QC procedures, and any other topics and are submitted to EPA for review and approval or disapproval. The installation locations provided in these plans shall be determined based on the requirements of 40 CFR part 60, appendices B and F.

Commenters: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that requiring CEMS on emergency stacks is inappropriate.

Response: The requirement to install CEMS on emergency stacks depends on the frequency and duration of the use of the emergency stacks during emergency events. If emergency stacks are used on a daily or weekly basis, then emissions from those stacks could have an impact on annual emissions (and visibility) and should be tracked and recorded. If emergency stacks are truly used infrequently for quick releases, then a CEMS may not be necessary. This can be addressed by each facility on a case-by-case basis in its monitoring plan.

Commenters: Cliffs Natural Resources and ArcelorMittal Minorca Mine

Comment: Cliffs stated that the subject-to-BART facilities should be exempt from the applicable emission limits during startup, shutdown and malfunction events.

Response: EPA disagrees. The CAA requires sources to comply with applicable emission limits at all times, including during startup, shutdown and malfunction. See, e.g., *Sierra Club* v. *EPA,* 551 F.3d 1019, 1021 (DC Cir. 2008); *US Magnesium, LLC* v. *EPA,* 690 F.3d 1157, 1170 (10th Cir. 2012).

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine and U.S. Steel.

Comment: Cliffs commented that the requirement to develop and implement a corrective action program for excess emission events should be directed toward the emissions unit and not be part of the CEMS requirement.

Response: EPA agrees that the corrective action plan for excess emission events should be directed toward the emissions unit. The corrective action plan should establish procedures that operators will follow each time an excess emission event occurs (as identified through the use of real-time CEMS data). These procedures should outline steps to adequately identify causes of excess emissions, actions to be taken to minimize or eliminate those emissions, and evaluate and implement practices to prevent the causes of such excess emissions from reoccurring. The corrective action plan can be an independently developed plan or the procedures can be incorporated into an existing Quality Control Program Plan, corrective action plan, or other existing standard operating plan.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that the dates proposed for installing CEMS are infeasible and suggested an alternative compliance period of 18 months.

Response: EPA disagrees with the length of time Cliffs asserted is needed to design and install CEMS. EPA recognizes that a certain period of time will be needed if significant upgrades to stacks are necessary. However, the design and installation of a CEMS can be completed far more rapidly than the 18-month period suggested by Cliffs. EPA also believes it is inappropriate to consider the time needed for CEMS installation in a cumulative sequential manner as suggested by Cliffs. Design, engineering requirements, and upgrades to data acquisition systems can be performed at the same time as other activities required by the proposed rule.

EPA also recognizes that once CEMS are installed and operating, there will be a short period of time needed to optimize and become familiar with the system in order to certify the units. EPA believes that the entire process for CEMS installation can be successfully met within the time periods outlined in the proposed rule. However, in response to the comments received, the final rule provides an additional 30 days to certify the CEMS and perform the initial Relative Accuracy Test Audit of the CEMS. The anticipated dates for initial certification and the Relative Accuracy Test Audit must be included in the monitoring plan required by the rule.

Commenter: U.S. Steel.

Comment: U.S. Steel commented that it is overly burdensome to require redundant or backup monitoring systems to obtain emissions data during periods of primary CEMS breakdown, repair, calibration check, or zero span adjustment. U.S. Steel proposed to use data gap-filling procedures during those periods when data are not available from the CEMS due to these types of events.

Response: The purpose of including the requirement to use ''other monitoring systems approved by EPA'' is to obtain real-time emissions data during periods of primary CEMS breakdown, repair, calibration check, or zero span adjustment. The secondary data can be used to assure data availability and compliance on a continuous basis. However, the requirement for ''other monitoring systems'' does not mean that a second CEMS system is necessarily needed. Because the duration of these CEMS downtime events is typically short, each subject-to-BART facility can submit proposals for using parametric monitoring or engineering estimates as a surrogate for actual emissions monitoring during these CEMS events. EPA expects that CEMS will be operated at all times, including periods of process unit startup, shutdown and malfunction, except during the events identified above as described at 40 CFR 60.13(e).

EPA also disagrees with the suggestion that gap-filling procedures (i.e., data substitution) should be used for periods of CEMS downtime. Gap-filling procedures are appropriate under 40 CFR part 75 because it is a cap-and-trade program. This final rule is more appropriately related to regulations at 40 CFR part 60, where compliance with an emission limit (rather than annual caps) is required. 40 CFR part 60 prohibits the use of ''data substitution'' (i.e., gap-filling) because it does not provide accurate emission rates during the CEMS downtime.

Commenter: U.S. Steel.

Comment: U.S. Steel commented that it is not appropriate to require initial performance testing of subject-to-BART

facilities or units if the facility is operating a certified CEMS system on the affected units.

Response: EPA has re-evaluated the need for initial performance testing and agrees with U.S. Steel that it is not necessary to require such testing, for purposes of this rule, at facilities that are or will be operating CEMS when those CEMS will be used to determine compliance. The requirement for initial performance testing has been removed from the final rule. It is important to note that while initial performance testing is being removed for purposes of demonstrating compliance, subject-to-BART units must still be tested as part of the CEMS certification process, although this the certification process will typically not require a 30-day test.

L. Comments Concerning Compliance Schedules

Commenter: Leech Lake Band of Ojibwe.

Comment: The Band supported the installation of low NO_X burners and felt that the 1.5 years allowed for the initial installation, with additional burner installations to follow one year later, is a fair and progressive approach to control NO_X emissions.

Response: EPA agrees with the commenter that installing low NO_X burners is the appropriate approach. In response to additional information submitted by other commenters, however, EPA reviewed the proposed installation schedule has extended it by a number of months in the final rule, as discussed in more detail below.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs commented that the BART Guidelines require the states, or EPA when promulgating a FIP, to establish deadlines for compliance with BART emission limits no later than five years from the date of approval or promulgation. EPA's proposed rule, however, contains arbitrary compliance deadlines that are unreasonably short. Cliffs stated that it would take at least four and a half years for it to complete the required engineering, installation, and commissioning of low NO_X burners for a single furnace. ArcelorMittal stated that ''a minimum of 48 months would be necessary to complete this onerous process'' for its Minorca Mine facility.

Response: CAA section 169A(b)(2)(A) requires subject-to-BART sources to install BART and comply with any applicable emission limits ''as expeditiously as practicable.'' The Act defines this term to mean ''as expeditiously as practicable but in no event later than five years after * * * the date of promulgation.'' CAA section 169A(g)(4). This language does not indicate that a compliance schedule of five years is to be assumed. Rather, BART must be installed ''as expeditiously as practicable,'' meaning as soon as the source is capable of installing the controls and meeting the applicable emission limits.

In response to EPA's request for a detailed timeline of the steps required to install low NO_X burners on a taconite furnace, U.S. Steel provided the following information based on its actual experience with a previous install:

TABLE 7—U.S. STEEL'S ESTIMATE COMPLIANCE SCHEDULE

Task	Time
Detailed low NO_X burner engineering	6 months.
Prepare permit applicability determination	2 months.
Procure and manufacture low NO_X burner	8 months.
Install low NO_X burner	3 weeks.
Shakedown of low NO_X burner	6 months.
Total time	22 months, 3 weeks.

In addition to this information, ArcelorMittal included an attachment to its comments of a September 27, 2012 report by Fives North American titled ''Retrofitting Low NO_X Burners on the ArcelorMittal Minorca Straight-Grate Pelletizing Furnace.'' In that report, Fives states that to develop an engineering solution that complies with environmental requirements, it is important to allow sufficient time (approximately four to eight months) for engineering analysis and (possibly) testing. The schedule should allow for an additional seven months for fabrication and delivery, followed by an additional two months for installation and commissioning. This amounts to an estimated time of 17 months to achieve compliance.

Based on the timeline provided by U.S. Steel, the vendor estimate from Fives, and concerns from the commenters, EPA is allowing 26 months for a company's first indurating furnace to comply with the final rule. This will allow each source sufficient time to perform an engineering analysis, prepare a permit applicability determination, manufacture and install the low NO_X burner, and allow for a shakedown period to achieve compliance after the low NO_X burner has been installed. This is eight months longer than the proposed compliance schedule, allowing for the additional time needed for a shakedown period.

The compliance schedule for additional indurating furnaces is being finalized as proposed. Specifically, a second line has an additional year to comply, for a total of 38 months from the effective date of the rule. A third line has two additional years to comply, for a total of 50 months from the effective date of the rule. This staggered installation schedule will minimize any potential impacts on production. EPA notes that U.S. Steel Minntac is following a shorter schedule consistent with the proposed rule. U.S. Steel Keetac will also follow a modified schedule. For more detail, see the comment below.

Commenter: U.S. Steel.

Comment: Due to the lead time associated with acquiring process fans at Keetac, which is estimated to be 52 weeks according to a third-party engineering firm working on the project, and the timing of the major outage schedule, which only occurs once per year, the potential exists to miss the timing window where the two sync up to meet the proposed schedule. Therefore, U.S. Steel requests an additional 12 months to the proposed schedule for installation. In addition, because this will be the first installation of this technology at Keetac, U.S. Steel requests an additional 6 months prior to compliance with the proposed emission limit to allow for a shakedown period to optimize the burner for NO_X reductions.

Response: EPA agrees with U.S. Steel that additional time is needed to procure new pre-heat fans and to achieve compliance after installation. In the final rule, Keetac has three years (36 months from the effective date of the

rule) for its single line to comply with the rule.

Commenter: U.S. Steel.

Comment: Due to timing of major outage schedules, U.S. Steel requests flexibility in the order of installation for Line 4 and Line 5 at Minntac. U.S. Steel agrees with the overall intent of the proposed schedule, but requests the option to select the order of installation of low NO_X burners at Lines 4 and 5.

Response: EPA agrees with the U.S. Steel's request to leave to the discretion of U.S. Steel the order of installation of low NO_X burners at Lines 4 and 5 at Minntac.

M. Comments Asserting That EPA Must Conduct Government-to-Government Consultation With the Tribes

Commenter: National Tribal Air Association (NTAA).

Comment: The Association understands that at the request of the Fond du Lac Band, EPA held a June 28, 2012 conference call with the region's Tribes to discuss the FIP. We appreciate EPA for doing this and highly recommend that the Agency hold similar calls with Tribes for other such actions. However, EPA must also honor its commitment to conduct formal government-to-government consultation in accordance with Executive Order (EO) 13175.

The Association disagrees with EPA's statement that the FIP ''does not have tribal implications, as specified in EO 13175. It will not have substantial direct effects on tribal governments. Thus, EO 13175 does not apply to this rule.'' The application of BART to taconite ore processing facilities that either are in close proximity to Tribes and their communities or are within Treaty-ceded territory areas maintaining Tribes' usufructary functions is a regulatory action that has Tribal implications. As such, EPA must conduct formal government-to-government consultation with Tribes.

There are also clear purposes for EPA to conduct formal government-to-government consultation with Tribes. First, it provides for more candid conversations between individual Tribes and EPA than would occur otherwise in a group meeting involving other Tribes. Second, each Tribe's circumstances are unique and must be treated as such by EPA. Group meetings would only give short shrift to these circumstances. Third, most cultural resources information is protected from release under statutory exemptions to the Freedom of Information Act. Discussion of such information as part of a group meeting risks its release to the general public and potentially endangers Tribal cultural sites and practices. Finally, the subject matter may be so unique, such as a dispute between an individual Tribe about whose cultural resources might be located within or near a taconite ore processing facility, that government-to-government consultation between the Tribe and EPA could provide the best opportunity for a resolution to the situation versus a group meeting where any number of issues might be discussed in a finite period of time.

Response: EPA acknowledges that this action may have tribal implications. EPA recognizes that Tribes may have significant interests in regulatory programs even if the potential Tribal impacts are not the types specifically identified in the Executive Order. In this case, EPA initiated consultation with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. While the Tribes ultimately chose not to engage in individual consultation, EPA did communicate with Tribal representatives to ensure that information was made available and that there was sufficient opportunity for questions and discussion. This effort is described in further detail in Section IV of this final rule. EPA appreciates the comments provided by the Tribes and NTAA on this rule, which will benefit Tribes through reduced pollution and improved visibility.

N. Comments Concerning Non-Air Quality Impacts of the Proposed Rule

Commenter: Cliffs Natural Resources.

Comment: Cliffs commented that significant environmental impacts will result if the rule is finalized as proposed. Cliffs stated that increased fuel combustion resulting from low NO_X burner application will result in increased emissions of the products of combustion. Cliffs added that EPA's proposed SO_2 controls also carry ancillary environmental consequences.

Response: EPA disagrees. The BART Guidelines recognize that environmental concerns become important when sensitive site-specific receptors exist and are impacted by byproducts of the control device. However, the fact that a control device creates liquid and solid waste that must be disposed of does not necessarily argue against that technology as BART. In this case, there are no such sensitive, site-specific issues. To avoid any such issues, EPA rejected the use of wet SO_2 scrubbing at taconite plants in Minnesota because wastewater from wet scrubbing had the potential to interfere with the production of wild rice.

Commenter: National Tribal Air Association.

Comment: The Association commented that Tribal traditional practices will benefit by controlling NO_X and SO_2 emissions from taconite ore processing facilities. Such benefits specifically relate to visibility, health, and acid deposition.

Not only does regional haze, which the FIP addresses, reduce the clarity, color, and visible distance that one can see, it marginalizes Tribal traditional practices that have existed since time immemorial. Many Tribes engage in traditional practices associated with sacred mountains, lakes, or other places that hold significance to them. Some of these practices are dependent on Tribal members being able to view and honor such icons that may be located many miles from a Tribe's lands.

A corresponding effect of NO_X and SO_2 emissions on Tribal traditional practices is on the health of Tribal members. Tribes are not immune from the health effects of NO_X and SO_2, such as asthma, bronchitis, and heart disease. In fact, they are more susceptible to these effects based on lifestyles. Many Tribes and their members spend considerable time outdoors engaged in Tribal traditional practices. Time-honored practice precludes Tribal members from simply moving indoors during high or moderate NO_X or SO_2 emission episodes. Hence, they experience increased health effects due to their long-term exposure to NO_X and SO_2. However, the FIP does much to reduce their exposures to such emissions from taconite ore processing facilities.

Tribal traditional practices are also affected by acid deposition for which NO_X and SO_2 serve as precursors. Upon being emitted into the atmosphere, NO_X and SO_2 return to the Earth's surface is one of two ways. The first occurs when these pollutants mix with water vapor in the atmosphere and are subsequently converted into acids. This is known as wet deposition. The second way occurs when NO_X and SO_2 form gases and salts. These gases and salts can cling to basically anything, including the ground, trees, and buildings. After they attach to an object, they are converted into acids at the point where moisture in the air mixes with them. Tribal foods, such as wild rice, can be contaminated by acid deposition. Forest ecosystems, which are an integral part to Tribal life, are susceptible to oxidation damage due to acid deposition and ozone exposure. Acid deposition adversely affects everything in the forest ecosystem, and the plants and animals on which a number of Tribes subsist. The

petroglyphs (rock images) and other sacred sites of Tribes are also susceptible to acid deposition and decay. The FIP helps to control acid deposition that would otherwise occur due to the emissions of taconite ore processing facilities. Undeniably, this will benefit the region's Tribes.

Response: While the focus of the regional haze program is to improve visibility at Class I areas, the EPA agrees with the Association that emission reductions made to improve visibility have additional benefits. EPA agrees that Midwestern Tribes will benefit as the regional haze program is implemented and emission reductions occur.

Commenter: Leech Lake Band of Ojibwe.

Comment: The Band commented about concerns related to the damage of wild rice. Wild rice is extremely susceptible to sulfides where impacts from these emissions can be currently observed. The effects of sulfide degradation can have detrimental effects on Tribal Lifeways for this important cultural and subsistence food source.

Commenter: Red Cliff Band of Lake Superior Chippewas.

Comment: Sulfur dioxide is a pollutant of special concern to the Red Cliff Tribe due to its negative impacts on sensitive aquatic organisms such as wild rice and its interaction with atmospherically deposited mercury in aquatic systems. Reductions in SO_2 could help to decrease the methylation of mercury in waters fished by Red Cliff and reduce limitations on how much locally harvested fish tribal members can safely consume.

Response: EPA did consider the energy and non-air quality environmental impacts as part of its BART determinations. EPA is aware of the concerns regarding sulfur oxides in wastewater and the resulting effect on wild rice. Accordingly, EPA considered the significance of the potential impacts of wastewater releases while evaluating the control technology options for the taconite facilities.

Commenter: National Tribal Air Association.

Comment: Tribes shoulder a disproportionate burden of the negative environmental consequences caused by the operation of commercial and industrial facilities. Most of these facilities are not located in Tribal communities, but their emissions often find their way onto Reservations and Ceded Territories. Such is the case for the taconite ore processing facilities whose current emissions not only affect the region's Tribes, but whose conversion to ozone could impact these Tribes even further. The Association finds that the NO_X reductions required under the FIP will help address the problem of ozone levels rising with respect to the taconite ore processing facilities and will inhibit climate change albeit a small amount.

Response: While emission reductions being required of the taconite industry are solely to improve visibility at mandatory Class I areas, EPA agrees that collateral benefits may also be achieved due to the emission reductions. EPA did not attempt to identify or quantify these additional potential benefits in this final rule.

O. Miscellaneous Comments

Commenter: Red Cliff Band of Lake Superior Chippewas.

Comment: The Northeast Minnesota Plan calls for a 30 percent reduction in emissions of SO_2 and NO_X (regional haze causing pollutants) from large emitters in this region by the year 2018, with an interim goal of a 20 percent reduction by the year 2012. Minnesota's regional haze SIP states that these facilities are well on-track for meeting these goals. However, over the past several years there have been numerous applications for new mining projects in the area. The Band is very concerned with maintaining the progress that has already been achieved, so that Voyageurs National Park and the Boundary Waters Canoe and Wilderness Area can meet their regional haze Reasonable Progress Goals, as required in the Regional Haze Rule.

Response: EPA gave final approval to many elements of the Minnesota regional haze plan on June 12, 2012 (77 FR 34801). This approval included the Northeast Minnesota Plan. EPA expects Minnesota to meet the pollution reductions goals in the Plan, which may include needing to offset any emission increases from new and expanding facilities with deeper emission reductions from other facilities.

Commenter: Fond du Lac Band of Lake Superior Chippewa.

Comment: The Band commented that it was concerned how the taconite facilities will meet the new hourly SO_2 and NO_2 National Ambient Air Quality Standards (NAAQS) that have recently been issued by EPA. It is likely that at least some of these facilities will need to install additional control equipment in order to be able to demonstrate attainment with these new standards. The installation of low NO_X burners on the BART-eligible taconite sources promises to be a good solution, both for achieving the one-hour NO_2 NAAQS and for reducing regional haze. Given the current state of uncertainty as to how modeling for this one-hour standard should be approached, it may be years before controls are required on taconite furnaces as a solution to any modeled exceedances of the NAAQS. The Band is concerned that this will cause delay in achieving regional haze goals in this area. It is also possible that litigation against or revocation of the NAAQS could further delay the area in achieving these goals.

Response: EPA agrees that control technology installed to meet BART requirements for regional haze may also contribute to improvements in ambient air quality.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs noted that it could not duplicate some of the delta DV and delta days values listed in Tables V–C.10, V–C.11, and V–C.14 of the proposed FIP.

Response: Upon review of the values, EPA agrees with the Cliffs that some of the delta DV and delta days values were incorrect in the proposed rule. Specifically, some of the values listed in Tables V–C.5, V–C.8, and V.C.9 were incorrect. Cliffs also noted that it could not reproduce values in Tables V–C.10, V–C.11, and V–C.14. These values were linked to values in the previous tables and also were listed incorrectly. EPA regrets the errors, but overall, the corrections were minor and did not change the conclusions reached. Corrected tables are listed below.

TABLE V–C.5—BART NO_X AND SO_2 EMISSION REDUCTIONS AND MODELED VISIBILITY IMPACT/EMISSION REDUCTION RATIOS FOR FINE PARTICULATES AT CLASS I AREAS FOR UNITED TACONITE

Parameter	Boundary waters	Voyageurs	Isle Royale
NO_X Emissions Decrease (Δ NO_X)	0 tons/year		

TABLE V–C.5—BART NO_X AND SO_2 EMISSION REDUCTIONS AND MODELED VISIBILITY IMPACT/EMISSION REDUCTION RATIOS FOR FINE PARTICULATES AT CLASS I AREAS FOR UNITED TACONITE—Continued

Parameter	Boundary waters	Voyageurs	Isle Royale
SO_2 Emissions Decrease (Δ SO_2)	1,837 tons/year		
Δ dv $PM_{2.5}$	−1.2	−0.8	−0.3
Δ dv $PM_{2.5}/\Delta$ SO_2	−0.00065	−0.00043	−0.000016
Δ Days $PM_{2.5}$	−10	−8	−3
Δ Days $PM_{2.5}/\Delta$ SO_2	−0.0054	−0.0044	−0.0016

TABLE V–C.8—BART NO_X AND SO_2 EMISSION REDUCTIONS AND MODELED VISIBILITY IMPACT/EMISSION REDUCTION RATIOS FOR FINE PARTICULATES AT CLASS I AREAS FOR NORTHSHORE MINING-SILVER BAY

Parameter	Boundary waters	Voyageurs	Isle Royale
NO_X Emissions Decrease (Δ NO_X)	678 tons/year		
SO_2 Emissions Decrease (Δ SO_2)	444 tons/year		
Δ dv $PM_{2.5}$	−0.2	−0.1	−0.2
Δ dv $PM_{2.5}/\Delta$ NO_X	−0.00029	−0.00015	−0.00029
Δ DV $PM_{2.5}/\Delta$ SO_2	−0.00045	−0.00023	−0.00045
Δ Days $PM_{2.5}$	−5	−1	−3
Δ Days $PM_{2.5}/\Delta$ NO_X	−0.0074	−0.0015	−0.0044
Δ Days $PM_{2.5}/\Delta$ SO_2	−0.011	−0.0023	−0.0068

TABLE V–C.9—AVERAGED VISIBILITY IMPACT/EMISSION CHANGE RATIOS FOR ANALYZED/IMPACTED CLASS I AREAS

Parameter ratio	Boundary waters	Voyageurs	Isle Royale
Δ DV $PM_{2.5}/\Delta$ NO_X	−0.00061	−0.00030	−0.00042
Δ DV $PM_{2.5}/\Delta$ SO_2	−0.00050	−0.00025	−0.00030
Δ Days/Δ NO_X	−0.0083	−0.004	−0.00524
Δ Days/Δ SO_2	−0.0067	−0.0030	−0.0037

TABLE V–C.10—ESTIMATED EMISSION REDUCTIONS AND RESULTING CHANGES IN VISIBILITY FACTORS FOR ARCELORMITTAL

Visibility factor or pollutant emissions reduction	Boundary waters	Voyageurs	Isle Royale
NO_X Emissions Reduction	2,859 tons/year		
Δ DV	−1.7	−0.9	−1.2
Δ Days > 0.5 DV	−24	−11	−15

TABLE V–C.11—ESTIMATED EMISSION REDUCTIONS AND RESULTING CHANGES IN VISIBILITY FACTORS FOR HIBBING TACONITE

Visibility factor or pollutant emissions reduction	Boundary waters	Voyageurs	Isle Royale
NO_X Emissions Reduction	5,259 tons/year		
Δ DV	−3.2	−1.6	−2.2
Δ Days > 0.5 DV	−44	−21	−28

TABLE V–C.12—ESTIMATED EMISSION REDUCTIONS AND RESULTING CHANGES IN VISIBILITY FACTORS FOR U.S. STEEL-KEETAC

Visibility factor or pollutant emissions reduction	Boundary waters	Voyageurs	Isle Royale
NO_X Emissions Reduction	2,908 tons/year		
Δ DV	−1.8	−0.9	−1.2

TABLE V–C.12—ESTIMATED EMISSION REDUCTIONS AND RESULTING CHANGES IN VISIBILITY FACTORS FOR U.S. STEEL-KEETAC—Continued

Visibility factor or pollutant emissions reduction	Boundary waters	Voyageurs	Isle Royale
Δ Days > 0.5 DV	−24	−11	−15

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: References to the optional use of Part 75 recordkeeping requirements should be removed from the proposed rule because taconite furnaces are not Acid Rain subject units.

Response: EPA intended to provide the Part 75 recordkeeping requirements as an option for facilities electing to use those recordkeeping requirements. If a subject-to-BART facility is not subject to the Acid Rain requirements, then recordkeeping requirements of either 40 CFR part 60 or 40 CFR part 63 may be used.

Commenter: Cliffs Natural Resources, ArcelorMittal Minorca Mine, and U.S. Steel.

Comment: Cliffs and U.S. Steel noted that the reference to 40 CFR 163.3 is incorrect and should be revised to 40 CFR 136.3.

Response: A correct citation is provided in the final rule.

Commenter: Cliffs Natural Resources and ArcelorMittal Minorca Mine.

Comment: Cliffs noted that the reference to 40 CFR part 60, appendix B, Performance Specification 2, Procedure 1, is incorrect. Procedure 1 should be associated with 40 CFR part 60, appendix F.

Response: A correct citation is provided in the final rule.

Commenter: Cliffs Natural Resources, ArcelorMittal Minorca Mine, and U.S. Steel.

Comment: Cliffs and U.S. Steel stated that the inclusion of references to the General Provisions of 40 CFR part 63 is inappropriate and overly burdensome. The references to 40 CFR part 63 should be removed.

Response: EPA included references to 40 CFR part 63 because many of those requirements (including the development of a startup, shutdown and malfunction plan and monitoring plan) should have already been developed for the subject-to-BART facilities for purposes of the Taconite MACT rule. Additionally, the requirements associated with the installation, certification, maintenance, and operation of the CEMS are similar. However, in response to the comments received, references to 40 CFR part 63 will be removed. References to 40 CFR part 60, appendices B and F will be retained where appropriate. The rule has also been revised to specifically identify requirements that we intended to include (for example notifications or reporting), but which were previously incorporated through citing to either 40 CFR part 60 or 40 CFR part 63.

III. What action is EPA taking?

The emission sources discussed below are indurating furnaces at seven taconite facilities. Six of the taconite facilities, ArcelorMittal, Hibbing Taconite, Northshore Mining, U.S. Steel Keetac, U.S. Steel Minntac, and United Taconite, are located in Minnesota, while Tilden is located in Michigan. EPA has adopted the terminology used by the companies and states to identify the indurating furnaces to ensure consistency with permits and other enforceable documents. However, regardless of whether the emission sources are referred to as furnaces, kilns, or lines, all terms refer to indurating furnaces, which involve a high temperature process for hardening taconite pellets for subsequent use in blast furnaces.

A. NO_X Limits

EPA is revising its proposed limit of 1.2 lbs NO_X/MMBTU, on a 30-day rolling average, to a limit of 1.2 lbs NO_X/MMBTU when only natural gas is used and a limit of 1.5 lbs NO_X/MMBTU for all other fuels, on a 30-day rolling average, for all indurating furnaces. These revised limits are based upon test data submitted by U.S. Steel for Lines 6 and 7 at Minntac while using low NO_X burners. This revision affects U.S. Steel Keetac, U.S. Steel Minntac, and United Taconite, which use solid fuel. The other four facilities will be subject to the natural gas limit of 1.2 lbs NO_X/MMBTU. To meet these limits, the sources will essentially be required to install low NO_X burners on each indurating furnace. Based upon information received during the comment period, EPA believes that 26 months is a reasonable time for a company's first indurating furnace to comply with the limit. This will allow each company sufficient time to perform an engineering analysis, prepare a permit applicability determination, manufacture and install the low NO_X burner(s), and provide for a shakedown period to achieve compliance after the low NO_X burner(s) have been installed. While this compliance schedule is six months longer than the proposal, EPA believes that the additional time is necessary for a shakedown period.

As specified in the proposal, a second line will have an additional year to comply with the emission limit, while a third line will have two additional years to comply. This approach will stagger the installation and minimize impacts on production. EPA notes, however, that U.S. Steel Minntac is on a shorter schedule consistent with what was proposed, while U.S. Steel Keetac has been given three years to comply with its only line. The additional time afforded to U.S. Steel Keetac is primarily due to the lead time associated with acquiring process fans.

B. SO_2 Limits

EPA is revising all of the proposed SO_2 limits as follows. Unless otherwise stated, these limits are based on the 95th percentile UPL.

Tilden Mining Company

Tilden's Grate Kiln Line 1 is required to convert to 100 percent natural gas and install CEMS within one year of the effective date of this rule. Within 26 months of the effective date of this rule, an emission limit must be established, in terms of lbs SO_2/hr, on a 30-day rolling average, based on the 95th percentile UPL. This compliance schedule allows two months to process 12 months of CEMS data. This is a change from the proposed requirement to install an add-on control system, achieving either 5 ppmv SO_2 or 95 percent removal efficiency, because such a control system is not economically feasible when a furnace is using only natural gas.

U.S. Steel Keetac

An emission limit of 225 lbs SO_2/hr, based on a 30-day rolling average, shall apply to U.S. Steel Keetac's Grate Kiln pelletizing furnace beginning three months from the effective date of the rule. This numerical limit and compliance schedule are the same as those contained in the proposed rulemaking and reflect existing controls. However, redundant control efficiency and pH limits have been eliminated.

EPA has clarified in the final rule that, in addition to this SO_2 limit, any coal burned at Keetac must have a sulfur content no greater than 0.60 percent sulfur by weight based on a monthly block average.

Hibbing Taconite

An aggregate emission limit of 247.8 lbs SO_2/hr, based on a 30-day rolling average, shall apply to the pelletizing furnaces at Hibbing's three lines beginning six months from the effective date of this rule. This limit reflects existing controls. This is an increase from the proposed limit, which totaled 183 lbs SO_2/hr, based on a 30-day rolling average. This increase is a result of more accurate emission data that was obtained subsequent to the proposal.

U.S. Steel Minntac

An aggregate emission limit of 498 lbs SO_2/hr shall apply to indurating furnace Lines 3–7 when all lines are producing flux pellets. An aggregate emission limit of 630 lbs SO_2/hr shall apply to Lines 3–7 when Lines 3–5 are producing acid pellets and Lines 6 and 7 are producing flux pellets. An aggregate emission limit of 800 lbs SO_2/hr shall apply to Lines 3–7 when all lines are producing acid pellets. These limits reflect existing controls. These SO_2 emission limits are based on a 30-day rolling average and apply three months from the effective date of this rule. This is an increase from the proposed limits, which totaled 327 lbs SO_2/hr, based on a 30-day rolling average. This increase is a result of more accurate emission data that was obtained subsequent to the proposal. EPA has clarified in the final rule that, in addition to these SO_2 limits, any coal burned at Minntac must have a sulfur content no greater than 0.60 percent sulfur by weight based on a monthly block average.

United Taconite

An aggregate emission limit of 529 lbs SO_2/hr, based on a 30-day rolling average, shall apply to the Line 1 and Line 2 pellet furnaces beginning 54 months from the effective date of this rule. In addition to this limit, United Taconite is required to burn either natural gas or a blend of natural gas and coal. Any coaled burned must have a sulfur content no greater than 0.60 percent sulfur by weight based on a monthly block average. This limit represents a change from the proposed requirement to install an add-on control system, achieving either 5 ppmv SO_2 or 95 percent removal efficiency. Because this federally enforceable operational change in fuel mixture will achieve approximately a 50 percent reduction in the facility's baseline and actual emissions, the proposed add-on control system is no longer cost effective.

ArcelorMittal Minorca Mine

An emission limit of 38.16 lbs SO_2/hr, based on a 30-day rolling average, shall apply to ArcelorMittal's indurating furnace beginning six months from the effective date of this rule. This is an increase from the proposed limit of 23 lbs SO_2/hr, based upon a 30-day rolling average. This increase is a result of more accurate emission data that was obtained subsequent to the proposal.

Northshore Mining Company

An aggregate emission limit of 39 lbs SO_2/hr, based on a 30-day rolling, shall apply to Furnace 11 and Furnace 12, beginning six months from the effective date of this rule. This limit will stay effective for one year. This is an increase from the proposed limit of 33.4 lbs SO_2/hr, based upon a 30-day rolling average. The proposed control efficiency requirement has been eliminated because it is a redundant requirement. Within 20 months of the effective date of this rule, a revised SO_2 limit must be established based on one year of hourly CEMS data using the 95th percentile UPL.

C. CEMS

As required in the proposal, installation and operation of CEMS is required no later than the applicable compliance date for each limit. This represents no change from the proposed rulemaking. However, as indicated above, some compliance dates have been extended, and some indurating furnaces are now subject to status-quo SO_2 limits. Based upon comments received, as well as additional information regarding the amount of time needed to install CEMS, we have increased the compliance schedule from three months to six months for those sources that are maintaining status quo controls and do not currently have CEMS.

D. Visibility Benefits and Cost Effectiveness

EPA estimates that this action will improve visibility at four Class I areas by reducing about 22,000 tons per year of NO_X emissions and 2,000 tons per year of SO_2 emissions from seven taconite facilities. The reductions in NO_X emissions will result from the installation of low NO_X burners, a relatively inexpensive control device that does not involve significant retrofit costs as the process consists primarily of switching out burners. U.S. Steel Minntac is the only facility at which low NO_X burners have been installed and the only one for which detailed cost information is available.

TABLE 8—LOW NO_X BURNER COST ANALYSIS AT U.S. STEEL MINNTAC LINE 6

Fuel blend	Capital cost ($)	Annualized capital cost ($/yr)	Annual O&M ($/yr)	Total annualized cost ($/yr)	Cost-effectiveness ($/ton)
60% Coal/40% Natural Gas	$2,846,422	$536,754	$228,293	$765,048	$441
100% Natural Gas	2,846,422	536,754	228,293	765,048	210

EPA believes that the costs cited by U.S. Steel are generally applicable across the industry based on discussions the Agency had with vendors. As a result, a figure of $500/ton was ultimately selected as a conservative upper bound for the cost effectiveness of installations at the other taconite facilities.

Reductions in SO_2 emissions will result from fuel switching and new emission limits that properly reflect existing SO_2 controls. EPA did not have sufficient information to estimate the costs of fuel switching.

Proposed Disapproval of the States' BART Determinations for Taconite Facilities

EPA reiterates that the Agency is not taking action today on its proposed disapproval of Minnesota and Michigan's BART determinations for the taconite industry. EPA is issuing a separate supplemental notice of

proposed rulemaking that provides additional explanation of the Agency's rationale for the proposed disapproval and solicits additional comments. EPA will publish a separate final rulemaking regarding the proposed disapproval once the Agency has completed review of any additional public comments received.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action finalizes BART requirements for seven taconite facilities in Minnesota and Michigan. Therefore, it is not a rule of general applicability, and not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51753, October 4, 1993). Because this type of action is exempt from review under EO 12866, it is also not subject to review under Executive Order 13563 (76 FR 3821, January 21, 2011).

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). Because this FIP only applies to seven facilities in Minnesota and Michigan, the Paperwork Reduction Act does not apply. See 5 CFR 1320.3(c).

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute 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 organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The net result of this final action is that EPA is promulgating emission controls on selected units at seven large taconite facilities that are not owned by small entities, and therefore are not themselves small entities.

D. Unfunded Mandates Reform Act (UMRA)

This rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. It is a rule of particular applicability that affects only seven facilities in Michigan and Minnesota. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule only applies to seven facilities in Michigan and Minnesota.

E. Executive Order 13132 Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action addresses Michigan and Minnesota's failure to submit SIPs by the applicable deadline that meet the regional haze requirements under the Clean Air Act. Thus, Executive Order 13132 does not apply to this action. Although section 6 of Executive Order 13132 does not apply to this action, EPA did consult with Michigan and Minnesota in developing this action.

F. Executive Order 13175

Subject to Executive Order 13175 (65 FR 67249, November 9, 2000), EPA may not issue a regulation that has Tribal implication, 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 Tribal governments, or EPA consults with Tribal officials early in the process of developing the proposed regulation and develops a Tribal summary impact statement.

EPA has concluded that this action may have Tribal implications. For example, although the FIP does not apply to sources in Indian country, controls and emission reductions arising from the program may affect Indian country or other Tribal interests. However, the regulations arising under this action will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law.

EPA initiated consultation with Tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA sent an invitation to consult to each Region 5 Tribe on August 15, 2012, along with a copy of the proposed taconite FIP **Federal Register** notice. Conference calls were held on the taconite FIP proposal on August 22, 2012 and September 12, 2012 to provide all Region 5 Tribes with more information on the proposed rulemaking and an opportunity to ask questions of EPA technical staff and request individual consultation if desired. Four Region 5 Tribes participated in the August 22, 2012 call. Two Region 5 Tribes participated in the September 12, 2012 discussion. One Region 5 Tribe provided verbal testimony at the public hearing held on the proposed taconite FIP rulemaking on August 29, 2012. One Region 5 Tribal Chair expressed appreciation for the discussions held with the Tribes and gratitude for EPA's careful consideration of the regional haze situation in northeast Minnesota.

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 action is not subject to Executive Order 13045 because it implements specific standards established by Congress in statutes. However, to the extent this rule will limit emissions, the rule will have a beneficial effect on children's health by reducing air pollution.

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

This action is not subject to Executive Order 13211 (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(d) of the National Technology Transfer and Advancement Act of 1995 (''NTTAA''), Public Law 104–113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Today's action does not require the public to perform activities conducive to the use of voluntary consensus standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

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

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

We have determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This rule limits emissions from seven facilities.

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. Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability.

L. 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 April 8, 2013. Pursuant to Clean Air Act section 307(d)(1)(B), this action is subject to the requirements of Clean Air Act section 307(d) because it promulgates a FIP under Clean Air Act section 110(c). 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 Clean Air Act section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: January 15, 2013.

Lisa P. Jackson,

Administrator.

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 X—Michigan

■ 2. Section 52.1183 is amended by adding and reserving paragraph (j), and adding paragraphs (k), (l), (m), and (n) to read as follows:

§ 52.1183 Visibility protection.

* * * * *

(j) [Reserved]

(k) Tilden Mining Company, or any subsequent owner/operator of the Tilden Mining Company facility in Ishpeming, Michigan, shall meet the following requirements:

(1) *NO_X Emission Limits.* An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the indurating furnace, Grate Kiln Line 1 (EUKILN1), beginning 26 months from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply.

(2) *SO_2 Emission Limits.* A fuel sulfur content limit of no greater than 1.20 percent sulfur content by weight shall apply to fuel combusted in Process Boiler #1 (EUBOILER1) and Process Boiler #2 (EUBOILER2) beginning 3 months from March 8, 2013. A fuel sulfur content limit of no greater than 1.50 percent sulfur content by weight shall apply to fuel combusted in the Line 1 Dryer (EUDRYER1) beginning 3 months from March 8, 2013. The sampling and calculation methodology for determining the sulfur content of fuel must be described in the monitoring plan required at paragraph (n)(8)(x) of this section.

(3) The owner or operator of the facility must switch Grate Kiln Line 1 (EUKILN1) to 100 percent natural gas beginning 1 year from March 8, 2013. For the purposes of CEMS requirements, the compliance date by which the CEMS must be installed and operated for Tilden is one year from March 8, 2013. Within 26 months of March 8, 2013, the owner or operator must calculate and comply with an SO_2 limit based on one year of hourly CEMS emissions data reported in lbs SO_2/hr and submit such limit, calculations and CEMS data to EPA. This limit shall be calculated in terms of lbs SO_2/hr, based on the following equations, with compliance to be determined on a 30-day rolling average.

$$m - (n + 1) * \alpha$$

m = the rank of the ordered data point, when data is sorted smallest to largest
n = number of data points
α = 0.95, to reflect the 95th percentile

If m is a whole number, then the limit, UPL, shall be computed as:

$$UPL = X_m,$$

Where:

x_m – value of the mth data point in terms of lbs SO_2/hr, when the data is sorted smallest to largest

If m is not a whole number, the limit shall be computed by linear

interpolation according to the following equation.

$$UPL = x_m = x_{m_i.m_d} = x_{m_i} + m_d \left(x_{m_i+1} - x_{m_i}\right)$$

Where:

m_i = the integer portion of m, i.e., m truncated at zero decimal places, and

m_d = the decimal portion of m

(4) Starting 26 months from March 8, 2013, records shall be kept for any day during which fuel oil is burned as fuel (either alone or blended with other fuels) in Grate Kiln Line 1. These records must include, at a minimum, the gallons of fuel oil burned per hour, the sulfur content of the fuel oil, and the SO_2 emissions in pounds per hour.

(5) Starting 26 months from March 8, 2013 for Grate Kiln Line 1, the SO_2 limit does not apply for any hour in which it is documented that there is a natural gas curtailment, beyond Cliffs' control, necessitating that the supply of natural gas to Tilden's Line 1 indurating furnace is restricted or eliminated. Records must be kept of the cause of the curtailment and duration of such curtailment. During such curtailment, the use of backup coal is restricted to coal with no greater than 0.60 percent sulfur by weight.

(l) *Testing and monitoring.* (1) The owner or operator shall install, certify, calibrate, maintain and operate a Continuous Emissions Monitoring System (CEMS) for NO_X on Tilden Mining Company unit EUKILN1. Compliance with the emission limits for NO_X shall be determined using data from the CEMS.

(2) The owner or operator shall install, certify, calibrate, maintain and operate a CEMS for SO_2 on Tilden Mining Company unit EUKILN1. Compliance with the emission standard selected for SO_2 shall be determined using data from the CEMS.

(3) The owner or operator shall install, certify, calibrate, maintain and operate one or more continuous diluent monitor(s) (O_2 or CO_2) and continuous flow rate monitor(s) on Tilden Mining Company unit EUKILN1 to allow conversion of the NO_X and SO_2 concentrations to units of the standard (lbs/MMBtu and lbs/hr, respectively) unless a demonstration is made that a diluent monitor and continuous flow rate monitor are not needed for the owner or operator to demonstrate compliance with applicable emission limits in units of the standards.

(4) For purposes of this section, all CEMS required by this section must meet the requirements of paragraphs (l)(4)(i)–(xiv) of this section.

(i) All CEMS must be installed, certified, calibrated, maintained, and operated in accordance with 40 CFR Part 60, Appendix B, Performance Specification 2 (PS–2) and Appendix F, Procedure 1.

(ii) All CEMS associated with monitoring NO_X (including the NO_X monitor and necessary diluent and flow rate monitors) must be installed and operational no later than the compliance date for the emission limit identified at (k)(1). All CEMS associated with monitoring SO_2 must be installed and operational no later than twelve months after March 8, 2013. Verification of the CEMS operational status shall, as a minimum, include completion of the manufacturer's written requirements or recommendations for installation, operation, and calibration of the devices.

(iii) The owner or operator must conduct a performance evaluation of each CEMS in accordance with 40 CFR Part 60, Appendix B, PS–2. The performance evaluations must be completed no later than 60 days after the respective CEMS installation.

(iv) The owner or operator of each CEMS must conduct periodic Quality Assurance, Quality Control (QA/QC) checks of each CEMS in accordance with 40 CFR Part 60, Appendix F, Procedure 1. The first CEMS accuracy test will be a relative accuracy test audit (RATA) and must be completed no later than 60 days after the respective CEMS installation.

(v) The owner or operator of each CEMS must furnish the Regional Administrator two, or upon request, more copies of a written report of the results of each performance evaluation and QA/QC check within 60 days of completion.

(vi) The owner or operator of each CEMS must check, record, and quantify the zero and span calibration drifts at least once daily (every 24 hours) in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 4.

(vii) Except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments, all CEMS required by this section shall be in continuous operation during all periods of process operation of the indurating furnaces, including periods of process unit startup, shutdown, and malfunction.

(viii) All CEMS required by this section must meet the minimum data requirements at paragraphs (l)(4)(viii)(A)–(C) of this section.

(A) Complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute quadrant of an hour.

(B) Sample, analyze and record emissions data for all periods of process operation except as described in paragraph (l)(4)(viii)(C) of this section.

(C) When emission data from CEMS are not available due to continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained using other monitoring systems or emission estimation methods approved by the EPA. The other monitoring systems or emission estimation methods to be used must be incorporated into the monitoring plan required by this section and provide information such that emissions data are available for a minimum of 18 hours in each 24 hour period and at least 22 out of 30 successive unit operating days.

(ix) Owners or operators of each CEMS required by this section must reduce all data to 1-hour averages. Hourly averages shall be computed using all valid data obtained within the hour but no less than one data point in each fifteen-minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling systems, and recertification events.

(x) The 30-day rolling average emission rate determined from data derived from the CEMS required by this section (in lbs/MMBtu or lbs/hr depending on the emission standard selected) must be calculated in accordance with paragraphs (l)(4)(x)(A)–(F) of this section.

(A) Sum the total pounds of the pollutant in question emitted from the Unit during an operating day and the previous twenty-nine operating days.

(B) Sum the total heat input to the unit (in MMBtu) or the total actual hours of operation (in hours) during an

operating day and the previous twenty-nine operating days.

(C) Divide the total number of pounds of the pollutant in question emitted during the thirty operating days by the total heat input (or actual hours of operation depending on the emission limit selected) during the thirty operating days.

(D) For purposes of this calculation, an operating day is any day during which fuel is combusted in the BART affected Unit regardless of whether pellets are produced. Actual hours of operation are the total hours a unit is firing fuel regardless of whether a complete 24-hour operational cycle occurs (i.e. if the furnace is firing fuel for only 5 hours during a 24-hour period, then the actual operating hours for that day are 5. Similarly, total number of pounds of the pollutant in question for that day is determined only from the CEMS data for the five hours during which fuel is combusted.)

(E) If the owner or operator of the CEMS required by this section uses an alternative method to determine 30-day rolling averages, that method must be described in detail in the monitoring plan required by this section. The alternative method will only be applicable if the final monitoring plan and the alternative method are approved by EPA.

(F) A new 30-day rolling average emission rate must be calculated for the period ending each new operating day.

(xi) The 30-day rolling average removal efficiency determined from data derived from the CEMS required by this section must be calculated in accordance with paragraphs (l)(4)(xi)(A)–(G) of this section.

(A) Calculate the 30-day rolling average emission rate described in paragraphs (l)(4)(x)(A)–(F) of this section at the inlet of the control device.

(B) Calculate the 30-day rolling average emission rate described in paragraphs (l)(4)(x)(A)–(F) of this section at the outlet of the control device.

(C) Subtract the 30-day rolling average emission rate determined at the outlet of the control device from the 30-day rolling average emission rate determined at the inlet of the control device.

(D) Divide the result of paragraph (l)(4)(xi)(C) of this section by the 30-day rolling average emission rate determined at the inlet.

(E) Multiply the result of paragraph (l)(4)(xi)(D) of this section by 100 to determine the 3-day rolling average percent removal efficiency.

(F) If the owner or operator of the CEMS required by this section uses an alternative method to determine the 30-day rolling average removal efficiency, that method must be described in detail in the monitoring plan required by this section. The alternative method will only be applicable if the final monitoring plan and the alternative method are approved by EPA.

(G) A new 30-day rolling average removal efficiency must be calculated for each new operating day.

(xii) Data substitution must not be used for purposes of determining compliance under this section.

(xiii) All CEMS data shall be reduced and reported in units of the applicable standard.

(xiv) A Quality Control Program must be developed and implemented for all CEMS required by this section in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 3. The program will include, at a minimum, written procedures and operations for calibration checks, calibration drift adjustments, preventative maintenance, data collection, recording and reporting, accuracy audits/procedures, periodic performance evaluations, and a corrective action program for malfunctioning CEMS.

(m) *Recordkeeping requirements.* (1)(i) Records required by this section must be kept in a form suitable and readily available for expeditious review.

(ii) Records required by this section must be kept for a minimum of 5 years following the date of creation.

(iii) Records must be kept on site for at least 2 years following the date of creation and may be kept offsite, but readily accessible, for the remaining 3 years.

(2) The owner or operator of the BART affected unit must maintain the records identified in paragraphs (m)(2)(i)–(xi) of this section.

(i) A copy of each notification and report developed for and submitted to comply with this section including all documentation supporting any initial notification or notification of compliance status submitted, according to the requirements of this section.

(ii) Records of the occurrence and duration of each startup, shutdown, and malfunction of the BART affected unit, air pollution control equipment, and CEMS required by this section.

(iii) Records of activities taken during each startup, shutdown, and malfunction of the BART affected unit, air pollution control equipment, and CEMS required by this section.

(iv) Records of the occurrence and duration of all major maintenance conducted on the BART affected unit, air pollution control equipment, and CEMS required by this section.

(v) Records of each excess emission report, including all documentation supporting the reports, dates and times when excess emissions occurred, investigations into the causes of excess emissions, actions taken to minimize or eliminate the excess emissions, and preventative measures to avoid the cause of excess emissions from occurring again.

(vi) Records of all CEMS data including, as a minimum, the date, location, and time of sampling or measurement, parameters sampled or measured, and results.

(vii) All records associated with quality assurance and quality control activities on each CEMS as well as other records required by 40 CFR Part 60, Appendix F, Procedure 1 including, but not limited to, the quality control program, audit results, and reports submitted as required by this section.

(viii) Records of the NO_X emissions during all periods of BART affected unit operation, including startup, shutdown and malfunction, in the units of the standard. The owner or operator shall convert the monitored data into the appropriate unit of the emission limitation using appropriate conversion factors and F-factors. F-factors used for purposes of this section shall be documented in the monitoring plan and developed in accordance with 40 CFR Part 60, Appendix A, Method 19. The owner or operator may use an alternate method to calculate the NO_X emissions upon written approval from EPA.

(ix) Records of the SO_2 emissions or records of the removal efficiency (based on CEMS data), depending on the emission standard selected, during all periods of operation, including periods of startup, shutdown and malfunction, in the units of the standard.

(x) Records associated with the CEMS unit including type of CEMS, CEMS model number, CEMS serial number, and initial certification of each CEMS conducted in accordance with 40 CFR Part 60, Appendix B, Performance Specification 2 must be kept for the life of the CEMS unit.

(xi) Records of all periods of fuel oil usage as required at paragraph (k)(4) of this section.

(n) *Reporting requirements.* (1) All requests, reports, submittals, notifications, and other communications to the Regional Administrator required by this section shall be submitted, unless instructed otherwise, to the Air and Radiation Division, U.S. Environmental Protection Agency, Region 5 (A–18J) at 77 West Jackson Boulevard, Chicago, Illinois 60604.

References in this section to the Regional Administrator shall mean the EPA Regional Administrator for Region 5.

(2) The owner or operator of each BART affected unit identified in this section and CEMS required by this section must provide to the Regional Administrator the written notifications, reports and plans identified at paragraphs (n)(2)(i)–(viii) of this section. If acceptable to both the Regional Administrator and the owner or operator of each BART affected unit identified in this section and CEMS required by this section the owner or operator may provide electronic notifications, reports and plans.

(i) A notification of the date construction of control devices and installation of burners required by this section commences postmarked no later than 30 days after the commencement date.

(ii) A notification of the date the installation of each CEMS required by this section commences postmarked no later than 30 days after the commencement date.

(iii) A notification of the date the construction of control devices and installation of burners required by this section is complete postmarked no later than 30 days after the completion date.

(iv) A notification of the date the installation of each CEMS required by this section is complete postmarked no later than 30 days after the completion date.

(v) A notification of the date control devices and burners installed by this section startup postmarked no later than 30 days after the startup date.

(vi) A notification of the date CEMS required by this section startup postmarked no later than 30 days after the startup date.

(vii) A notification of the date upon which the initial CEMS performance evaluations are planned. This notification must be submitted at least 60 days before the performance evaluation is scheduled to begin.

(viii) A notification of initial compliance, signed by the responsible official who shall certify its accuracy, attesting to whether the source has complied with the requirements of this section, including, but not limited to, applicable emission standards, control device and burner installations, CEMS installation and certification. This notification must be submitted before the close of business on the 60th calendar day following the completion of the compliance demonstration and must include, at a minimum, the information at paragraphs (n)(2)(viii)(A)–(F) of this section.

(A) The methods used to determine compliance.

(B) The results of any CEMS performance evaluations, and other monitoring procedures or methods that were conducted.

(C) The methods that will be used for determining continuing compliance, including a description of monitoring and reporting requirements and test methods.

(D) The type and quantity of air pollutants emitted by the source, reported in units of the standard.

(E) A description of the air pollution control equipment and burners installed as required by this section, for each emission point.

(F) A statement by the owner or operator as to whether the source has complied with the relevant standards and other requirements.

(3) The owner or operator must develop and implement a written startup, shutdown, and malfunction plan for NO_X and SO_2. The plan must include, at a minimum, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for a malfunctioning process and air pollution control and monitoring equipment used to comply with the relevant standard. The plan must ensure that, at all times, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty to minimize or eliminate emissions using good air pollution control practices. The plan must ensure that owners or operators are prepared to correct malfunctions as soon as practicable after their occurrence.

(4) The written reports of the results of each performance evaluation and QA/QC check in accordance with and as required by paragraph (l)(4)(v) of this section.

(5) Compliance Reports. The owner or operator of each BART affected unit must submit semiannual compliance reports. The semiannual compliance reports must be submitted in accordance with paragraphs (n)(5)(i) through (iv) of this section, unless the Regional Administrator has approved a different schedule.

(i) The first compliance report must cover the period beginning on the compliance date that is specified for the affected source through June 30 or December 31, whichever date comes first after the compliance date that is specified for the affected source.

(ii) The first compliance report must be postmarked no later than 30 calendar days after the reporting period covered by that report (July 30 or January 30), whichever comes first.

(iii) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(iv) Each subsequent compliance report must be postmarked no later than 30 calendar days after the reporting period covered by that report (July 30 or January 30).

(6) Compliance report contents. Each compliance report must include the information in paragraphs (n)(6)(i) through (vi) of this section.

(i) Company name and address.

(ii) Statement by a responsible official, with the official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report.

(iii) Date of report and beginning and ending dates of the reporting period.

(iv) Identification of the process unit, control devices, and CEMS covered by the compliance report.

(v) A record of each period of a startup, shutdown, or malfunction during the reporting period and a description of the actions the owner or operator took to minimize or eliminate emissions arising as a result of the startup, shutdown or malfunction and whether those actions were or were not consistent with the source's startup, shutdown, and malfunction plan.

(vi) A statement identifying whether there were or were not any deviations from the requirements of this section during the reporting period. If there were deviations from the requirements of this section during the reporting period, then the compliance report must describe in detail the deviations which occurred, the causes of the deviations, actions taken to address the deviations, and procedures put in place to avoid such deviations in the future. If there were no deviations from the requirements of this section during the reporting period, then the compliance report must include a statement that there were no deviations. For purposes of this section, deviations include, but are not limited to, emissions in excess of applicable emission standards established by this section, failure to continuously operate an air pollution control device in accordance with operating requirements designed to assure compliance with emission standards, failure to continuously operate CEMS required by this section, and failure to maintain records or submit reports required by this section.

(7) Each owner or operator of a CEMS required by this section must submit quarterly excess emissions and monitoring system performance reports to the Regional Administrator for each pollutant monitored for each BART affected unit monitored. All reports must be postmarked by the 30th day following the end of each three-month period of a calendar year (January–March, April–June, July–September, October–December) and must include, at a minimum, the requirements at paragraphs (n)(7)(i)–(xv).

(i) Company name and address.

(ii) Identification and description of the process unit being monitored.

(iii) The dates covered by the reporting period.

(iv) Total source operating hours for the reporting period.

(v) Monitor manufacturer, monitor model number and monitor serial number.

(vi) Pollutant monitored.

(vii) Emission limitation for the monitored pollutant.

(viii) Date of latest CEMS certification or audit.

(ix) A description of any changes in continuous monitoring systems, processes, or controls since the last reporting period.

(x) A table summarizing the total duration of excess emissions, as defined at paragraphs (n)(7)(x)(A)–(B) of this section, for the reporting period broken down by the cause of those excess emissions (startup/shutdown, control equipment problems, process problems, other known causes, unknown causes), and the total percent of excess emissions (for all causes) for the reporting period calculated as described at paragraph (n)(7)(x)(C) of this section.

(A) For purposes of this section, an excess emission is defined as any 30-day rolling average period, including periods of startup, shutdown and malfunction, during which the 30-day rolling average emissions of either regulated pollutant (SO_2 and NO_X), as measured by a CEMS, exceeds the applicable emission standards in this section.

(B) For purposes of this section, if a facility calculates a 30-day rolling average emission rate in accordance with this section which exceeds the applicable emission standards of this section, then it will be considered 30 days of excess emissions. If the following 30-day rolling average emission rate is calculated and found to exceed the applicable emission standards of this section as well, then it will add one more day to the total days of excess emissions (i.e. 31 days). Similarly, if an excess emission is calculated for a 30-day rolling average period and no additional excess emissions are calculated until 15 days after the first, then that new excess emission will add 15 days to the total days of excess emissions (i.e. 30 + 15 = 45). For purposes of this section, if an excess emission is calculated for any period of time within a reporting period, there will be no fewer than 30 days of excess emissions but there should be no more than 121 days of excess emissions for a reporting period.

(C) For purposes of this section, the total percent of excess emissions will be determined by summing all periods of excess emissions (in days) for the reporting period, dividing that number by the total BART affected unit operating days for the reporting period, and then multiplying by 100 to get the total percent of excess emissions for the reporting period. An operating day, as defined previously, is any day during which fuel is fired in the BART affected unit for any period of time. Because of the possible overlap of 30-day rolling average excess emissions across quarters, there are some situations where the total percent of excess emissions could exceed 100 percent. This extreme situation would only result from serious excess emissions problems where excess emissions occur for nearly every day during a reporting period.

(xi) A table summarizing the total duration of monitor downtime, as defined at paragraph (n)(7)(xi)(A) of this section, for the reporting period broken down by the cause of the monitor downtime (monitor equipment malfunctions, non-monitor equipment malfunctions, quality assurance calibration, other known causes, unknown causes), and the total percent of monitor downtime (for all causes) for the reporting period calculated as described at paragraph (n)(7)(xi)(B) of this section.

(A) For purposes of this section, monitor downtime is defined as any period of time (in hours) during which the required monitoring system was not measuring emissions from the BART affected unit. This includes any period of CEMS QA/QC, daily zero and span checks, and similar activities.

(B) For purposes of this section, the total percent of monitor downtime will be determined by summing all periods of monitor downtime (in hours) for the reporting period, dividing that number by the total number of BART affected unit operating hours for the reporting period, and then multiplying by 100 to get the total percent of excess emissions for the reporting period.

(xii) A table which identifies each period of excess emissions for the reporting period and includes, at a minimum, the information in paragraphs (n)(7)(xii)(A)–(F) of this section.

(A) The date of each excess emission.

(B) The beginning and end time of each excess emission.

(C) The pollutant for which an excess emission occurred.

(D) The magnitude of the excess emission.

(E) The cause of the excess emission.

(F) The corrective action taken or preventative measures adopted to minimize or eliminate the excess emissions and prevent such excess emission from occurring again.

(xiii) A table which identifies each period of monitor downtime for the reporting period and includes, at a minimum, the information in paragraphs (n)(7)(xiii)(A)–(D) of this section.

(A) The date of each period of monitor downtime.

(B) The beginning and end time of each period of monitor downtime.

(C) The cause of the period of monitor downtime.

(D) The corrective action taken or preventative measures adopted for system repairs or adjustments to minimize or eliminate monitor downtime and prevent such downtime from occurring again.

(xiv) If there were no periods of excess emissions during the reporting period, then the excess emission report must include a statement which says there were no periods of excess emissions during this reporting period.

(xv) If there were no periods of monitor downtime, except for daily zero and span checks, during the reporting period, then the excess emission report must include a statement which says there were no periods of monitor downtime during this reporting period except for the daily zero and span checks.

(8) The owner or operator of each CEMS required by this section must develop and submit for review and approval by the Regional Administrator a site specific monitoring plan. The purpose of this monitoring plan is to establish procedures and practices which will be implemented by the owner or operator in its effort to comply with the monitoring, recordkeeping and reporting requirements of this section. The monitoring plan must include, at a minimum, the information at paragraphs (n)(8)(i)–(x) of this section.

(i) Site specific information including the company name, address, and contact information.

(ii) The objectives of the monitoring program implemented and information describing how those objectives will be met.

(iii) Information on any emission factors used in conjunction with the CEMS required by this section to calculate emission rates and a description of how those emission factors were determined.

(iv) A description of methods to be used to calculate emission rates when CEMS data is not available due to downtime associated with QA/QC events.

(v) A description of the QA/QC program to be implemented by the owner or operator of CEMS required by this section. This can be the QA/QC program developed in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 3.

(vi) A list of spare parts for CEMS maintained on site for system maintenance and repairs.

(vii) A description of the procedures to be used to calculate 30-day rolling averages and an example calculation which shows the algorithms used by the CEMS to calculate 30-day rolling averages.

(viii) A sample of the document to be used for the quarterly excess emission reports required by this section.

(ix) A description of the procedures to be implemented to investigate root causes of excess emissions and monitor downtime and the proposed corrective actions to address potential root causes of excess emissions and monitor downtime.

(x) A description of the sampling and calculation methodology for determining the percent sulfur by weight as a monthly block average for coal used during that month.

Subpart Y—Minnesota

■ 3. Section 52.1235 is added to read as follows:

§ 52.1235 Regional haze.

(a) [Reserved]

(b)(1) *NO_X emission limits.* (i) United States Steel Corporation, Keetac: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Grate Kiln pelletizing furnace (EU030), beginning 3 years from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply.

(ii) Hibbing Taconite Company: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Line 1 pelletizing furnace (EU020) beginning 26 months from March 8, 2013. An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Line 2 pelletizing furnace (EU021) beginning 38 months from March 8, 2013. An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Line 3 pelletizing furnace (EU022) beginning 50 months from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used at any Hibbing Taconite pelletizing furnace, a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to that furnace.

(iii) United States Steel Corporation, Minntac: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to each of the five indurating furnaces (EU225, EU261, EU282, EU315, and EU334). The owner or operator shall comply with this NO_X emission limit beginning 12 months from March 8, 2013 for the Line 6 indurating furnace (EU315); 24 months from March 8, 2013 for the Line 7 indurating furnace (EU334); 36 months from March 8, 2013 for the Line 4 or Line 5 indurating furnace (EU261) or (EU282); 48 months from March 8, 2013 for the Line 5 or Line 4 indurating furnace (EU282) or (EU261); and 59 months from March 8, 2013 for the Line 3 indurating furnace (EU225). However, for any 30 or more consecutive days when only natural gas is used at any of Minntac's indurating furnaces, a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to that furnace.

(iv) United Taconite: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Line 1 pellet furnace (EU040) beginning 38 months from March 8, 2013. An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the Line 2 pellet furnace (EU042) beginning 26 months from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used at either of United Taconites' Line 1 or Line 2 pellet furnaces, a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to that furnace.

(v) ArcelorMittal Minorca Mine: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to the indurating furnace (EU026) beginning 26 months from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used, a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply.

(vi) Northshore Mining Company-Silver Bay: An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to Furnace 11 (EU100/EU104) beginning 26 months from March 8, 2013. An emission limit of 1.5 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply to Furnace 12 (EU110/114) beginning 38 months from March 8, 2013. However, for any 30, or more, consecutive days when only natural gas is used at either Northshore Mining Furnace 11 or Furnace 12, a limit of 1.2 lbs NO_X/MMBtu, based on a 30-day rolling average, shall apply. An emission limit of 0.085 lbs/MMBtu, based on a 30-day rolling average, shall apply to Process Boiler #1 (EU003) and Process Boiler #2 (EU004) beginning 5 years from March 8, 2013. The 0.085 lbs/MMBtu emission limit for each process boiler applies at all times a unit is operating, including periods of start-up, shut-down and malfunction.

(2) *SO_2 emission limits.* (i) United States Steel Corporation, Keetac: An emission limit of 225 lbs SO_2/hr, based on a 30-day rolling average, shall apply to the Grate Kiln pelletizing furnace (EU030). Any coal burned at Keetac shall have a sulfur content of 0.60 percent sulfur by weight or less based on a monthly block average. The sampling and calculation methodology for determining the sulfur content of fuel must be described in the monitoring plan required at paragraph (e)(8)(x) of this section. Compliance with these requirements for EU030 is required beginning 3 months from March 8, 2013.

(ii) Hibbing Taconite Company: An aggregate emission limit of 247.8 lbs SO_2/hr shall apply to the three affected lines, EU020, EU021, and EU022. The SO_2 emission limits for these three pelletizing furnaces are based on a 30-day rolling average. Emissions resulting from the combustion of fuel oil are not included in the calculation of the 30-day rolling average. However, if any fuel oil is burned after the first day that SO_2 CEMS are required to be operational, then the information specified in (b)(2)(vii) must be submitted, for each calendar year, to the Regional Administrator no later than 30 days after the end of each calendar year so that a limit can be set. Compliance with the emission limits is required beginning 6 months from March 8, 2013. Within 20 months of March 8, 2013, the owner or operator may calculate a revised SO_2 limit based on one year of hourly CEMS emissions data reported in lbs SO_2/hr and submit such limit, calculations and CEMS data to EPA. This limit shall be set in terms of lbs

SO_2/hr, based on the following equations, with compliance to be determined on a 30-day rolling average.

$m=(n+1)*\alpha$

m = the rank of the ordered data point, when data is sorted smallest to largest

$n=\alpha$ number of data points

α = 0.95, to reflect the 95th percentile

If m is a whole number, then the limit, *UPL,* shall be computed as:

$UPL = X_m$,

Where:

$X=_m$ value of the mth data point in terms of lbs SO_2/hr, when the data is sorted smallest to largest.

If m is not a whole number, the limit shall be computed by linear interpolation according to the following equation.

$$UPL = x_m = x_{m_i+m_d} = x_{m_i} + m_d\left(x_{m_i+1} - x_{m_i}\right)$$

Where:

$m=_I$ the integer portion of m, i.e., m truncated at zero decimal places, and

$m=_d$ the decimal portion of m

(iii) United States Steel Corporation, Minntac: An aggregate emission limit for indurating furnace Lines 3–7 (EU225, EU261, EU282, EU315, and EU334) of 498 lbs SO_2/hr shall apply when all lines are producing flux pellets. An aggregate emission limit of 630 lbs SO_2/hr shall apply to Lines 3–7 when Line 3–5 are producing acid pellets and Lines 6 and 7 are producing flux pellets. An aggregate emission limit of 800 lbs SO_2/hr shall apply to Lines 3–7 when all lines are producing acid pellets. The SO_2 emission limits are based on a 30-day rolling average and apply beginning 3 months from March 8, 2013. The emission limit for a given 30-day rolling average period is calculated using a weighted average as follows:

$$L_{30} = \frac{498n_f + 630n_{af} + 800n_a}{30}$$

Where:

L_{30} = the limit for a given 30 day averaging period

n_f = the number of days in the 30 day period that the facility is producing flux pellets on lines 3–7

n_{af} = the number of days in the 30 day period that the facility is producing acid pellets on lines 3–5 and flux pellets on lines 6 and 7

n_a = the number of days in the 30 day period that the facility is producing acid pellets on lines 3–7

Also, beginning 3 months from March 8, 2013, any coal burned at Minntac's Lines 3–7 shall have a sulfur content of 0.60 percent sulfur by weight or less based on a monthly block average. The sampling and calculation methodology for determining the sulfur content of fuel must be described in the monitoring plan required at paragraph (e)(8)(x) of this section.

(iv) United Taconite: An aggregate emission limit of 529.0 lbs SO_2/hr, based on a 30-day rolling average, shall apply to the Line 1 pellet furnace (EU040) and Line 2 pellet furnace (EU042) beginning 54 months from March 8, 2013. Also, beginning 54 months from March 8, 2013, any coal burned in the Line 1 or Line 2 pellet furnace shall have a sulfur content of 0.60 percent sulfur by weight or less based on a monthly block average. The sampling and calculation methodology for determining the sulfur content of fuel must be described in the monitoring plan required at paragraph (e)(8)(x) of this section.

(v) ArcelorMittal Minorca Mine: An emission limit of 38.16 lbs SO_2/hr, based on a 30-day rolling average, shall apply to the indurating furnace (EU026) beginning 6 months from March 8, 2013. This limit shall not apply when the unit is combusting fuel oil. However, if any fuel oil is burned after the first day that SO_2 CEMS are required to be operational, then the information specified in paragraph (b)(2)(vii) of this section must be submitted, for each calendar year, to the Regional Administrator no later than 30 days after the end of each calendar year so that a limit can be set. Within 20 months of March 8, 2013, the owner or operator may calculate a revised SO_2 limit based on one year of hourly CEMS emissions data reported in lbs SO_2/hr and submit such limit, calculations, and CEMS data to EPA. This limit shall be set in terms of lbs SO_2/hr, based on the following equations, with compliance to be determined on a 30-day rolling average.

$m = (n + 1) * \alpha$

m = the rank of the ordered data point, when data is sorted smallest to largest

n = number of data points

α = 0.95, to reflect the 95th percentile

If m is a whole number, then the limit, *UPL,* shall be computed as:

$UPL = X_m$,

Where:

x_m = value of the mth data point in terms of lbs SO_2/hr, when the data is sorted smallest to largest

If m is not a whole number, the limit shall be computed by linear interpolation according to the following equation.

$$UPL = x_m = x_{m_i+m_d} = x_{m_i} + m_d\left(x_{m_i+1} - x_{m_i}\right)$$

Where:

m_i = the integer portion of m, i.e., m truncated at zero decimal places, and

m_α = the decimal portion of m

(vi) Northshore Mining Company—Silver Bay: An aggregate emission limit of 39.0 lbs SO_2/hr, based on a 30-day rolling average, shall apply to Furnace 11 (EU100/EU104) and Furnace 12 (EU110/EU114). Compliance with this limit is required within 6 months. Emissions resulting from the combustion of fuel oil are not included in the calculation of the 30-day rolling average. However, if any fuel oil is burned after the first day that SO_2 CEMS are required to be operational, then the information specified in paragraph (b)(2)(vii) of this section must be submitted, for each calendar year, to the Regional Administrator no later than 30 days after the end of each calendar year so that a limit can be set. Within 20 months of March 8, 2013, the owner or operator must calculate a revised SO_2 limit based on one year of hourly CEMS emissions data reported in lbs SO_2/hr and submit such limit, calculations and CEMS data to EPA. This limit shall be set in terms of lbs SO_2/hr, based on the following equations, with compliance to be determined on a 30-day rolling average.

$m = (n + 1) * \alpha$

m = the rank of the ordered data point, when data is sorted smallest to largest

n = number of data points

α = 0.95, to reflect the 95th percentile

If m is a whole number, then the limit, *UPL,* shall be computed as:

$UPL = X^m$,

Where:

x_m = value of the mth data point in terms of lbs SO_2/hr, when the data is sorted smallest to largest

If m is not a whole number, the limit shall be computed by linear interpolation according to the following equation.

$$UPL = x_m = x_{m_i + m_d} = x_{m_i} + m_d \left(x_{m_i+1} - x_{m_i}\right)$$

Where:

m_i = the integer portion of m, i.e., m truncated at zero decimal places, and

$m\alpha$ = the decimal portion of m

(vii) Starting with the first day that SO_2 CEMS are required to be operational, for the facilities listed in paragraphs (b)(2)(i)–(b)(2)(vi) of this section, records shall be kept for any day during which fuel oil is burned (either alone or blended with other fuels) in one or more of a facility's indurating furnaces. These records must include, at a minimum, the gallons of fuel oil burned per hour, the sulfur content of the fuel oil, and the SO_2 emissions in pounds per hour. If any fuel oil is burned after the first day that SO_2 CEMS are required to be operational, then the records must be submitted, for each calendar year, to the Regional Administrator no later than 30 days after the end of each calendar year.

(c) *Testing and monitoring.* (1) The owner or operator of the respective facility shall install, certify, calibrate, maintain and operate Continuous Emissions Monitoring Systems (CEMS) for NO_X on United States Steel Corporation, Keetac unit EU030; Hibbing Taconite Company units EU020, EU021, and EU022; United States Steel Corporation, Minntac units EU225, EU261, EU282, EU315, and EU334; United Taconite units EU040 and EU042; ArcelorMittal Minorca Mine unit EU026; and Northshore Mining Company—Silver Bay units Furnace 11 (EU100/EU104) and Furnace 12 (EU110/EU114). Compliance with the emission limits for NO_X shall be determined using data from the CEMS.

(2) The owner or operator shall install, certify, calibrate, maintain and operate CEMS for SO_2 on United States Steel Corporation, Keetac unit EU030; Hibbing Taconite Company units EU020, EU021, and EU022; United States Steel Corporation, Minntac units EU225, EU261, EU282, EU315, and EU334; United Taconite units EU040 and EU042; ArcelorMittal Minorca Mine unit EU026; and Northshore Mining Company—Silver Bay units Furnace 11 (EU100/EU104) and Furnace 12 (EU110/EU114).

(3) The owner or operator shall install, certify, calibrate, maintain and operate one or more continuous diluent monitor(s) (O_2 or CO_2) and continuous flow rate monitor(s) on the BART affected units to allow conversion of the NO_X and SO_2 concentrations to units of the standard (lbs/MMBtu and lbs/hr, respectively) unless a demonstration is made that a diluent monitor and continuous flow rate monitor are not needed for the owner or operator to demonstrate compliance with applicable emission limits in units of the standards.

(4) For purposes of this section, all CEMS required by this section must meet the requirements of paragraphs (c)(4)(i)–(xiv) of this section.

(i) All CEMS must be installed, certified, calibrated, maintained, and operated in accordance with 40 CFR Part 60, Appendix B, Performance Specification 2 (PS–2) and Appendix F, Procedure 1.

(ii) All CEMS associated with monitoring NO_X (including the NO_X monitor and necessary diluent and flow rate monitors) must be installed and operational no later than the unit specific compliance dates for the emission limits identified at paragraphs (b)(1)(i)–(vi) of this section. All CEMS associated with monitoring SO_2 (except the CEMS associated with monitoring SO_2 at United Taconite Line 1 and Line 2 pellet furnaces) must be installed and operational no later than six months after March 8, 2013. All CEMs associated with monitoring SO_2 at United Taconite Line 1 and Line 2 pellet furnaces must be installed and operational no later than 54 months from March 8, 2013. Verification of the CEMS operational status shall, as a minimum, include completion of the manufacturer's written requirements or recommendations for installation, operation, and calibration of the devices.

(iii) The owner or operator must conduct a performance evaluation of each CEMS in accordance with 40 CFR Part 60, Appendix B, PS–2. The performance evaluations must be completed no later than 60 days after the respective CEMS installation.

(iv) The owner or operator of each CEMS must conduct periodic Quality Assurance, Quality Control (QA/QC) checks of each CEMS in accordance with 40 CFR Part 60, Appendix F, Procedure 1. The first CEMS accuracy test will be a relative accuracy test audit (RATA) and must be completed no later than 60 days after the respective CEMS installation.

(v) The owner or operator of each CEMS must furnish the Regional Administrator two, or upon request, more copies of a written report of the results of each performance evaluation and QA/QC check within 60 days of completion.

(vi) The owner or operator of each CEMS must check, record, and quantify the zero and span calibration drifts at least once daily (every 24 hours) in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 4.

(vii) Except for CEMS breakdowns, repairs, calibration checks, and zero and span adjustments, all CEMS required by this section shall be in continuous operation during all periods of BART affected process unit operation, including periods of process unit startup, shutdown, and malfunction.

(viii) All CEMS required by this section must meet the minimum data requirements at paragraphs (c)(4)(viii)(A)–(C) of this section.

(A) Complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute quadrant of an hour.

(B) Sample, analyze and record emissions data for all periods of process operation except as described in paragraph (c)(4)(viii)(C) of this section.

(C) When emission data from CEMS are not available due to continuous monitoring system breakdowns, repairs, calibration checks, or zero and span adjustments, emission data must be obtained using other monitoring systems or emission estimation methods approved by the EPA. The other monitoring systems or emission estimation methods to be used must be incorporated into the monitoring plan required by this section and provide information such that emissions data are available for a minimum of 18 hours in each 24 hour period and at least 22 out of 30 successive unit operating days.

(ix) Owners or operators of each CEMS required by this section must reduce all data to 1-hour averages. Hourly averages shall be computed using all valid data obtained within the hour but no less than one data point in each fifteen-minute quadrant of an hour. Notwithstanding this requirement, an hourly average may be computed from at least two data points separated by a

minimum of 15 minutes (where the unit operates for more than one quadrant in an hour) if data are unavailable as a result of performance of calibration, quality assurance, preventive maintenance activities, or backups of data from data acquisition and handling systems, and recertification events.

(x) The 30-day rolling average emission rate determined from data derived from the CEMS required by this section (in lbs/MMBtu or lbs/hr depending on the emission standard selected) must be calculated in accordance with paragraphs (c)(4)(x)(A)–(F) of this section.

(A) Sum the total pounds of the pollutant in question emitted from the Unit during an operating day and the previous twenty-nine operating days.

(B) Sum the total heat input to the unit (in MMBtu) or the total actual hours of operation (in hours) during an operating day and the previous twenty-nine operating days.

(C) Divide the total number of pounds of the pollutant in question emitted during the thirty operating days by the total heat input (or actual hours of operation depending on the emission limit selected) during the thirty operating days.

(D) For purposes of this calculation, an operating day is any day during which fuel is combusted in the BART affected Unit regardless of whether pellets are produced. Actual hours of operation are the total hours a unit is firing fuel regardless of whether a complete 24-hour operational cycle occurs (i.e. if the furnace is firing fuel for only 5 hours during a 24-hour period, then the actual operating hours for that day are 5. Similarly, total number of pounds of the pollutant in question for that day is determined only from the CEMS data for the five hours during which fuel is combusted.)

(E) If the owner or operator of the CEMS required by this section uses an alternative method to determine 30-day rolling averages, that method must be described in detail in the monitoring plan required by this section. The alternative method will only be applicable if the final monitoring plan and the alternative method are approved by EPA.

(F) A new 30-day rolling average emission rate must be calculated for each new operating day.

(xi) The 30-day rolling average removal efficiency determined from data derived from the CEMS required by this section must be calculated in accordance with paragraphs (c)(4)(xi)(A)–(G) of this section.

(A) Calculate the 30-day rolling average emission rate described in paragraphs (c)(4)(x)(A)–(F) of this section at the inlet of the control device.

(B) Calculate the 30-day rolling average emission rate described in paragraphs (c)(4)(x)(A)–(F) of this section at the outlet of the control device.

(C) Subtract the 30-day rolling average emission rate determined at the outlet of the control device from the 30-day rolling average emission rate determined at the inlet of the control device.

(D) Divide the result of paragraph (c)(4)(xi)(C) of this section by the 30-day rolling average emission rate determined at the inlet.

(E) Multiply the result of paragraph (c)(4)(xi)(D) of this section by 100 to determine the 30-day rolling average removal efficiency.

(F) If the owner or operator of the CEMS required by this section uses an alternative method to determine the 30-day rolling average removal efficiency, that method must be described in detail in the monitoring plan required by this section. The alternative method will only be applicable if the final monitoring plan and the alternative method are approved by EPA.

(G) A new 30-day rolling average removal efficiency must be calculated for each new operating day.

(xii) Data substitution must not be used for purposes of determining compliance under this section.

(xiii) All CEMS data shall be reduced and reported in units of the applicable standard.

(xiv) A Quality Control Program must be developed and implemented for all CEMS required by this section in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 3. The program will include, at a minimum, written procedures and operations for calibration checks, calibration drift adjustments, preventative maintenance, data collection, recording and reporting, accuracy audits/procedures, periodic performance evaluations, and a corrective action program for malfunctioning CEMS.

(5) No later than the compliance date of this section, owners or operators utilizing a wet scrubber to control SO_2 shall include in the performance testing an evaluation of compliance with the pH limits established by this section. The pH evaluation shall be performed in accordance with the requirements of 40 CFR 136.3 using EPA Method 150.2.

(d) *Recordkeeping requirements.* (1)(i) Records required by this section must be kept in a form suitable and readily available for expeditious review.

(ii) Records required by this section must be kept for a minimum of 5 years following the date of creation.

(iii) Records must be kept on site for at least 2 years following the date of creation and may be kept offsite, but readily accessible, for the remaining 3 years.

(2) The owner or operator of the BART affected units must maintain the records at paragraphs (d)(2)(i)–(xi) of this section.

(i) A copy of each notification and report developed for and submitted to comply with this section including all documentation supporting any initial notification or notification of compliance status submitted according to the requirements of this section.

(ii) Records of the occurrence and duration of startup, shutdown, and malfunction of the BART affected units, air pollution control equipment, and CEMS required by this section.

(iii) Records of activities taken during each startup, shutdown, and malfunction of the BART affected unit, air pollution control equipment, and CEMS required by this section.

(iv) Records of the occurrence and duration of all major maintenance conducted on the BART affected units, air pollution control equipment, and CEMS required by this section.

(v) Records of each excess emission report, including all documentation supporting the reports, dates and times when excess emissions occurred, investigations into the causes of excess emissions, actions taken to minimize or eliminate the excess emissions, and preventative measures to avoid the cause of excess emissions from occurring again.

(vi) Records of all CEMS data including, as a minimum, the date, location, and time of sampling or measurement, parameters sampled or measured, and results.

(vii) All records associated with quality assurance and quality control activities on each CEMS as well as other records required by 40 CFR Part 60, Appendix F, Procedure 1 including, but not limited to, the quality control program, audit results, and reports submitted as required by this section.

(viii) Records of the NO_X emissions during all periods of BART affected unit operation, including startup, shutdown and malfunction in the units of the standard. The owner or operator shall convert the monitored data into the appropriate unit of the emission limitation using appropriate conversion factors and F-factors. F-factors used for purposes of this section shall be documented in the monitoring plan and developed in accordance with 40 CFR

Part 60, Appendix A, Method 19. The owner or operator may use an alternate method to calculate the NO_X emissions upon written approval from EPA.

(ix) Records of the SO_2 emissions or records of the removal efficiency (based on CEMS data), depending on the emission standard selected, during all periods of operation, including periods of startup, shutdown and malfunction, in the units of the standard.

(x) Records associated with the CEMS unit including type of CEMS, CEMS model number, CEMS serial number, and initial certification of each CEMS conducted in accordance with 40 CFR Part 60, Appendix B, Performance Specification 2 must be kept for the life of the CEMS unit.

(xi) Records of all periods of fuel oil usage as required at paragraph (b)(2)(vi) of this section.

(e) *Reporting requirements.* (1) All requests, reports, submittals, notifications, and other communications to the Regional Administrator required by this section shall be submitted, unless instructed otherwise, to the Air and Radiation Division, U.S. Environmental Protection Agency, Region 5 (A–18J), at 77 West Jackson Boulevard, Chicago, Illinois 60604.

(2) The owner or operator of each BART affected unit identified in this section and CEMS required by this section must provide to the Regional Administrator the written notifications, reports and plans identified at paragraphs (e)(2)(i)–(viii) of this section. If acceptable to both the Regional Administrator and the owner or operator of each BART affected unit identified in this section and CEMS required by this section the owner or operator may provide electronic notifications, reports and plans.

(i) A notification of the date construction of control devices and installation of burners required by this section commences postmarked no later than 30 days after the commencement date.

(ii) A notification of the date the installation of each CEMS required by this section commences postmarked no later than 30 days after the commencement date.

(iii) A notification of the date the construction of control devices and installation of burners required by this section is complete postmarked no later than 30 days after the completion date.

(iv) A notification of the date the installation of each CEMS required by this section is complete postmarked no later than 30 days after the completion date.

(v) A notification of the date control devices and burners installed by this section startup postmarked no later than 30 days after the startup date.

(vi) A notification of the date CEMS required by this section startup postmarked no later than 30 days after the startup date.

(vii) A notification of the date upon which the initial CEMS performance evaluations are planned. This notification must be submitted at least 60 days before the performance evaluation is scheduled to begin.

(viii) A notification of initial compliance, signed by the responsible official who shall certify its accuracy, attesting to whether the source has complied with the requirements of this section, including, but not limited to, applicable emission standards, control device and burner installations, CEMS installation and certification. This notification must be submitted before the close of business on the 60th calendar day following the completion of the compliance demonstration and must include, at a minimum, the information at paragraphs (e)(2)(viii)(A)–(F) of this section.

(A) The methods used to determine compliance.

(B) The results of any CEMS performance evaluations, and other monitoring procedures or methods that were conducted.

(C) The methods that will be used for determining continuing compliance, including a description of monitoring and reporting requirements and test methods.

(D) The type and quantity of air pollutants emitted by the source, reported in units of the standard.

(E) A description of the air pollution control equipment and burners installed as required by this section, for each emission point.

(F) A statement by the owner or operator as to whether the source has complied with the relevant standards and other requirements.

(3) The owner or operator must develop and implement a written startup, shutdown, and malfunction plan for NO_X and SO_2. The plan must include, at a minimum, procedures for operating and maintaining the source during periods of startup, shutdown, and malfunction; and a program of corrective action for a malfunctioning process and air pollution control and monitoring equipment used to comply with the relevant standard. The plan must ensure that, at all times, the owner or operator operates and maintains each affected source, including associated air pollution control and monitoring equipment, in a manner which satisfies the general duty to minimize or eliminate emissions using good air pollution control practices. The plan must ensure that owners or operators are prepared to correct malfunctions as soon as practicable after their occurrence.

(4) The written reports of the results of each performance evaluation and QA/QC check in accordance with and as required by paragraph (c)(4)(v) of this section.

(5) *Compliance reports.* The owner or operator of each BART affected unit must submit semiannual compliance reports. The semiannual compliance reports must be submitted in accordance with paragraphs (e)(5)(i) through (iv) of this section, unless the Administrator has approved a different schedule.

(i) The first compliance report must cover the period beginning on the compliance date that is specified for the affected source through June 30 or December 31, whichever date comes first after the compliance date that is specified for the affected source.

(ii) The first compliance report must be postmarked no later than 30 calendar days after the reporting period covered by that report (July 30 or January 30), whichever comes first.

(iii) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(iv) Each subsequent compliance report must be postmarked no later than 30 calendar days after the reporting period covered by that report (July 30 or January 30).

(6) *Compliance report contents.* Each compliance report must include the information in paragraphs (e)(6)(i) through (vi) of this section.

(i) Company name and address.

(ii) Statement by a responsible official, with the official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report.

(iii) Date of report and beginning and ending dates of the reporting period.

(iv) Identification of the process unit, control devices, and CEMS covered by the compliance report.

(v) A record of each period of startup, shutdown, or malfunction during the reporting period and a description of the actions the owner or operator took to minimize or eliminate emissions arising as a result of the startup, shutdown, or malfunction and whether those actions were or were not consistent with the source's startup, shutdown, and malfunction plan.

(vi) A statement identifying whether there were or were not any deviations from the requirements of this section

during the reporting period. If there were deviations from the requirements of this section during the reporting period, then the compliance report must describe in detail the deviations which occurred, the causes of the deviations, actions taken to address the deviations, and procedures put in place to avoid such deviations in the future. If there were no deviations from the requirements of this section during the reporting period, then the compliance report must include a statement that there were no deviations. For purposes of this section, deviations include, but are not limited to, emissions in excess of applicable emission standards established by this section, failure to continuously operate an air pollution control device in accordance with operating requirements designed to assure compliance with emission standards, failure to continuously operate CEMS required by this section, and failure to maintain records or submit reports required by this section.

(7) Each owner or operator of a CEMS required by this section must submit quarterly excess emissions and monitoring system performance reports for each pollutant monitored for each BART affected unit monitored. All reports must be postmarked by the 30th day following the end of each three-month period of a calendar year (January–March, April–June, July–September, October–December) and must include, at a minimum, the requirements at paragraphs (e)(7)(i)–(xv) of this section.

(i) Company name and address.

(ii) Identification and description of the process unit being monitored.

(iii) The dates covered by the reporting period.

(iv) Total source operating hours for the reporting period.

(v) Monitor manufacturer, monitor model number and monitor serial number.

(vi) Pollutant monitored.

(vii) Emission limitation for the monitored pollutant.

(viii) Date of latest CEMS certification or audit.

(ix) A description of any changes in continuous monitoring systems, processes, or controls since the last reporting period.

(x) A table summarizing the total duration of excess emissions, as defined at paragraphs (e)(7)(x)(A)–(B) of this section, for the reporting period broken down by the cause of those excess emissions (startup/shutdown, control equipment problems, process problems, other known causes, unknown causes), and the total percent of excess emissions (for all causes) for the reporting period calculated as described at paragraph (e)(7)(x)(C) of this section.

(A) For purposes of this section, an excess emission is defined as any 30-day rolling average period, including periods of startup, shutdown and malfunction, during which the 30-day rolling average emissions of either regulated pollutant (SO_2 and NO_X), as measured by a CEMS, exceeds the applicable emission standards in this section.

(B) For purposes of this section, if a facility calculates a 30-day rolling average emission rate in accordance with this section which exceeds the applicable emission standards of this section, then it will be considered 30 days of excess emissions. If the following 30-day rolling average emission rate is calculated and found to exceed the applicable emission standards of this section as well, then it will add one more day to the total days of excess emissions (i.e. 31 days). Similarly, if an excess emission is calculated for a 30-day rolling average period and no additional excess emissions are calculated until 15 days after the first, then that new excess emission will add 15 days to the total days of excess emissions (i.e. 30 + 15 = 45). For purposes of this section, if an excess emission is calculated for any period of time within a reporting period, there will be no fewer than 30 days of excess emissions but there should be no more than 121 days of excess emissions for a reporting period.

(C) For purposes of this section, the total percent of excess emissions will be determined by summing all periods of excess emissions (in days) for the reporting period, dividing that number by the total BART affected unit operating days for the reporting period, and then multiplying by 100 to get the total percent of excess emissions for the reporting period. An operating day, as defined previously, is any day during which fuel is fired in the BART affected unit for any period of time. Because of the possible overlap of 30-day rolling average excess emissions across quarters, there are some situations where the total percent of excess emissions could exceed 100 percent. This extreme situation would only result from serious excess emissions problems where excess emissions occur for nearly every day during a reporting period.

(xi) A table summarizing the total duration of monitor downtime, as defined at paragraph (e)(7)(xi)(A) of this section, for the reporting period broken down by the cause of the monitor downtime (monitor equipment malfunctions, non-monitor equipment malfunctions, quality assurance calibration, other known causes, unknown causes), and the total percent of monitor downtime (for all causes) for the reporting period calculated as described at paragraph (e)(7)(xi)(B) of this section.

(A) For purposes of this section, monitor downtime is defined as any period of time (in hours) during which the required monitoring system was not measuring emissions from the BART affected unit. This includes any period of CEMS QA/QC, daily zero and span checks, and similar activities.

(B) For purposes of this section, the total percent of monitor downtime will be determined by summing all periods of monitor downtime (in hours) for the reporting period, dividing that number by the total number of BART affected unit operating hours for the reporting period, and then multiplying by 100 to get the total percent of excess emissions for the reporting period.

(xii) A table which identifies each period of excess emissions for the reporting period and includes, at a minimum, the information in paragraphs (e)(7)(xii)(A)–(F) of this section.

(A) The date of each excess emission.

(B) The beginning and end time of each excess emission.

(C) The pollutant for which an excess emission occurred.

(D) The magnitude of the excess emission.

(E) The cause of the excess emission.

(F) The corrective action taken or preventative measures adopted to minimize or eliminate the excess emissions and prevent such excess emission from occurring again.

(xiii) A table which identifies each period of monitor downtime for the reporting period and includes, at a minimum, the information in paragraphs (e)(7)(xiii)(A)–(D) of this section.

(A) The date of each period of monitor downtime.

(B) The beginning and end time of each period of monitor downtime.

(C) The cause of the period of monitor downtime.

(D) The corrective action taken or preventative measures adopted for system repairs or adjustments to minimize or eliminate monitor downtime and prevent such downtime from occurring again.

(xiv) If there were no periods of excess emissions during the reporting period, then the excess emission report must include a statement which says there were no periods of excess emissions during this reporting period.

(xv) If there were no periods of monitor downtime, except for daily zero

and span checks, during the reporting period, then the excess emission report must include a statement which says there were no periods of monitor downtime during this reporting period except for the daily zero and span checks.

(8) The owner or operator of each CEMS required by this section must develop and submit for review and approval by the Regional Administrator a site specific monitoring plan. The purpose of this monitoring plan is to establish procedures and practices which will be implemented by the owner or operator in its effort to comply with the monitoring, recordkeeping and reporting requirements of this section. The monitoring plan must include, at a minimum, the information at paragraphs (e)(8)(i)–(x) of this section.

(i) Site specific information including the company name, address, and contact information.

(ii) The objectives of the monitoring program implemented and information describing how those objectives will be met.

(iii) Information on any emission factors used in conjunction with the CEMS required by this section to calculate emission rates and a description of how those emission factors were determined.

(iv) A description of methods to be used to calculate emission rates when CEMS data is not available due to downtime associated with QA/QC events.

(v) A description of the QA/QC program to be implemented by the owner or operator of CEMS required by this section. This can be the QA/QC program developed in accordance with 40 CFR Part 60, Appendix F, Procedure 1, Section 3.

(vi) A list of spare parts for CEMS maintained on site for system maintenance and repairs.

(vii) A description of the procedures to be used to calculate 30-day rolling averages and an example calculation which shows the algorithms used by the CEMS to calculate 30-day rolling averages.

(viii) A sample of the document to be used for the quarterly excess emission reports required by this section.

(ix) A description of the procedures to be implemented to investigate root causes of excess emissions and monitor downtime and the proposed corrective actions to address potential root causes of excess emissions and monitor downtime.

(x) A description of the sampling and calculation methodology for determining the percent sulfur by weight as a monthly block average for coal used during that month.

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Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Tidewater Goby; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2011–0085; 4500030114]

RIN 1018–AX39

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Tidewater Goby

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, designate critical habitat for the tidewater goby (*Eucyclogobius newberryi*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 12,156 acres (4,920 hectares) in Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego Counties, California, fall within the boundaries of the critical habitat designation.

DATES: This rule becomes effective on March 8, 2013.

ADDRESSES: This final rule and the associated final economic analysis are available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0085, and from the Ventura Fish and Wildlife Office Web site at *http://www.fws.gov/ventura/.* Comments and materials received, as well as supporting documentation used in preparing this final rule, are available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone 805–644–1766; facsimile 805–644–3958.

The coordinates or plot points or both from which the maps included in the regulation are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/ventura/,* at *http://www.regulations.gov* in Docket No. FWS–R8–ES–2011–0085, and at the Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that has been developed for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: For general information, and information about the final designation in Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, and Los Angeles Counties, contact Diane K. Noda, Field Supervisor, U.S. Fish and Wildlife Service, Ventura Fish and Wildlife Office, 2493 Portola Road, Suite B, Ventura, CA 93003; telephone 805–644–1766; facsimile 805–644–3958. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

For information about the final designation in Del Norte, Humboldt, and Mendocino Counties, contact Nancy Finley, Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office, 1655 Heindon Road, Arcata, CA 95521; telephone 707–822–7201; facsimile 707–822–8411.

For information about the final designation in Sonoma, Marin, and San Mateo Counties, contact Susan Moore, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Suite W–2605, Sacramento, CA 95825; telephone 916–414–6600; facsimile 916–414–6712.

For information about the final designation in Orange and San Diego Counties, contact Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Service Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone 760–431–9440; facsimile 760–431–5901.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. This is a final rule to revise the designation of critical habitat for the endangered tidewater goby. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule. In total, approximately 12,156 acres (ac) (4,920 hectares (ha)) of critical habitat for the tidewater goby in California fall within the boundaries of the critical habitat designation.

We designated critical habitat for this species in 2000 and again in 2008. As part of a settlement agreement, we agreed to reconsider the 2008 designation. A proposed rule to revise the 2008 critical habitat designation was published in the **Federal Register** on October 19, 2011 (76 FR 64996). This constitutes our final revised designation for the tidewater goby.

We are making the following changes to the critical habitat designation. The 2008 final critical habitat designation (73 FR 5920) consisted of 44 units in Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, and Los Angeles Counties, California, totaling 10,003 ac (4,050 ha). In this final critical habitat designation, we have designated 65 critical habitat units for the tidewater goby throughout its range, including the 44 units designated in the 2008 final rule. These units are essential for the recovery of the tidewater goby as described in the Recovery Plan for the Tidewater Goby (Service 2005a; Recovery Plan).

The basis for our action. Under the Act, we must determine critical habitat for any endangered or threatened species to the maximum extent prudent and determinable. We are required to base the designation on the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary of the Department of the Interior (Secretary) may exclude an area from critical habitat if the benefits of exclusion outweigh the benefits of designation, unless the exclusion will result in the extinction of the species.

We prepared an economic analysis. In order to consider economic impacts, we prepared a new analysis of the economic impacts of the proposed revised critical designation. We announced the availability of the draft economic analysis (DEA) in the **Federal Register** on July 24, 2012 (77 FR 43222), allowing the public to provide comments on our analysis. We considered all comments and information received from the public during the comment period, incorporated the comments as appropriate, and have completed the final economic analysis (FEA) concurrently with this final determination. The economic analysis did not identify any areas with disproportionate costs associated with the designation, and no areas were excluded from the final designation based on economic reasons.

Peer review and public comment. We sought comments and information from independent specialists to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We had invited these peer reviewers to comment on our specific assumptions and

conclusions in the proposed revision of the critical habitat designation. These peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated in this final revised designation. We also considered all comments and information received from the public during the comment period.

Previous Federal Actions

On April 15, 2009, the Natural Resources Defense Council (NRDC) filed a lawsuit in the U.S. District Court for the Northern District of California challenging a portion of the January 31, 2008, final rule that designated 44 critical habitat units in California (73 FR 5920, January 31, 2008). The lawsuit challenged the Service's failure to include any unoccupied habitat and the exclusion of some occupied habitat from critical habitat designation, and the failure to explain why unoccupied habitat previously included in the 2000 designation was not included in the 2008 designation. In a consent decree dated December 11, 2009, the U.S. District Court: (1) Stated that the 44 critical habitat units should remain in effect; (2) stated that the final rule designating critical habitat was remanded in its entirety for reconsideration; and (3) directed the Service to promulgate a revised critical habitat rule that considers the entire geographic range of the tidewater goby and any currently unoccupied tidewater goby habitat. The consent decree requires that the Service submit proposed and final revised rules to the **Federal Register** no later than October 7, 2011, and November 27, 2012, respectively. We published a proposed revised critical habitat in the **Federal Register** on October 19, 2011 (76 FR 64996). Information on the associated draft economic analysis for the revised proposed critical habitat was published in the **Federal Register** on July 24, 2012 (77 FR 43222). At the request of the Service on November 26, 2012, the U.S. District Court granted a 60-day extension to submit the final revised rule to the **Federal Register** no later than January 26, 2013. By publishing this final revised designation we are complying with the consent decree established by the Court. For additional information on previous Federal actions please refer to the 1994 listing rule (59 FR 5494; February 4, 1994), and previous critical habitat designation (73 FR 5920; January 31, 2008).

Background

It is our intent to discuss in this final rule only those topics directly relevant to the development and designation of critical habitat for the tidewater goby under the Act (16 U.S.C. 1531 *et seq.*). For more information on the biology and ecology of the tidewater goby, refer to the final listing rule published in the **Federal Register** on February 4, 1994 (59 FR 5494). For information on tidewater goby critical habitat, refer to the proposed rules to designate critical habitat for the tidewater goby published in the **Federal Register** on August 3, 1999 (64 FR 42250), November 28, 2006 (71 FR 68914), and October 19, 2011 (76 FR 64996); and the subsequent final critical habitat designations published in the **Federal Register** on November 20, 2000 (65 FR 69693), and January 31, 2008 (73 FR 5920); and to our Recovery Plan (Service 2005a), which is available from the Ventura Fish and Wildlife Office (see **ADDRESSES** section or *http://ecos.fws.gov*). Information on the associated draft economic analysis for the proposed rule to revise critical habitat was published in the **Federal Register** on July 24, 2012 (77 FR 43222).

Species Description and Genetic/Morphological Characteristics

The tidewater goby is a small, elongate, gray-brown fish rarely exceeding 2 inches (in) (5 centimeters (cm)) in length. This species possesses large pectoral fins, with the pelvic or ventral fins joined to each other beginning below the chest and belly and from below the gill cover back to just anterior of the anus. Male tidewater gobies are nearly transparent with a mottled brown upper surface. Female tidewater gobies develop darker colors, often black, on the body and dorsal and anal fins. The tidewater goby is a short-lived species; the lifespan of most individuals appears to be about 1 year (Irwin and Soltz 1984, p. 26; Swift *et al.* 1989, p. 4; Hellmair 2011, p. 5).

Various genetic markers demonstrate that pronounced differences exist in the genetic structure of the tidewater goby, and that tidewater goby populations in some locations are genetically distinct. A study of mitochondrial DNA and cytochrome b (molecular material used in genetic studies) sequences from tidewater gobies that were collected at 31 locations throughout the species' geographic range has identified six major phylogeographic (historical processes that may be responsible for the current geographic distributions) units (Dawson *et al.* 2001, p. 1171). These six regional units are the basis for the recovery units in the Recovery Plan (Service 2005a, p. 30), and include the following areas: (1) Tillas Slough (Smith River) in Del Norte County to Lagoon Creek in Mendocino County (North Coast (NC) Recovery Unit); (2) Salmon Creek in Sonoma County to Bennett's Slough in Monterey County (Greater Bay (GB) Recovery Unit); (3) Arroyo del Oso to Morro Bay in San Luis Obispo County (Central Coast (CC) Recovery Unit); (4) San Luis Obispo Creek in San Luis Obispo County to Rincon Creek in Santa Barbara County (Conception (CO) Recovery Unit); (5) Ventura River in Ventura County to Topanga Creek in Los Angeles County (Los Angeles-Ventura (LV) Recovery Unit); and (6) San Pedro Harbor in Los Angeles County to Los Peñasquitos Lagoon in San Diego County (South Coast (SC) Recovery Unit).

A more recent study to gather genetic distribution data for the tidewater goby used a panel of novel microsatellite loci (repeating sequences of DNA) assessed in a first-order (unbound strands of DNA) survey across its range (Earl *et al.* 2010, p. 104). More specifically, Earl *et al.* (2010, p. 103) described 19 taxon-specific microsatellite loci, and assessed genetic variation across the tidewater goby's range relative to genetic subdivision. The study concluded: (1) Populations of tidewater goby in northern San Diego County form a highly divergent clade (a genetically related group) with reduced genetic variation that appears to merit status as a separate species; (2) populations along the mid-coast of California are subdivided into regional groups, which are more similar to each other than different, contrary to conclusions from previous mitochondrial sequence-based studies (Dawson *et al.* 2001, p. 1176); and (3) that tidewater goby dispersal during the Pleistocene/Holocene sea level rise (approximately 7,000 years ago), followed by increased isolation during the Holocene, formed a star phylogeny (recent population formed from a common ancestor) with geographic separation in the northernmost populations and some local differentiation (Earl *et al.* 2010, p. 103). Genetic diversity among populations within a species may be important to long-term persistence because it represents the raw material for adapting to differing local conditions and environmental stochasticity (Frankham 2005, p. 754).

The conclusion that the populations of the tidewater goby in the North Coast Recovery Unit formed as a result of a single recent episode of colonization of newly formed habitats is supported by McCraney *et al.* (2010, p. 3325). They compared genetic variation of 13

naturally and artificially fragmented populations of the tidewater goby in northern California, including 8 Humboldt Bay populations and 5 coastal lagoon populations (Lake Earl, Stone Lagoon, Big Lagoon, Virgin Creek, and Pudding Creek), and reached similar conclusions to Earl *et al.* (2010, p. 113). McCraney *et al.* (2010, p. 3325) also concluded that natural and artificial habitat fragmentation caused marked divergence among the tidewater goby in the North Coast populations. Their study showed that Humboldt Bay populations, due to isolation by manmade barriers, exhibited very high levels of genetic differentiation between populations, extremely low levels of genetic diversity within populations, and no migration among populations. They concluded that this pattern makes the Humboldt Bay populations of tidewater goby vulnerable to extirpation because artificial fragmentation and its resulting genetic differentiation between subpopulations, extremely low levels of genetic diversity within subpopulations, and lack of migration among the subpopulations reduces fitness and adaptive potential of a subpopulation (McCraney *et al.* 2010, p. 3325). In contrast, the study found that, while coastal lagoon populations also exhibited very high levels of genetic differentiation between populations, these populations displayed substantial levels of genetic diversity within populations indicating occasional migration among lagoons (McCraney *et al.* 2010, p. 3325). Populations in all coastal lagoons, with the exception of Lake Earl in Del Norte County, appear to be stable and genetically healthy (McCraney *et al.* 2010, p. 3325). The Lake Earl population exhibited reduced levels of genetic diversity in comparison to similar coastal lagoon populations (McCraney *et al.* 2010, p. 3324). McCraney *et al.* (2010, p. 3324) suspects that the reduced genetic diversity detected within Lake Earl is likely due to repeated population bottlenecks (reduced genetic diversity due to reduced population size) resulting from regular artificial breaching of the sandbar at the lagoon mouth.

To summarize, the conclusions from these studies are:

(1) The species can be divided into six phylogeographic units based upon genetic similarities and differences.

(2) The tidewater goby to the south of the gap between Los Angeles and Orange Counties is probably a separate species from populations to the north based on its divergent genetic makeup.

(3) Natural and anthropogenic barriers have contributed to genetic differentiation among populations.

(4) Although genetic differences occur between populations north of the Los Angeles-Orange County line, they are not as divergent as those populations further south.

(5) Some north coast populations exhibit significantly reduced genetic diversity, reduced growth potential, and reduced duration of spawning period. These populations appear to be vulnerable to extirpation.

Metapopulation Dynamics

Local populations of tidewater goby are best characterized as metapopulations (Lafferty *et al.* 1999a, p. 1448; Smith, *in litt.* 2012). How a metapopulation functions through time is an important factor in the conservation of the tidewater goby and thus it is an important consideration in the designation of critical habitat. As such, using information primarily from Groom *et al.* (2006, pp. 216–219, 383–384, 424–428) and Primack (2006, pp. 285–287) and elsewhere as noted below, we present the general concept of metapopulation dynamics followed by a discussion of its application to the tidewater goby.

A metapopulation, in short, is a population of populations (often referred to as subpopulations). However, because of variations in the rates of birth, death, immigration, and emigration, each population is not static over time; as such, the interplay of a metapopulation's constituent populations results in a dynamic process of metapopulation maintenance. Thus, definitions of the term *metapopulation* within the scientific literature often incorporate the dynamic interaction of subpopulations, according to Groom *et al.* (2006, p. 706) a metapopulation consists of: ''A network of semi-isolated populations with some level of regular or intermittent migration and gene flow among them, in which individual populations may go extinct [become extirpated] but can then be recolonized from other populations.'' The Recovery Plan also incorporates interpopulation interaction in its definition of metapopulation: ''several to many subpopulations [of] tidewater goby that are close enough to one another that dispersing individuals could be exchanged'' (Service 2005a, p. A–3).

Regarding this discussion, two points in particular are important to note in metapopulations: (1) Variability within subpopulations, and (2) connectivity between them through dispersing individuals. As mentioned above, subpopulations at different locations within a metapopulation vary over time. Because of intrinsic and extrinsic factors (Soulé and Simberloff 1986, pp. 27–28), some populations at given locations have high rates of growth in some years and other populations decline or even become extirpated. Yet, because subpopulations within a metapopulation are biologically connected through dispersing individuals, high-productivity subpopulations (sources) may augment the population size in low-productivity subpopulations (sinks); moreover, dispersing individuals may even recolonize extirpated areas. In this way, a metapopulation as a whole maintains a greater level of stability over time than its constituent subpopulations—in effect, metapopulation dynamics dampen the effects of variability. In addition to bolstering subpopulations or recolonizing extirpated areas, dispersing individuals are also important for maintaining gene flow between subpopulations (genetic connectivity) and thereby reducing the risk that certain alleles may be lost as a result of the extirpation of a subpopulation.

Moreover, the greater the number of constituent subpopulations within a metapopulation, the greater the likelihood the effects of variability will be attenuated in that metapopulation. In short, because of metapopulation dynamics, extirpation of a subpopulation is not necessarily permanent. This results in a situation where constituent subpopulations ''blink out'' and ''blink on'' over time. A metapopulation persists through time because the rate of extirpation in subpopulations is balanced by the rate of recolonization. As a result, occupancy of an area may change over time.

The balance discussed above is in large part dependent upon dispersal of individuals. Ultimately, when the rate of recolonization is reduced or eliminated, the effects of the threats are no longer dampened by metapopulation dynamics. In such a case, each constituent subpopulation becomes increasingly or completely independent, and extirpation of such a subpopulation is likely to be permanent.

The pattern of extirpation and recolonization observed in the tidewater goby suggests that some tidewater goby populations exhibit a metapopulation dynamic where some populations survive or remain viable by continually exchanging individuals and recolonizing after occasional extirpations (Doak and Mills 1994, p. 619). Individual populations of tidewater goby occupy coastal lagoons and estuaries that are separated from each other by land and, in most cases, are separated from the open ocean by

sandbars, or other barriers. Very few tidewater gobies have ever been captured in the marine environment (Swift *et al.* 1989, p. 7), which suggests that this species rarely occurs in the open ocean. Studies of the tidewater goby suggest that some populations persist on a consistent basis, while other populations appear to experience intermittent extirpations (local extinctions) (Lafferty *et al.* 1999a, p. 1452). These extirpations may result from one or a series of factors, such as the drying up of the lagoon during prolonged droughts (Lafferty *et al.* 1999a, p. 1451). Some of the areas where the tidewater goby has been extirpated apparently have been recolonized by nearby populations (those within approximately 6 miles (mi) (10 kilometers (km))) (Lafferty *et al.* 1999a, p. 1451; Smith, *in litt.* 2012). However, genetic research has revealed tidewater gobies are capable of dispersing up to 30 mi (48 km) (Jacobs *et al.* 2005, p.52).

Lafferty *et al.* (1999b, p. 618) monitored the postflood persistence of several tidewater goby populations in Santa Barbara and Los Angeles Counties after the heavy winter floods of 1995. All of the monitored populations persisted after the floods, and no significant changes in population sizes were noted (Lafferty *et al.* 1999b, p. 621). However, tidewater goby apparently colonized Cañada Honda in Santa Barbara County after one flood event (Lafferty *et al.* 1999b, p. 621). This suggests that flooding—where the barrier between the lagoon and the open ocean is breached and tidewater goby individuals are washed out to sea—may sometimes have a positive effect, forcing the dispersal of individuals and thereby allowing for recolonization of habitats where a tidewater goby population has become extirpated or allowing for genetic exchange between extant populations.

Historical records and survey results for several areas occupied by the tidewater goby are available (Swift *et al.* 1989, pp. 18–19; Swift *et al.* 1994, pp. 8–16). These studies suggest that the persistence of tidewater goby populations is related to habitat size, configuration, location, and proximity to human development. In general, the most stable and persistent tidewater goby populations tend to occur in lagoons and estuaries that are more than 2.5 ac (1 ha) in size, and that have remained relatively unaffected by human activities (Lafferty *et al.* 1999a, pp. 1450–1453). Conversely, some habitats less than 2.5 ac (1 ha) in size have tidewater goby populations that persist on a regular basis, such as Cañada del Agua Caliente in Santa Barbara County (Swift *et al.* 1997, p. 3). We also note that some systems that are affected or altered by human activities also have relatively large and stable populations; examples include Pismo Creek in San Luis Obispo County, the Santa Ynez River in Santa Barbara County, and the Santa Clara River in Ventura County. The best available information suggests that the lagoons and estuaries with persistent tidewater goby populations likely serve as source populations that provide individuals that colonize adjacent locations with intermittent populations (Lafferty *et al.* 1999a, p. 1452). However, a rangewide metapopulation viability analysis for the tidewater goby has not been conducted; data from such a study would help inform which tidewater goby populations are source populations and which are sinks, and allow for the development of metapopulation-based recovery objectives for the species. Until data on demography and dynamics of tidewater goby metapopulations are available, the Recovery Plan for the species calls for interim objectives that emphasize consistent occupancy of habitat capable of sustaining viable tidewater goby populations (Service 2005a, p. 39).

Distribution

The known geographic range of the tidewater goby is limited to the coast of California (Eschmeyer *et al.* 1983, p. 262; Swift *et al.* 1989, p. 12). The species historically occurred from locations 3 mi (5 km) south of the California—Oregon border (Tillas Slough in Del Norte County) to 44 mi (71 km) north of the United States—Mexico border (Agua Hedionda Lagoon in San Diego County). The available documentation (Eschmeyer *et al.* 1983, p. 262; Swift *et al.* 1989, p. 12) suggests that the northernmost extent of the current geographic range has not changed over time. Tidewater goby historically occurred in Agua Hedionda Lagoon, but the site is currently considered to be unoccupied. The species' southernmost, known, currently occupied locality is the San Luis Rey River, 5 mi (8 km) north of Agua Hedionda Lagoon in San Diego County. Although the northernmost extent of the tidewater goby's range has not changed and the southernmost extent has retracted by only 5 mi (8 km), its overall distribution has become patchy and fragmented along the coast. However, as discussed above in the *Metapopulation Dynamics* section, the occupancy of an area may change overtime and, when determining occupancy of an area, we first look at the rangewide occupancy for the species and then consider potential connectivity and source areas at the subpopulation or unit level.

The tidewater goby appears to be naturally absent from several long (50 to 135 mi (80 to 217 km)) stretches of coastline lacking lagoons or estuaries, where steep topography or swift currents may prevent the tidewater goby from dispersing between adjacent locations (Swift *et al.* 1989, p. 13; Earl *et al.* 2010, p. 104). One such gap occurs between the Eel River in Humboldt County and the Ten Mile River in Mendocino County. A second gap exists between Davis Lake in Mendocino County and Salmon Creek in Sonoma County. Another large natural gap exists between Monterey County and Arroyo del Oso in San Luis Obispo County. Habitat loss and other anthropogenic-related factors have resulted in the tidewater goby's absence from several locations where it historically occurred; the extirpation of tidewater goby from some of these locations has expanded gaps and created additional gaps in the species' geographic distribution (Capelli 1997, p. 7). Two examples of extirpations are San Francisco Bay in San Francisco and Alameda Counties, and Redwood Creek and Freshwater Lagoon in Humboldt County.

Swift *et al.* (1989, p. 13) reported that, as of 1984, tidewater goby occurred or had been known to occur at 87 locations, including those at the extreme northern and southern end of the species' historical geographic range. An assessment of the species' distribution in 1993, using records that were limited to the area between the Monterey Peninsula in Monterey County and the United States—Mexico border, found the tidewater goby occurring at four additional sites since 1984 (Swift *et al.* 1993, p. 129). Other locations have been identified since 1993, and to date the tidewater goby has been documented to have occurred at 135 locations. Of these 135 locations, 21 (16 percent) are no longer occupied by the tidewater goby.

Habitat

The lagoons, estuaries, backwater marshes, and freshwater tributaries that tidewater goby occupy are dynamic environments subject to considerable fluctuations on a seasonal and annual basis. Typically, a sandbar forms in the late spring as flow into a lagoon declines enough to allow the ocean surf to build up sand at the mouth of the lagoon. Winter rains and increased stream flows may bring in considerable sediment and dramatically affect the bottom profile and substrate composition of a lagoon or estuary. Fine mud and clay either move through the

lagoon or estuary, or settle out in the backwater marshes, while heavier sand is left behind. High flows associated with winter rains can scour out the lagoon bottom to a lower level, especially after breaching the mouth sandbar, with sand building up again after flows decline. These dynamic processes result in wetland habitats that, over time, move both up or down coast, and inland or coastward.

The horizontal extent of the lentic (pondlike) wetland habitat associated with a particular tidewater goby locality varies and is affected, in part, by local precipitation patterns and topography. In coastal areas where the topography is steep and precipitation relatively low, such as areas adjacent to the Santa Ynez Mountains in Santa Barbara County, the habitats occupied by tidewater goby may be a few acres in size and only extend a few hundred feet inland from the ocean, with backwater marshes small or absent. In other coastal settings where topography is less steep and precipitation is more abundant, surface streams are larger, and coastal lagoons or estuaries may be hundreds of acres in size and extend many miles inland and may include extensive backwater marshes (for example, Lake Earl in Del Norte County and Ten Mile River in Mendocino County). Some occupied locations, such as Bennett's Slough in Monterey County, receive water from upstream areas on a year-round basis. Such locations tend to possess wetland habitats that are larger and can extend inland for several miles. Other occupied locations do not possess stream channels or tributaries that provide a considerable amount of water throughout the summer or fall months. Such locations, such as Little Pico Creek in San Luis Obispo County, tend to possess wetland habitats that extend only a short distance inland.

Reproduction

The tidewater goby has been observed to spawn in every month of the year except December (Swenson 1999, p. 107). Reproduction tends to peak in late April or May to July, and can continue into November depending on seasonal temperature and rainfall. Hellmair's (2011) findings reveal year-round reproduction for some tidewater goby populations that have high genetic diversity and restricted spawning periods for other populations with low genetic diversity. Swenson (1995, p. 31) has documented the spawning activities of adult fish or the presence of egg clutches at water temperatures between 48 and 77 degrees Fahrenheit (°F) (9 and 25 degrees Celsius (°C)). Spawning tidewater gobies have been documented to breed in water salinities between 1 and 30 parts per thousand (ppt) (Swenson 1995, p. 31, Smith, *in litt.* 2012). However, tidewater gobies prefer salinities less than 10 ppt (Moyle 2002, p. 431).

Threats

The final listing rule for the tidewater goby published in 1994 (59 FR 5494; February 4, 1994) and the 5-year review (Service 2007) state that this species is threatened, or potentially threatened, by: (1) Coastal development projects that result in the loss or alteration of coastal wetland habitat; (2) water diversions and alterations of water flows upstream of coastal lagoons and estuaries that negatively impact the species' breeding and foraging activities; (3) groundwater overdrafting; (4) channelization of the rivers where the species occurs; (5) discharge of agricultural and sewage effluents; (6) cattle grazing and feral pig activity that results in increased sedimentation of coastal lagoons and riparian habitats, removal of vegetative cover, increased ambient water temperatures, and elimination of plunge pools and undercut banks utilized by the tidewater goby; (7) introduced species that prey on the tidewater goby (e.g., bass (*Micropterus* spp.), rainwater killifish (*Lucania parva*), and crayfish (*Cambarus* spp.)); (8) the inadequacy of existing regulatory mechanisms; (9) drought conditions that result in the deterioration of coastal and riparian habitats; and (10) competition with introduced species, such as the yellowfin goby (*Acanthogobius flavimanus*) and chameleon goby (*Tridentiger trigonocephalus*). Lastly, loss of genetic diversity has also been recently shown to threaten populations of tidewater goby (McCraney *et al.* 2010, Hellmair 2011).

Climate Change

Our analyses under the Endangered Species Act include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (e.g., temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007, p. 78). Various types of changes in climate can have direct or indirect effects on species. These effects may be positive, neutral, or negative and they may change over time, depending on the species and other relevant considerations, such as the effects of interactions of climate with other variables (e.g., habitat fragmentation) (IPCC 2007, pp. 8–14, 18–19). In our analyses, we use our expert judgment to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

In addition to the threats listed above, tidewater goby populations are threatened by global climate change. Sea level rise and hydrological changes associated with climate change are having and will continue to have significant effects on tidewater goby habitat over the next several decades.

Sea level rise is a result of two phenomena: thermal expansion (increased sea water temperatures) and global ice melt (Cayan *et al.* 2006, p. 5, National Research Council 2012, p. 33). Between 1897 and 2006, the observed sea level rise has been approximately 2 millimeters (0.08 in) per year, or a total of 20 cm (8 in) over that period (Heberger *et al.* 2009, p. 6). Older estimates projected that sea level rise along the California coast would follow a similar rate and reach 0.2–0.6 meters (m) (0.7–2 feet (ft)) by 2100 (IPCC 2007). Recent observations and models indicate that those projections were conservative and ignored some critical factors, such as melting of the Greenland and Antarctica ice sheets (Heberger *et al.* 2009, p. 6; Rahmstorf 2010, p. 44). Heberger *et al.* (2009, p. 8) have updated the sea level rise projections for California to 1.0–1.4 m (3.3–4.6 ft) by 2100, while Vermeer and Rahmstorf (2009, p. 21530) calculate the sea level rise globally at 0.57–1.9 m (2.4–6.2 ft); in both cases, recent estimates were more than twice earlier projections. Combined with California's normal dramatic tidal fluctuations and coincidental storms—the severity of the latter is projected to increase with more frequent El Niño Southern Oscillations due to increasing surface water temperature (Cayan *et al.* 2006, p. 17)—the effects of sea level rise are expected to result in greater coastal erosion (Scripps Institution of Oceanography 2012, p. 24) and reach farther inland than previously anticipated (Cayan *et al.* 2006, pp. 48–49; Cayan *et al.* 2009, p. 40).

Park *et al.* (1989, pp. 1–52) projected that, of the saltmarshes along the coast of the contiguous United States: 30 percent would be lost with a 0.5-m (1.6-

ft) sea level rise, 46 percent with a 1-m (3.3-ft) sea level rise, 52 percent with a 2-m (6.6-ft) sea level rise, and 65 percent with a 3-m (9.8-ft) sea level rise. While we cannot project directly to California from the estimates of Park *et al.* (1989, p. 1–52) who focused on the east coast and Gulf coast of the United States, we can anticipate that, with a projected global sea level rise of up to almost 2 m (6.6 ft), 46 to 65 percent of the remaining coastal saltmarshes in California would be lost by 2100. Applying Heberger *et al.'s* (2009, p. 8) more conservative estimates for California to Park *et al.'s* calculations, with a projected sea level rise of 1.0–1.4 m (3.3–4.6 ft) by 2100, somewhere between 46 and 52 percent of the coastal saltmarshes in California would be inundated.

For the tidewater goby, sea level rise estimates based on more recent projections, combined with the effects of storms and tidal fluctuations, have the potential to transform coastal lagoons into primarily saltwater bodies (Cayan *et al.* 2006, pp. 34, 48–49). More severe storms that are likely to result from climate change (Cayan *et al.* 2006, p. 17), especially along the northern coast of California (Cayan *et al.* 2009, p. 38), combined with the higher than normal sea levels, will breach lagoon mouths more frequently from the ocean side, allowing more saltwater intrusion, altering the physical conditions of the tidewater goby's habitat (increased salinity), and disrupting the tidewater goby's normal reproduction process that requires closed lagoons and a specific range of salinities. The conversion of coastal lagoons and estuaries from brackish to primarily saltwater bodies, in addition to the inundation and breaching of sandbars, would eliminate habitat for tidewater goby in many areas. For a species that exhibits metapopulation dynamics and was listed as endangered due to past habitat loss and fragmentation of metapopulations, the projection of further habitat loss due to sea level rise raises concerns for the tidewater goby's survival over the long term.

Summary of Changes From Previously Designated Critical Habitat and 2011 Proposed Revised Critical Habitat Designation

In this section we present the differences between what was designated in the January 31, 2008, final rule (73 FR 5920), what was included in the October 19, 2011, proposed rule (76 FR 64996), and what is included in this final designation.

The 2008 final critical habitat designation (73 FR 5920, January 31, 2008) consisted of 44 units in Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, and Los Angeles Counties, California, totaling 10,003 ac (4,050 ha). In this final critical habitat designation, we have designated 65 critical habitat units for the tidewater goby throughout its range, including the 44 units designated in the 2008 final rule. Of the 21 new units included in this designation, 5 units are within the geographical area occupied at the time of listing and 16 units are outside the geographical area occupied at the time of listing (Table 1). Of the 16 new units that are outside the geographical area occupied at the time of listing, 8 units are currently occupied (Table 1). These 16 units are essential for the conservation of the tidewater goby as described in the Recovery Plan (Service 2005a).

This final critical habitat designation for the tidewater goby also differs from our October 19, 2011 (76 FR 64996) proposed rule. We reviewed and considered comments from the public and peer reviewers on the proposed revised designation, and from the public on the draft economic analysis published on July 24, 2012 (77 FR 43222). As a result of comments received, our final designation differs from our proposed designation, as follows:

(1) Based on information we received in comments regarding our proposal to designate unoccupied units, we revised the language in the *Criteria Used To Identify Critical Habitat* section of this final rule to clarify our intent. In the proposed rule we stated that, ''We also are proposing to designate specific areas outside the geographical area occupied by the species at the time of listing that were historically occupied, but are presently unoccupied, because such areas are essential for the conservation of the species'' (p. 65004). However, we did not intend to limit the proposal to only specific areas outside the geographical area occupied by the species at the time of listing that were historically occupied. Our intent was to consider all areas that are essential for the conservation of the species and not only those that were known to be historically occupied; we were in error when we included ''that were historically occupied, but are presently unoccupied'' in the proposed rule. We proposed to designate six units that are outside the geographical area occupied by the species at the time of listing where the tidewater goby has not been detected historically. These units are: Pomponio Creek (SM–2), Bolinas Lagoon (MAR–5), Arroyo de la Cruz (SLO–1), Oso Flaco Lake (SLO–12), Arroyo Sequit (LA–1), and Zuma Canyon (LA–2). Subsequent to the publication of the proposed rule, tidewater gobies have been detected in Pomponio Creek (SM–2) (Rischbieter, *in litt.* 2012). These units are essential for the conservation of the tidewater goby as described in the Recovery Plan (Service 2005a) and the unit descriptions below.

(2) We revised and expanded our discussion on tidewater goby metapopulation dynamics and provided a discussion on the effects of climate change on the tidewater goby and its habitat.

(3) Based on comments received from the County of Santa Barbara pertaining to unit SB–12, Arroyo Paredon Creek, we reassessed the topography of the unit as originally proposed and determined that the gradient of the upper portion of the unit was a barrier to tidewater gobies. The unit now includes approximately 3 ac (1 ha), a net decrease of approximately 1 ac (less than 1 ha) from the proposal.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features.

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements that provide for a species' life-history processes, such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that, under the appropriate species-specific circumstances, are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, we may determine that an area currently occupied by the species but outside the geographical area occupied at the time of listing is essential for the conservation of the species and include it in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the Recovery Plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to insure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) the prohibitions of section 9 of the Act if actions occurring in these areas may affect the species. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential to tidewater goby conservation from studies of this species' habitat, ecology, and life history as described in the Critical Habitat section of the proposed rule to revise critical habitat published in the **Federal Register** on October 19, 2011 (76 FR 64996), and in the information presented below. Additional information can be found in the final listing rule published in the **Federal Register** on February 4, 1994 (59 FR 5494), and the Recovery Plan for the tidewater goby (Service 2005a). We have determined that the tidewater goby requires the following physical or biological features:

Space for Individual and Population Growth and for Normal Behavior

Saline Aquatic Habitat

The tidewater goby occurs in lagoons, estuaries, and backwater marshes that are adjacent to the Pacific Ocean (Wang 1982, p. 14; Irwin and Soltz 1984, p. 27; Swift *et al.* 1989, p. 1; Swenson 1993, p. 3; Moyle 2002, p. 431). The tidewater goby is most commonly found in waters with relatively low salinities, that is, less than 10 to 12 parts per thousand (ppt) (Swift *et al.* 1989, p. 7) (see below for further details). This species can, however, tolerate a wide range of salinities and is frequently found in coastal habitats with higher salinity levels (Swift *et al.* 1989, p. 7; Worcester 1992, p. 106; Swift *et al.* 1997, pp. 15–22); the species has been collected in salinities as high as 42 ppt (Swift *et al.* 1989, p. 7). The species' tolerance of high salinities likely enables it to withstand some exposure to the marine environment, which has a salinity of about 35 ppt, allowing it to recolonize nearby lagoons and estuaries following flood events (Swift *et al.* 1989, p. 7). However, tidewater gobies have only rarely been captured in the marine environment (Swift *et al.* 1989, p. 7), and they appear to enter the ocean only when flushed out of lagoons, estuaries, and river mouths by storm events or human-caused breaches of sand bars. Salinity tolerance studies indicate that larval stages are largely intolerant of high salinities whereas adult tidewater gobies can tolerate higher salinities. These findings suggest spawning in saline conditions is unlikely to be productive and that migration among subpopulations is most likely the result of adult tidewater goby movement (Kinziger, *in litt.* 2012). The goal of the Recovery Plan is to preserve the diversity of habitats that occur within the range of the species, the metapopulation structure of the species, and genetic diversity (Service 2005a, p. 28).

Water Depth, Velocity, and Temperature

The tidewater goby is most commonly collected in water less than 6 ft (2 m) deep (Wang 1982, pp. 4–5; Worchester 1992, p. 53). However, recently tidewater gobies were collected in Big Lagoon in Humboldt County during the breeding season at a water depth of 15 ft (4.6 m) (Goldsmith, *in litt.* 2006a). Whether use of these deeper waters is confined to this locality or is more widespread will require additional sampling at various depths and locations. The tidewater goby tends to avoid currents and concentrate in slack-water areas; this suggests it is less likely to occur in areas with a steep gradient or microhabitats that have a substantial current. At Pescadero Creek in San Mateo County, tidewater gobies were absent from portions of the flowing creek that had a surface velocity of 0.15 m per second (0.49 ft per second), and the species was instead more densely concentrated in nearby eddies with lower water velocities (Swenson 1993, p. 3). Backwater marshes may provide important refuges that reduce the likelihood that a substantial number of tidewater gobies will be flushed out of the lagoons or estuaries and into the marine environment during heavy winter floods (Lafferty *et al.* 1999b, p. 619). Evidence that increased flows can eliminate the tidewater goby from a locality is suggested by the elimination of the tidewater goby from Waddell Creek in Santa Cruz County following a flood event in the winter of 1972–73 (Nelson as cited in Swift 1990, p. 2); this creek had been channelized and no longer afforded protection from high flows during flood events. Likewise, the channelization and elimination of habitat lateral to the main stream channel upstream of San Onofre Lagoon in San Diego County probably led to the flushing and extirpation of the tidewater goby from this locality during a storm in 1993 (Swift *et al.* 1994, p. 22–23). The importance of backwater marshes is also highlighted by the fact that tidewater gobies in these habitats can achieve a greater size at maturity than in adjacent lagoons and creeks (Swenson 1993, pp. 6–7).

Freshwater Habitat

The tidewater goby also occurs in freshwater streams up-gradient and tributary to brackish habitats; the salinity of these freshwater streams is typically less than 0.5 ppt. The available documentation demonstrates that, in some areas, tidewater goby can occur 1.6 to 7.3 mi (2.6 to 11.7 km) upstream from the ocean environment (Irwin and Soltz 1984, p. 27; Swift *et al.* 1997, p. 20; Goldsmith, *in litt.* 2006b). Within a 2-hour period, hundreds of tidewater gobies have been observed to move upstream of a fixed location into areas in the Santa Ynez River 3.2 mi (5.1 km) from the ocean in Santa Barbara County (Swift *et al.* 1997, p. 20). The fact that this many individuals were observed to move through an area suggests that freshwater tributaries in some riverine systems provide important habitat for individual and population growth. We have reviewed a variety of documents to determine how far tidewater gobies have been detected upstream from the ocean. Goldsmith (*in litt.* 2006b) found tidewater gobies 1.6 to 2.0 mi (2.6 to 3.3 km) upstream from the ocean in the Ten Mile River in Mendocino County; Swift *et al.* (1997, p. 18) found tidewater gobies 4.6 mi (7.3 km) upstream from the ocean in the San Antonio River in Santa Barbara County; Swift *et al.* (1997, p. 20) found tidewater gobies at various distances from 3.9 to 7.3 mi (6.2 to 11.7 km) upstream from the ocean in the Santa Ynez River in Santa Barbara County; and Holland (1992, p. 9) found tidewater gobies 3 mi (5 km) upstream from the ocean in the Santa Margarita River in San Diego County. Collectively, these data suggest the average maximum distance tidewater gobies have been detected upstream from the ocean in medium to large rivers is approximately 4.0 mi (6.4 km). Other than high stream gradient, the reasons for the variation in upstream movement between one locality and another have not been determined; salinity could be an important factor. Upstream salinity levels may vary with time of year, tidal cycles, storm events, and topography. However, Swift *et al.* (1997, p. 26) indicate that gradient and lack of barriers (e.g., beaver dams, sills) are more important factors than salinity to upstream dispersal.

Sandbars

Many of the locations occupied by the tidewater goby closely correspond to stream drainages. Under natural conditions, these stream drainages and the marine environment collectively act to produce sandbars that form a barrier between the ocean and the lagoon, estuary, backwater marsh, and freshwater stream system (Habel and Armstrong 1977, p. 39). These sandbars tend to be present during the late spring, summer, and fall seasons. The presence of a sandbar can create a lower salinity level (5 to 10 ppt) in the area up gradient from the sandbar (Carpelan 1967, p. 324) than would otherwise exist if there were no sandbar. The tidewater goby is more commonly associated with these lower salinity levels than with the salinity levels that occur in the ocean or an estuary without a sandbar, that is, about 35 ppt (Swift *et al.* 1989, p. 7). The formation of a sandbar also creates more habitat for aquatic organisms because water becomes ponded behind the sandbar. Artificial breaching of a sandbar tends to result in a rapid decrease in water levels, unlike natural breaching, and increases the likelihood that adult tidewater gobies, their nests, and their fry could become stranded and die, or become concentrated and subject to greater levels of predation pressure by birds or other predators. Natural breaching events tend to occur during

the late winter and early spring when tidewater goby breeding is at a low point in the reproduction cycle. Furthermore, tidewater gobies are likely able to detect storm events due to the increased inflow of fresh water that may cause a natural breaching event and swim upstream or take refuge in side channels (Lafferty *et al.* 1999b, p. 619).

In Humboldt Bay and the Eel River estuary in Humboldt County, a large amount of salt and brackish marsh habitat was historically eliminated through the construction of levees and drainage channels. As a result, several of the locations occupied by the tidewater goby do not contain natural sandbars between the ocean and habitat where the species is present. Instead, manmade water control structures such as tidegates and culverts exist between tidal waters and the locations where tidewater goby occur. These tidegates have been in place for decades, and in some cases they provide habitat conditions similar to those created by the presence of a seasonal sandbar. In fact, most of the occupied tidewater goby habitats in the Humboldt Bay-Eel River estuaries are above tidegates. Other examples where large amounts of brackish marsh habitat have been lost due to construction of levees and drainage channels include the tributaries to the San Francisco Bay, Tomales Bay, Waddell Creek, Salinas River, Goleta Slough, Santa Clara River, and Mugu Lagoon.

Food

The tidewater goby feeds mainly on macroinvertebrates (for example shrimp and aquatic insects) (Irwin and Soltz 1984, p. 21–23; Swift *et al.* 1989, p. 6; Swenson 1995, p. 87). The diets of adult and juvenile tidewater gobies tend to include the same relative abundance of different invertebrate species (Swenson and McCray 1996, p. 962). The nonnative New Zealand mudsnails (NZMS; *Potamopyrgus antipodarum*) have been a seasonally important component of the diet of tidewater gobies in the northcoast region (Hellmair *et al.* 2011, p. 1).

Cover or Shelter

A variety of native and nonnative fish species and fish-eating bird species, such as egrets (*Egretta* spp.) and herons (e.g., great blue herons (*Ardea herodias*)), prey on tidewater gobies. Therefore, escape cover or shelter is necessary to reduce the likelihood that tidewater gobies will be preyed upon. A species' ability to persist when it is subject to predation pressure frequently depends on the presence of different features that provide a greater level of structure, which makes it more likely a prey species will avoid predation (Crowder and Cooper 1982, p. 1802; Gilinsky 1984, p. 455). At locations where the tidewater goby occurs, submerged and emergent aquatic vegetation has the potential to provide cover from predators, and provide a greater degree of habitat heterogeneity or structure that would not otherwise exist if the aquatic vegetation was absent. Stable lagoons often possess dense aquatic vegetation that frequently consists of sago pondweed (*Potamogeton pectinatus*) or widgeon grass (e.g., *Ruppia maritima* and *R. cirrhosa*). At some locations, juvenile tidewater gobies are more prevalent in areas with at least some submergent vegetation as compared to other areas with no or little vegetation (Wang 1984, p. 16; Swenson 1994, p. 6; Trihey & Associates, Inc. 1996, p. 11). It is reasonable to assume that the presence of submerged or emergent vegetation reduces the likelihood that tidewater gobies will be preyed upon by native and nonnative species because this vegetation provides cover and increases the level of habitat heterogeneity in a way that makes it more likely that tidewater gobies will persist where they co-occur with predators.

Aquatic vegetation may provide some degree of shelter or refuge during flash flood events (Lafferty *et al.* 1999b, p. 621). These refuges presumably would result because the presence of vegetation would create lower water velocities than might otherwise occur in unvegetated areas. Such refuges would be especially important to fish species that are not strong swimmers, such as the tidewater goby.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The eggs of the tidewater goby are laid in burrows that are excavated by male fish. The available literature suggests that burrows most commonly occur in areas with relatively unconsolidated, clean, coarse sand (Swift *et al.* 1989, p. 8), while other documents demonstrate that burrows may also occasionally occur in silt or mud (Wang 1982, p. 6). Swenson (1995, p. 148) demonstrated that tidewater gobies prefer a sandy substrate in the laboratory. Male tidewater gobies remain in the burrow to guard the eggs attached to the burrow ceiling and walls. Male tidewater gobies care for the embryos for approximately 9 to 11 days until they hatch, rarely if ever emerging from the burrow to feed (Swift *et al.* 1989, p. 4). The tidewater goby larvae occupy the water column after the eggs hatch (Wang 1982, p. 15). As they mature, they occupy the bottom substrate. Worcester (1992, pp. 77–79) found that larval tidewater gobies in Pico Creek Lagoon in San Luis Obispo County tended to use the deeper portion of the lagoon, that is, depths of 29 inches (in) (73 centimeters (cm)) versus 17 in (42 cm).

Habitats Protected from Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

The majority of lagoons and estuaries that currently support the tidewater goby have experienced some level of disturbance. The lagoons and estuaries that support the tidewater goby range in size from approximately 3.5 square yards (3 m^2) of surface area to about 2,000 ac (800 ha). Most lagoons and estuaries that support the tidewater goby range from about 1.25 to 12.5 ac (0.5 to 5 ha). Surveys of tidewater goby locations and historical records indicate that size, configuration, location, and access by humans are all factors in the persistence of populations of this species (Swift *et al.* 1989, p. 15, 1994, p. 26–27). Lagoons and estuaries smaller than about 5 ac (2 ha) generally have histories of extirpation or population reduction to very low levels. These small locations are also often within a mile or so of another locality from which recolonization could occur following natural episodic catastrophic events. The most stable or largest populations today are in locations of intermediate sizes, which range from 5 to 125 ac (2 to 50 ha). In many cases these intermediate-sized locations likely serve as source populations for the smaller ephemeral sites (Lafferty *et al.* 1999b, p. 1452).

Primary Constituent Elements for Tidewater Goby

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the tidewater goby within the geographical area occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be the elements of physical or biological features that provide for a species' life-history processes that are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent element (PCE) specific to the tidewater goby is:

(1) Persistent, shallow (in the range of approximately 0.3 to 6.6 ft (0.1 to 2 m)),

still-to-slow-moving lagoons, estuaries, and coastal streams with salinity up to 12 ppt, which provide adequate space for normal behavior and individual and population growth that contain one or more of the following:

(a) Substrates (e.g., sand, silt, mud) suitable for the construction of burrows for reproduction;

(b) Submerged and emergent aquatic vegetation, such as *Potamogeton pectinatus, Ruppia maritima, Typha latifolia,* and *Scirpus* spp., that provides protection from predators and high flow events; or

(c) Presence of a sandbar(s) across the mouth of a lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, thereby providing relatively stable water levels and salinity.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. Special management considerations or protection may be necessary to eliminate or reduce the magnitude of threats that affect the physical or biological features essential to the conservation of the tidewater goby. Threats identified in the final listing rule for the tidewater goby include:

(1) Coastal development projects, including proposed restoration projects that involve elimination of backwaters and loss or alteration of coastal wetland habitat, which may be crucial for flood refuge for the tidewater goby;

(2) water diversions and alterations of water flows upstream of coastal lagoons and estuaries that negatively impact the species' breeding and foraging habitat and activities;

(3) groundwater overdrafting that results in reduction of flows and negatively impacts the species' breeding and foraging habitat and activities;

(4) channelization of habitats where the species occurs that removes or reduces quality of habitat;

(5) discharge of agricultural and sewage effluents;

(6) cattle grazing and feral pig activity that result in increased sedimentation of coastal lagoons and riparian habitats, remove vegetative cover, increase ambient water temperatures, and eliminate plunge pools and collapsed undercut banks utilized by the tidewater goby;

(7) introduced species that prey on the tidewater goby (such as bass, rainwater killifish, African clawed frogs);

(8) the inadequacy of existing regulatory mechanisms;

(9) drought conditions that result in the deterioration of coastal and riparian habitats; and

(10) competition with introduced species, such as the yellowfin goby and chameleon goby.

For the purposes of this final rule, we have combined the ''water diversions and alterations of water flows upstream of coastal lagoons and estuaries that negatively impact the species' breeding and foraging activities'' threats category with ''drought conditions'' and ''groundwater overdrafting,'' along with the addition of artificial breaching of sandbars, into one threat category. The combined category is referred to as ''water diversions, alterations of water flows, artificial sandbar breaching, and groundwater overdrafting that negatively impact the species' breeding and foraging activities.'' Similarly, we have combined the two threat categories of ''introduced species that prey on the tidewater goby (e.g., bass, African clawed frogs)'' and ''competition with introduced species such as the yellowfin goby and chameleon goby'' into one category called, ''introduced species that prey on, or compete with, the tidewater goby (for example, yellowfin goby, and bass).'' We also recognize that where special management may be necessary, regulatory mechanisms may need to be added or amended by local, State, or Federal governmental entities if sufficient management is not achievable through voluntary mechanisms.

The tidewater goby's distribution reflects a pattern of occupancy and extirpation. The species requires refugia under drought conditions and places to recolonize under wetter conditions; otherwise, the tidewater goby would be relegated to existing only within those few lagoons and estuaries large enough to support it during periods of drought. If the suitable localities that are occupied during periods of normal precipitation cease to function as tidewater goby habitat due to modification or destruction while the localities are unoccupied, the metapopulation dynamics may be disrupted and the species may not be able to respond by recolonizing unoccupied localities under favorable conditions. The tidewater goby is facing numerous threats, including habitat loss from multiple sources, habitat fragmentation due to the loss of ''stepping stone'' localities between subpopulations, predation and nonnative competitors, alterations to hydrology (sandbar breaching, channelization, for example), changes in water quality, stochastic events such as drought, and the growing and inevitable impact of sea level rise. While some of these threats can singly have a substantial impact on individual tidewater goby subpopulations, in most cases it is the combined impact that is a threat to the species, especially in light of global climate change. A more detailed discussion of threats to the tidewater goby can be found in the final listing rule (59 FR 5494, February 4, 1994), and the final Recovery Plan (Service 2005a, pp. 16–19).

We find that the components of the PCE present within all the areas we are designating as critical habitat may require special management considerations or protection due to threats to the tidewater goby or its habitat. Using current information provided in the Recovery Plan (Service 2005a, Appendix E) and other information in our files, we have identified the components of the PCE that may require special management considerations or protection from known threats within each of the critical habitat units (see Critical Habitat Designation and Table 2 below for a unit-by-unit description). Some of the special management actions that may be needed for essential features of tidewater goby habitat are briefly summarized below.

(1) Implement measures to avoid, minimize or mitigate direct and indirect loss and modification of tidewater goby habitat due to dredging, draining, and filling of lagoons and estuaries. Additional management actions should be taken to restore historical tidewater goby locations and potential habitats as opportunities become available to eliminate, minimize, or mitigate the effects of existing structures and past activities that have destroyed or degraded tidewater goby habitat.

(2) Develop and implement measures to minimize the adverse effects due to channelization that can eliminate crucial backwater habitats or other flood refuges.

(3) Implement measures, such as best management practices, for managing excessive sedimentation in tidewater goby habitat. Measures should be implemented to control sedimentation in tidewater goby habitat due to cattle grazing, development, channel modification, recreational activity, and agricultural practices.

(4) Implement measures to prevent further decrease in freshwater inflow, water depth, and surface area within

tidewater goby habitat due to dams, water diversions, and groundwater pumping.

(5) Implement measures to avoid anthropogenic breaching of lagoons and use of pumping and other water control structures to regulate water levels, to maintain suitable habitat conditions during the summer and fall when tidewater goby reproduction is at its highest and freshwater inflow is at its lowest.

(6) Implement measures to improve water quality degraded as a result of agricultural runoff and effluent, municipal runoff, golf course runoff, sewage treatment effluent, cattle grazing, development, oil spills, oil field runoff, toxic waste, and gray-water dumping. Also, measures should be implemented to prevent further degradation of the water quality due to dikes, tidal gates, and other impedances to the natural freshwater/saltwater interface that alter the salinity regime in some of the tidewater goby habitats.

(7) Implement measures to control the abundance and distribution of nonnative species.

(8) Implement measures to restore genetic diversity within populations where the natural metapopulation dynamic will be unable to do so.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we used the best scientific and commercial data available to designate critical habitat. We reviewed available information pertaining to the habitat requirements of this species. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we considered whether designating areas outside those currently occupied as well as those occupied at the time of listing are essential to ensure the conservation of the species. We are designating critical habitat in areas within the geographical area occupied by the species at the time of listing in 1994. We also are designating specific areas outside the geographical area occupied by the species at the time of listing because such areas are essential for the conservation of the species.

In revising critical habitat for the tidewater goby, we made extensive use of the information in the Recovery Plan (Service 2005a), and incorporated the recovery goals and strategy identified in the Recovery Plan for the development of our revised designation. We also reviewed other relevant information, including peer-reviewed journal articles, unpublished reports and materials (for example, survey results and expert opinions), the final listing rule (59 FR 5494; February 4, 1994), the 2000 final critical habitat rule (65 FR 69693; November 20, 2000), the 2006 proposed critical habitat rule (71 FR 68914; November 28, 2006), the 2008 final critical habitat rule (73 FR 5920; January 31, 2008), the 2011 proposed critical habitat rule (76 FR 64996; October 19, 2011), the 5-year review for the tidewater goby (Service 2007), and regional databases and GIS coverages, for example, the California Natural Diversity Database, and National Wetlands Inventory maps. We analyzed this information to identify: (1) Specific areas within the geographical area occupied at the time of listing that contain the physical or biological features essential to the conservation of the tidewater goby and which may require special management considerations or protection, and (2) criteria for specific areas outside the geographical area occupied at the time of listing that are essential for the conservation of the tidewater goby.

The Recovery Plan focuses on preserving the diversity of tidewater goby habitats throughout the range of the species, preserving the natural processes of recolonization and population exchange (metapopulation dynamics) that enable recovery following natural episodic catastrophic events, and preserving genetic diversity (Service 2005a, p. 28). The conservation of the environmental, morphological, and genetic diversity across the range of the species is an important consideration in determining specific areas on which are found the physical or biological features essential to the conservation of the species and other specific areas that are essential for the conservation of the tidewater goby. For example, a population's ability to successfully adapt to changing environmental conditions is a function of the population size and genetic variation of the individuals at a given location (Reed and Frankham 2003, p. 233).

Local adaptations to different environmental conditions and morphological differences are likely linked to genetic variations among populations. These features may in turn be best protected by: (1) Identifying areas that represent the range of environmental, genetic, and morphological diversity; and (2) maximizing within these areas the protection of contiguous environmental gradients across which selection and migration can interact to maintain population viability and (adaptive) genetic diversity (Moritz 2002, p. 238). The Recovery Plan subdivides the geographical distribution of the tidewater goby into 6 recovery units, encompassing a total of 26 subunits defined according to genetic differentiation and geomorphology. We considered the conservation of the tidewater goby in each of the recovery units and subunits, as well as the species as a whole, in our analysis.

Based on the information and recommendations in the Recovery Plan, we developed a conservation framework and criteria to identify the specific circumstances under which the presence of the components of the PCE within the geographical area occupied by the species at the time of listing provides the physical or biological features essential to the conservation of the tidewater goby, and additionally what areas outside the geographical area occupied at the time of listing are essential for the conservation of the species.

Areas Within the Geographical Area Occupied at the Time of Listing

Within the geographical area occupied at the time of listing, the specific areas meeting the criteria below are designated as critical habitat in this final rule because they provide the physical or biological features essential to the conservation of the tidewater goby.

(1) Areas that support source populations (populations where local reproductive success is greater than local mortality (Meffe and Carroll 1994, p. 187)). For the purposes of this designation, we identified areas supporting source populations as those that are currently occupied and have been consistently occupied for 3 or more consecutive years based on survey data and published reports. Source populations are more likely to be capable of maintaining populations over many years and are, therefore, capable of providing individuals to recruit into surrounding subpopulations.

(2) Areas that support subpopulations within each metapopulation in addition to source populations in the event that the source population is extirpated due to a natural episodic catastrophic event such as a major flood or drought.

(3) Areas that provide connectivity between metapopulations. These areas are likely to act as ''stepping stones'' between more isolated populations, and thereby contribute to metapopulation persistence and genetic exchange. For the purposes of this designation, we generally identified locations that provide connectivity as those within approximately 6 mi (10 km) of another location. However, we included a few locations that exceeded 6 mi but were

within the maximum dispersal distance as determined through genetic research (Jacobs *et al.* 2005, p. 52) where there were no other locations with suitable habitat in that portion of the coast.

Areas Outside the Geographical Area Occupied at the Time of Listing

We have determined that the specific areas within the geographical area occupied at the time of listing alone are not sufficient to meet the recovery goals for the species because:

(1) The Recovery Plan recommends a targeted program of introduction and reintroduction of tidewater gobies into suitable habitat to minimize the chance of local extirpations resulting in extinction of a broader metapopulation (see the *Metapopulation Dynamics* section, above, for details) and resultant loss of its unique genetic traits (Service 2005a, p. 29);

(2) There has been loss and degradation (see the *Threats* section, above, for details) of habitat throughout the species' range since the time of listing;

(3) We anticipate a further loss of habitat in the future due to sea-level rise resulting from climate change (see the *Climate Change* section, above, for details); and

(4) The species needs habitat areas that are arranged spatially in a way that will maintain connectivity and allow dispersal within and between units (see the *Metapopulation Dynamics* section, above, for details).

One example of the need to designate areas outside the geographical area occupied at the time of listing is where distances between areas occupied at the time of listing may make it difficult for tidewater goby to disperse from one area to the next. Another example is to help prevent the extirpation of a metapopulation in which only one or two occupied sites remain. These areas that are outside the geographical area occupied at the time of listing include locations that are currently occupied and, in a few cases, ones that were historically occupied. In some unoccupied areas, the habitat would require some management: For example, restoration of a natural breaching regime, exotic predator management, or freshwater inflow enhancement.

Therefore, for areas outside the geographical area occupied at the time of listing, those meeting the criteria below are designated as critical habitat in this final rule because they are essential for the conservation of the species.

(1) Areas of aquatic habitat in coastal lagoons and estuaries with still-to-slow-moving water that allow for the conservation of viable metapopulations under varying environmental conditions, such as, for example, drought.

(2) Areas that provide connectivity between source populations or may provide connectivity in the future. These areas are likely to act as ''stepping stones'' between more isolated populations, and thereby contribute to metapopulation persistence and genetic exchange. For the purposes of this designation, we generally identified locations that provide connectivity as those within approximately 6 mi (10 km) of another location.

(3) Additional areas that may be more isolated but may represent unique adaptations to local features (habitat variability, hydrology, microclimate). For example, the Eel River (HUM–4) is essential for the conservation of tidewater goby because it possesses ecological characteristics that are important in maintaining the species' ability to adapt to changing environments, including the ability to disperse into higher channels and marsh habitat during severe flood events.

By applying the two sets of criteria to the 26 recovery subunits described in the Recovery Plan, we have identified 45 critical habitat units within the geographical area occupied by the species at the time of listing that we have determined contain the physical or biological features essential to the conservation of the tidewater goby and which may require special management considerations or protection, and 20 critical habitat units outside the geographical area occupied by the species at the time of listing that we have determined are essential for the conservation of the species. Please see Table 1, below, for the occupancy status of each of the 65 critical habitat units.

As emphasized throughout this rule and the Recovery Plan, the conservation of the tidewater goby is dependent on maintaining the metapopulation dynamics of the species, and we have therefore designated all those locations that we determined are essential for achieving that goal. In order to maintain metapopulation dynamics, we have determined that some locations where tidewater gobies have never been found or have not been found in recent years are essential for the conservation of the species. It should be noted, however, that some subpopulations within a metapopulation tend to decline or disappear periodically due to events such as drought and severe flooding, but then reappear or increase in abundance during more optimal conditions. However, surveys to determine the presence or absence of tidewater gobies are not usually conducted every year, and therefore the presence of tidewater gobies may have been missed. For example, tidewater gobies were known to occur in the San Luis Rey River in 1958. However, the river has only been surveyed five times in the last 65 years since 1958, and tidewater gobies were found in 2010.

As discussed previously, a metapopulation is generally considered to consist of several distinct but related subpopulations that are within dispersal distance of each other. Although the individual subpopulations may sometimes disappear, the metapopulation as a whole is often stable because immigrants from one population (which may, for example, be experiencing a population boom) are likely to re-colonize habitat which has been left open by the extirpation of another population as long as the habitat still remains. They may also emigrate to a small population and rescue that population from extirpation. In a metapopulation dynamic, connectivity of source populations is crucial, and locations considered unoccupied may serve this purpose. Although no single tidewater goby subpopulation may be able to guarantee the long-term survival of this species, the combined effect of many sporadically connected subpopulations may. Therefore, although a particular location may not be occupied at one point in time, or even for long periods of time, that location may be important for maintaining the connectivity between subpopulations, and hence contribute to the species' overall survival and conservation. For example, although tidewater gobies have not been detected in Arroyo del la Cruz, it is within dispersal distance of Arroyo del Corral, which is considered currently to be occupied in critical habitat. Arroyo de la Cruz is located approximately 2.0 mi (3.2 km) north of the Arroyo de Corral. Arroyo de la Cruz provides habitat for tidewater gobies that disperse from Arroyo del Corral, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. Arroyo de la Cruz is one of two locations with suitable habitat within the Central Coast Recovery Subunit (CC 1), as described in the Recovery Plan. Therefore, although tidewater gobies have not been detected at Arroyo de la Cruz, we consider this area to be essential to the conservation of the species because it contributes to ensuring the viability of the metapopulation because if the subpopulation within the Arroyo de

Corral unit (SLO–2) is extirpated, the entire metapopulation would be lost.

The process of making exclusions under Section 4(b)(2) considers the extent to which habitat restoration would be necessary to support the species in areas currently unoccupied. Where restoration is not likely due to cost or other factors, the benefits in terms of conservation value may not be as strong. Restoration activities would benefit all of the critical habitat units in this designation, and some form of restoration will be necessary to support the successful reintroduction or recolonization of the tidewater goby in the units that are unoccupied. For example, some of the unoccupied locations need improvements to water quality, barrier removal, exotic species management (e.g., Walker Creek, Salinas River, Arroyo de la Cruz, Oso Flaco Lake, etc.). However, designation of critical habitat does not mandate restoration or management of any areas. However, we determined it is feasible to restore all of the unoccupied habitat designated in this rule to the point where it can support gobies and we avoided designating unoccupied areas that are highly degraded or fragmented and not likely restorable (e.g., Los Angeles River, Mugu Lagoon). Such areas provide little or no long-term conservation value, and are not essential for the conservation of the species.

Mapping

After determining the lagoons and estuaries necessary for the conservation of the tidewater goby by applying criteria outlined above, the boundaries of each critical habitat unit were mapped. Unit boundaries were based on several factors, including species occurrence data that demonstrated where tidewater gobies have been observed, the presence of barriers and stream gradients that limit tidewater goby movements, and the presence and extent of the essential physical or biological features.

The geographic extent of each critical habitat unit was delineated, in part, using existing digital data. To determine the lateral boundaries of each critical habitat unit, we most frequently relied on the Pacific Institute global climate change model and National Wetland Inventory (NWI) maps that were prepared by the Service in 2006. The NWI maps are based on the Cowardin classification system (Cowardin *et al.* 1979, pp. 1–103). The Service has adopted this classification system as its official standard to describe wetland and deepwater habitats. Specifically, the following wetland types based on Cowardin (1979, p. 5) were used to delineate unit boundaries: Lake, Estuarine and Marine Deepwater, Estuarine and Marine Wetland, Freshwater Pond, Freshwater Emergent Wetland, Freshwater Forested/Shrub Wetland, and Riverine. These wetland types have, or are likely to have, components of the PCE at various times throughout the year, depending on the season and environmental factors such as storm or drought events. In some cases, we used existing anthropogenic structures, such as concrete or riprap channel linings that occur within wetland habitat types, to delineate the lateral boundaries of units. To a lesser extent, we also used aerial imagery from the National Agricultural Imagery Program (NAIP) to delineate the lateral boundaries of a critical habitat unit where insufficient NWI data were available.

The precise location of tidewater goby habitat at a particular locality may vary on a daily, seasonal, and annual basis; the habitats occupied by tidewater goby exist in a dynamic environment that varies over time. For example, the size and lateral extent of a coastal lagoon or estuary varies with daily tide cycles. Flood events may also change the precise location where surface water exists within a given lagoon, estuary, backwater marsh, or freshwater tributary. Therefore, it is appropriate to delineate each critical habitat unit to encompass the entire area that may be occupied by tidewater goby on a daily, seasonal, or annual basis. This was accomplished by using the boundaries delineated on the NWI maps to determine the lateral extent of each unit.

The delineation of the farthest upstream extent of a particular critical habitat unit was determined using one of four features that include:

(1) The average distance that tidewater gobies are known to move upstream from the ocean (4.0 mi (6.4 km)),

(2) the presence of barriers, such as culverts that may prevent tidewater gobies from moving upstream,

(3) the presence of a vertical drop, for example more than 4 to 8 in (10 to 20 cm) high, or steep gradient that precludes tidewater gobies from swimming upstream or can act as a barrier that makes it less likely tidewater gobies will be able to swim upstream (Swift *et al.* 1997, p. 20)), or

(4) limited surface water in the tributary up-gradient from the lagoon or estuary.

Each of the above features describes a barrier to upstream movement; therefore, the upstream extent of a particular unit was determined by whichever barrier was identified first through the mapping process regardless of whether or not components of the PCE were still present above it.

When determining critical habitat boundaries within this final rule, we made every effort to avoid including developed areas such as lands covered by bridges, docks, and other structures because such lands cannot provide habitat for the tidewater goby. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text in the rule and are not designated as critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action may affect adjacent critical habitat.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R8–ES–2011–0085, on our Internet sites at *http://www.fws.gov/ventura/*, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

We are designating as critical habitat lands that we have determined are within the geographical area occupied at the time of listing and contain sufficient physical or biological features to support life-history processes essential to the conservation of the species, and lands outside of the geographical area occupied at the time of listing that we have determined are essential for the conservation of tidewater goby.

Units within the geographical area occupied at the time of listing are designated based on sufficient elements of physical or biological features being present to support tidewater goby life processes. Some units contain all of the identified elements of physical or biological features and support multiple life processes. Some units contain only some elements of the physical or biological features necessary to support the tidewater goby's particular use of that habitat.

Final Critical Habitat Designation

We are designating 65 units as critical habitat for tidewater goby (see Table 1 below). The critical habitat areas described below constitute our best assessment at this time of areas that meet the definition of critical habitat.

TABLE 1—OCCUPANCY OF TIDEWATER GOBY BY DESIGNATED CRITICAL HABITAT UNITS

Unit	Name	Within the geographical area occupied at time of listing?	Currently occupied [1]
DN–1	Tillas Slough (Smith River)	Yes	Yes.
DN–2	Lake Earl/Lake Tolowa	Yes	Yes.
HUM–1	Stone Lagoon	Yes	Yes.
HUM–2	Big Lagoon	Yes	Yes.
HUM–3	Humboldt Bay	Yes	Yes.
HUM–4	Eel River	No	Yes.
MEN–1	Ten Mile River	Yes	Yes.
MEN–2	Virgin Creek	Yes	Yes.
MEN–3	Pudding Creek	Yes	Yes.
MEN–4	Davis Lake and Manchester State Park Ponds.	Yes	Yes.
SON–1	Salmon Creek	Yes	Yes.
MAR–1	Estero Americano	Yes	Yes.
MAR–2	Estero de San Antonio	Yes	Yes.
MAR–3	Walker Creek	No	No.
MAR–4	Lagunitas (Papermill) Creek	No	Yes.
MAR–5	Bolinas Lagoon [2]	No	No.
MAR–6	Rodeo Lagoon	Yes	Yes.
SM–1	San Gregorio Creek	Yes	Yes.
SM–2	Pomponio Creek	No	Yes.
SM–3	Pescadero-Butano Creek	Yes	Yes.
SM–4	Bean Hollow Creek (Arroyo de Los Frijoles).	Yes	Yes.
SC–1	Waddell Creek	Yes	Yes.
SC–2	Scott Creek	No	Yes.
SC–3	Laguna Creek	Yes	Yes.
SC–4	Baldwin Creek	Yes	Yes.
SC–5	Moore Creek	Yes	Yes.
SC–6	Corcoran Lagoon	Yes	Yes.
SC–7	Aptos Creek	Yes	Yes.
SC–8	Pajaro River	Yes	Yes.
MN–1	Bennett Slough	Yes	Yes.
MN–2	Salinas River	No	No.
SLO–1	Arroyo de la Cruz [2]	No	No.
SLO–2	Arroyo del Corral	Yes	Yes.
SLO–3	Oak Knoll Creek (Arroyo Laguna).	Yes	Yes.
SLO–4	Little Pico Creek	Yes	Yes.
SLO–5	San Simeon Creek	Yes	Yes.
SLO–6	Villa Creek	Yes	Yes.
SLO–7	San Geronimo Creek	Yes	Yes.
SLO–8	Toro Creek	Yes	Yes.
SLO–9	Los Osos Creek	No	Yes.
SLO–10	San Luis Obispo Creek	Yes	Yes.
SLO–11	Pismo Creek	Yes	Yes.
SLO–12	Oso Flaco Lake [2]	No	No.
SB–1	Santa Maria River	Yes	Yes.
SB–2	Cañada de las Agujas	Yes	Yes.
SB–3	Cañada de Santa Anita	Yes	Yes.
SB–4	Cañada de Alegria	Yes	Yes.
SB–5	Cañada de Agua Caliente	Yes	Yes.
SB–6	Gaviota Creek	Yes	Yes.
SB–7	Arroyo Hondo	No	Yes.
SB–8	Winchester-Bell Canyon	Yes	Yes.
SB–9	Goleta Slough	No	Yes.
SB–10	Arroyo Burro	No	Yes.
SB–11	Mission Creek-Laguna Channel.	Yes	Yes.
SB–12	Arroyo Paredon	No	Yes.
VEN–1	Ventura River	Yes	Yes.
VEN–2	Santa Clara River	Yes	Yes.
VEN–3	J Street Drain-Ormond Lagoon.	Yes	Yes.
VEN–4	Big Sycamore Canyon	No	Yes.
LA–1	Arroyo Sequit [2]	No	No.
LA–2	Zuma Creek [2]	No	No.
LA–3	Malibu Lagoon	Yes	Yes.

TABLE 1—OCCUPANCY OF TIDEWATER GOBY BY DESIGNATED CRITICAL HABITAT UNITS—Continued

Unit	Name	Within the geographical area occupied at time of listing?	Currently occupied [1]
LA–4	Topanga Creek	No	Yes.
OR–1	Aliso Creek	No	No.
SAN–1	San Luis Rey River	No	Yes.

[1] Based on the Recovery Plan and subsequent survey information where available.
[2] Tidewater gobies have never been recorded from this location; however, regularly scheduled monitoring of these subpopulations has not been conducted.

The approximate area of each critical habitat unit is shown in Table 2.

TABLE 2—CRITICAL HABITAT UNITS DESIGNATED FOR THE TIDEWATER GOBY AND KNOWN THREATS THAT MAY REQUIRE SPECIAL MANAGEMENT CONSIDERATIONS OR PROTECTION OF THE ESSENTIAL PHYSICAL OR BIOLOGICAL FEATURES FOR UNITS WITHIN THE GEOGRAPHICAL AREA OCCUPIED BY THE SPECIES AT THE TIME OF LISTING

Unit name	Federal ac (ha)	State ac (ha)	Local ac (ha)	Private ac (ha)	Total [1] ac (ha)	Known threats that may require special management considerations or protection of the essential features [2]
DN–1: Tillas Slough (Smith River)	0 (0)	0 (0)	0 (0)	21 (8)	21 (8)	2, 3, 5
DN–2: Lake Earl/Lake Tolowa	0 (0)	2,335 (945)	0 (0)	348 (141)	2,683 (1,086)	1, 2, 4
HUM–1: Stone Lagoon	0 (0)	653 (264)	0 (0)	0 (0)	653 (264)	4
HUM–2: Big Lagoon	0 (0)	1,527 (618)	0 (0)	2 (1)	1,529 (619)	2, 4
HUM–3: Humboldt Bay	652 (264)	61 (24)	45 (18)	81 (33)	839 (339)	1, 3, 4, 5
HUM–4: Eel River	0 (0)	5 (2)	0 (0)	34 (13)	39 (15)	N/A
MEN–1: Ten Mile River	0 (0)	17 (7)	0 (0)	56 (23)	73 (30)	4
MEN–2: Virgin Creek	0 (0)	2 (1)	0 (0)	2 (1)	4 (2)	1, 4
MEN–3: Pudding Creek	0 (0)	10 (4)	1 (1)	6 (2)	17 (7)	1, 2, 4
MEN–4: Davis Lake and Manchester State Park Ponds	0 (0)	29 (12)	0 (0)	0 (0)	29 (12)	4
SON–1: Salmon Creek	0 (0)	47 (19)	14 (6)	47 (19)	108 (44)	1, 2, 4, 5
MAR–1: Estero Americano	0 (0)	0 (0)	0 (0)	465 (188)	465 (188)	1, 4, 5
MAR–2: Estero De San Antonio	0 (0)	0 (0)	0 (0)	285 (115)	285 (115)	1, 2, 4, 5
MAR–3: Walker Creek	0 (0)	9 (4)	0 (0)	109 (44)	118 (48)	N/A
MAR–4: Lagunitas (Papermill) Creek	318 (129)	459 (186)	0 (0)	221 (90)	998 (405)	N/A
MAR–5: Bolinas Lagoon	29 (12)	0 (0)	1,048 (424)	37 (15)	1,114 (451)	N/A
MAR–6: Rodeo Lagoon	40 (16)	0 (0)	0 (0)	0 (0)	40 (16)	1
SM–1: San Gregorio Creek	0 (0)	33 (13)	0 (0)	12 (5)	45 (18)	1, 3
SM–2: Pomponio Creek	0 (0)	1 (1)	0 (0)	6 (2)	7 (3)	N/A
SM–3: Pescadero-Butano Creek	0 (0)	241 (97)	0 (0)	4 (2)	245 (99)	1, 3, 4
SM–4: Bean Hollow Creek (Arroyo de Los Frijoles)	0 (0)	3 (1)	0 (0)	7 (3)	10 (4)	1, 2
SC–1: Waddell Creek	0 (0)	39 (16)	0 (0)	36 (14)	75 (30)	2, 3, 4
SC–2: Scott Creek	0 (0)	66 (27)	6 (2)	2 (1)	74 (30)	N/A
SC–3: Laguna Creek	0 (0)	26 (11)	0 (0)	0 (0)	26 (11)	2, 4
SC–4: Baldwin Creek	0 (0)	27 (11)	0 (0)	0 (0)	27 (11)	2, 4
SC–5: Moore Creek	15 (6)	0 (0)	0 (0)	0 (0)	15 (6)	2, 4
SC–6: Corcoran Lagoon	0 (0)	1 (1)	6 (2)	21 (8)	28 (11)	1, 4
SC–7: Aptos Creek	0 (0)	9 (4)	0 (0)	0 (0)	9 (4)	1, 3, 4
SC–8: Pajaro River	0 (0)	158 (64)	11 (4)	46 (19)	215 (87)	1, 3, 4
MN–1: Bennett Slough	0 (0)	108 (44)	5 (2)	54 (22)	167 (68)	1, 2, 3, 4
MN–2: Salinas River	195 (79)	33 (13)	1 (1)	237 (96)	466 (189)	N/A
SLO–1: Arroyo de la Cruz	0 (0)	25 (10)	0 (0)	8 (3)	33 (13)	N/A
SLO–2: Arroyo del Corral	0 (0)	4 (2)	0 (0)	1 (1)	5 (3)	1, 5
SLO–3: Oak Knoll Creek (Arroyo Laguna)	0 (0)	4 (2)	0 (0)	1 (1)	5 (3)	1, 3
SLO–4: Little Pico Creek	0 (0)	2 (1)	0 (0)	7 (3)	9 (4)	5
SLO–5: San Simeon Creek	0 (0)	17 (7)	0 (0)	0 (0)	17 (7)	2, 4, 5
SLO–6: Villa Creek	0 (0)	14 (6)	0 (0)	1 (1)	15 (7)	1, 2, 4, 5
SLO–7: San Geronimo Creek	0 (0)	1 (1)	0 (0)	0 (0)	1 (1)	5
SLO–8: Toro Creek	0 (0)	1 (1)	0 (0)	8 (3)	9 (4)	2, 3, 4
SLO–9: Los Osos Creek	0 (0)	62 (25)	1 (1)	10 (4)	73 (30)	N/A
SLO–10: San Luis Obispo Creek	0 (0)	0 (0)	3 (1)	28 (11)	31 (12)	1, 2, 3, 4
SLO–11: Pismo Creek	0 (0)	14 (6)	1 (1)	5 (2)	20 (9)	1, 3, 4
SLO–12: Oso Flaco Lake	0 (0)	165 (67)	0 (0)	6 (2)	171 (69)	N/A
SB–1: Santa Maria River	0 (0)	0 (0)	42 (17)	432 (174)	474 (192)	1, 2, 4, 5

TABLE 2—CRITICAL HABITAT UNITS DESIGNATED FOR THE TIDEWATER GOBY AND KNOWN THREATS THAT MAY REQUIRE SPECIAL MANAGEMENT CONSIDERATIONS OR PROTECTION OF THE ESSENTIAL PHYSICAL OR BIOLOGICAL FEATURES FOR UNITS WITHIN THE GEOGRAPHICAL AREA OCCUPIED BY THE SPECIES AT THE TIME OF LISTING—Continued

Unit name	Federal ac (ha)	State ac (ha)	Local ac (ha)	Private ac (ha)	Total [1] ac (ha)	Known threats that may require special management considerations or protection of the essential features [2]
SB–2: Cañada de las Agujas	0 (0)	0 (0)	0 (0)	1 (1)	1 (1)	1, 4
SB–3: Cañada de Santa Anita	0 (0)	0 (0)	0 (0)	3 (1)	3 (1)	4
SB–4: Cañada de Alegria	0 (0)	0 (0)	0 (0)	2 (1)	2 (1)	1, 2, 4, 5
SB–5: Cañada de Agua Caliente	0 (0)	0 (0)	0 (0)	1 (1)	1 (1)	1, 4
SB–6: Gaviota Creek	0 (0)	10 (4)	0 (0)	1 (1)	11 (5)	1, 3, 4, 5
SB–7: Arroyo Hondo	0 (0)	0 (0)	0 (0)	1 (1)	1 (1)	N/A
SB–8: Winchester-Bell Canyon	0 (0)	0 (0)	1 (1)	5 (2)	6 (3)	2, 4
SB–9: Goleta Slough	0 (0)	0 (0)	164 (66)	26 (10)	190 (76)	N/A
SB–10: Arroyo Burro	0 (0)	0 (0)	3 (1)	0 (0)	3 (1)	N/A
SB–11: Mission Creek-Laguna Channel	0 (0)	3 (1)	4 (2)	0 (0)	7 (3)	1, 3, 4
SB–12: Arroyo Paredon	0 (0)	1 (1)	1 (1)	1 (1)	3 (3)	N/A
VEN–1: Ventura River	0 (0)	25 (10)	16 (7)	9 (4)	50 (20)	1, 2, 3, 4
VEN–2: Santa Clara River	0 (0)	199 (80)	14 (6)	110 (44)	323 (130)	1, 2, 3, 4
VEN–3: J Street Drain-Ormond Lagoon	0 (0)	5 (2)	49 (20)	67 (27)	121 (49)	1, 2, 3, 4
VEN–4: Big Sycamore Canyon	0 (0)	1 (1)	0 (0)	0 (0)	1 (1)	N/A
LA–1: Arroyo Sequit	0 (0)	1 (1)	0 (0)	0 (0)	1 (1)	N/A
LA–2: Zuma Canyon	0 (0)	0 (0)	5 (2)	0 (0)	5 (2)	N/A
LA–3: Malibu Lagoon	0 (0)	41 (17)	1 (1)	22 (9)	64 (27)	1, 2, 3, 4
LA–4: Topanga Creek	0 (0)	4 (1)	0 (0)	2 (1)	6 (2)	N/A
OR–1: Aliso Creek	0 (0)	0 (0)	8 (3)	6 (2)	14 (5)	N/A
SAN–1: San Luis Rey River	0 (0)	3 (1)	49 (20)	4 (2)	56 (23)	N/A
Total [1]	1,249 (506)	6,501 (2,636)	1,501 (611)	2,905 (1,177)	12,156 (4,920)	

Note: Area sizes may not sum due to rounding.

[1] Area estimates in ac (ha) reflect the entire area within the critical habitat unit boundaries. Area estimates are rounded to the nearest whole integer that is equal to or greater than 1.

[2] Codes of known threats that may require special management considerations or protection of the essential physical or biological features are as follows:

1. Coastal development projects that result in the loss or alteration of coastal wetland habitat affecting the PCE components 1a, 1b, or 1c.
2. Water diversions, alterations of water flows, and groundwater overdrafting upstream of coastal lagoons and estuaries that negatively impact the species' breeding and foraging activities and the PCE components 1a or 1b.
3. Channelization of habitats where the species occurs affecting the PCE components 1a, 1b, or 1c.
4. Nonpoint- and point-source pollution or discharge of agricultural and sewage effluents that are likely to impact the species' health or breeding and foraging activities and the PCE.
5. Cattle grazing that results in increased sedimentation of coastal lagoons and riparian habitats, removes vegetative cover, increases ambient water temperatures, and eliminates plunge pools and undercut banks utilized by tidewater goby affecting the PCE.

N/A—Not applicable because location is outside the geographical area occupied by the species at the time of listing.

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for tidewater goby, below. The first two or three letters in the code for each critical habitat unit description reflect the county where the unit occurs: DN = Del Norte, HUM = Humboldt, MEN = Mendocino, SON = Sonoma, MAR = Marin, SM = San Mateo, SC = Santa Cruz, MN = Monterey, SLO = San Luis Obispo, SB = Santa Barbara, VEN = Ventura, LA = Los Angeles, OR = Orange, and SAN = San Diego. In Tables 1 and 2 above, these units are listed in sequential order from north to south. For the purposes of this document, the term ''local ownership'' refers to land owned or managed by a city, county, or municipal government entity.

DN–1: Tillas Slough

DN–1 consists of 21 ac (8 ha) of private lands. This unit is located in Del Norte County, approximately 3.0 mi (4.8 km) west of the community of Smith River and 8.0 mi (12.8 km) north of Lake Earl/Lake Tolowa (DN–2), which is also the next nearest extant subpopulation.

DN–1 was occupied at the time of listing. This unit supports the northernmost tidewater goby subpopulation. DN–1 will support the recovery of the tidewater goby subpopulation within the North Coast Recovery Unit. This unit is important for maintaining the tidewater goby metapopulation in the region, and plays an important role in dispersal of the tidewater goby, which could prove vital if certain factors, such as climate change, adversely impact the tidewater goby habitat locally or to the south. A culvert that serves as a grade control structure, which mutes the tide cycle, provides relatively stable water levels in this unit (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

DN–2: Lake Earl/Lake Tolowa

DN–2 consists of 2,683 ac (1,086 ha). This unit is located in Del Norte County, approximately 3 mi (4.8 km) north of the town of Crescent City. The unit consists of 2,335 ac (945 ha) of State lands and 348 ac (140 ha) of private lands. This unit includes two contiguous lagoons (Lake Tolowa and Lake Earl), referred to collectively as Lake Earl. DN–2 is located 8.0 mi (12.8 km) south of (DN–1), which is also the nearest extant subpopulation.

DN–2 was occupied at the time of listing. The tidewater goby subpopulation in DN–2 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit.

DN–2 is representative of extensive coastal lagoons and bays north of Cape Mendocino formed over uplifting Holocene sediments on broad flat coastal benches. These coastal benches include an intricate network of estuaries and other channels that are features essential to the conservation of the tidewater goby because they provide refugia during seasonal floods and breeding habitat through the full range of drought cycles. The water level and salinity within the lagoon varies seasonally and annually in response to: (a) Periods of high precipitation or drought within its watershed; (b) the timing, duration, and frequency of breaching events; (c) the water level in the lagoon at the time of breaching; and (d) ocean tidal cycles during and immediately following a breach. As a result of natural and human-induced environmental changes, including artificial breaching, maximum water depth within Lake Earl/Lake Tolowa varies during an annual cycle from less than 5 ft (1.5 m) deep to more than 10 ft (3 m) deep. The distribution of tidewater goby and the PCE within Lake Earl/Lake Tolowa changes in response to these dynamic short-term habitat conditions; over a multiyear cycle, tidewater goby may persist and breed anywhere within the lagoon. McCraney *et al.* (2010) indicate that artificial breaching activities may be reducing genetic diversity in this subpopulation by repeated bottlenecking.

On an intermittent basis, DN–2 possesses a sandbar across the mouth of the lagoon or estuary during the majority of the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions during those times (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

HUM–1: Stone Lagoon

HUM–1 consists of 653 ac (264 ha). This unit is located in Humboldt County, approximately 11 mi (18 km) north of the City of Trinidad. The unit consists entirely of State lands. HUM–1 is located 3.1 mi (5.0 km) north of Big Lagoon (HUM–2), which is also the nearest extant subpopulation.

HUM–1 was occupied at the time of listing. The tidewater goby subpopulation in HUM–1 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit.

On an intermittent basis, HUM–1 possesses a sandbar across the mouth of the lagoon or estuary during the majority of the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

HUM–2: Big Lagoon

HUM–2 consists of 1,529 ac (619 ha). This unit is located in Humboldt County, approximately 7 mi (11 km) north of the City of Trinidad. The unit consists of 1,527 ac (618 ha) of State lands and 2 ac (1 ha) of private lands. HUM–2 is located 3.1 mi (5.0 km) south of Stone Lagoon (HUM–1), which is also the nearest extant subpopulation.

HUM–2 was occupied at the time of listing. The tidewater goby subpopulation in HUM–2 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit.

Mark and recapture surveys for tidewater goby were conducted by Humboldt State University in a large cove near the State Park boat ramp in Big Lagoon during the fall of 2008, 2009, and 2010, to estimate the minimum tidewater goby subpopulation for each year (Hellmair 2011, p. 47). Results indicate that, in 2008, the tidewater goby subpopulation was approximately 21,000 individuals. In 2009, the subpopulation was approximately 1.7 to 3.4 million individuals in the cove. In 2010, the subpopulation was approximately 30,000 individuals in the same cove. Based on the results of this research, which estimated that the subpopulation fluctuated between 21,000 and 1.7–3.4 million individuals, and the relatively large size of the lagoon, Big Lagoon likely has the largest and most robust tidewater goby subpopulation in northern California. The results of the study also reflect how variable tidewater goby subpopulation numbers can be from year to year in a given location.

On an intermittent basis, HUM–2 possesses a sandbar across the mouth of the lagoon or estuary during the majority of the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions during those times (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

HUM–3: Humboldt Bay

HUM–3 consists of 839 ac (339 ha). This unit is located in Humboldt County, within an approximate 8-mi (13-km) radius to the north, south, and west of the City of Eureka. The unit consists of 652 ac (264 ha) of Federal lands, 61 ac (24 ha) of State lands, 45 ac (18 ha) of local lands, and 81 ac (33 ha) of private lands. HUM–3 is located 18.4 mi (29.7 km) north of the Eel River (HUM–4), which is also the nearest extant subpopulation. HUM–3 was

occupied at the time of listing. The tidewater goby subpopulation in HUM–3 is likely a source population, which is important in maintaining the metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit. This subpopulation may provide essential demographic and genetic support to HUM–4, especially after periods of extreme floods, for example, after the 1964 ''Christmas Flood,'' when the subpopulation of tidewater goby at the Eel River estuary may have been extirpated.

Humboldt Bay and its adjacent marshes and estuaries are a complex mixture of natural and human-made aquatic features that have experienced many decades of human-induced changes. These changes include the construction of levees, tidegates, culverts, and other water control structures, and extensive dredging of sandbars. Surrounding the Bay itself is a generally broad bench historically dominated by mudflats, tidal marshes, estuarine channels, and brackish marshes. Substantial portions of these habitats were converted to agricultural, urban, and industrial uses in recent history, resulting in the loss of as much as 10,000 ac (4,047 ha) of potentially suitable tidewater goby habitat. This critical habitat unit consists of a complex of interconnected estuary channels and tidegates along the eastern edge of Humboldt Bay, which collectively mimic, on a much-reduced scale, suitable habitat for tidewater goby. Many of these channels and marshes are themselves the result of changes to historical habitats, and depend on specific, yet generally undocumented, management activities, such as dredging or sandbar breaches, for their continued function.

To address the dynamic variability of these habitats resulting from seasonal and inter-annual precipitation differences, we have included both the actual known locations where the tidewater goby has been documented, as well as portions of those channels contiguous to, and upchannel or downchannel from, occupied habitat. We have not designated Humboldt Bay proper as critical habitat, nor have we proposed major channels subject to substantial daily tidal fluctuations, as tidewater gobies are not known to breed there. Similarly, we have not designated channels that are discontiguous with occupied habitat, nor have we included intervening marsh or agricultural lands that may occasionally be flooded during severe winter storm events.

Based on several recent surveys, we have found that the precise locations of tidewater goby use within the channel complex during any particular year may change in response to variations in precipitation and channel hydrology. We anticipate that the persistence of the tidewater goby source population within this unit may require protection of lagoons and estuaries that are not occupied every year, but collectively support a source population through an interconnected complex of channels and shallow water habitats. That is, any of the several known occupied locations within a channel complex may be used by tidewater goby during various years in response to dynamic habitat conditions during seasonal, annual, and longer term climatic cycles, such as drought.

PCE 1c (a sandbar(s) across the mouth of a lagoon or estuary) is not likely to occur within this unit because a navigable, dredged channel with a permanent open connection to the ocean is maintained on a regular basis. PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

HUM–4: Eel River

This unit is located in Humboldt County, approximately 4.0 mi (6.5 ha) northwest of the City of Ferndale. The unit consists of two subunits, totaling 5 ac (2 ha) of State lands and 34 ac (13 ha) of private lands.

Both subunits are outside the geographical area occupied by the species at the time of listing but are now occupied. The Eel River estuary is similar to Humboldt Bay (HUM–3) in that tidewater goby subpopulations have been found in isolated populations in severely and artificially fragmented habitats, which are often found behind tidegates, culverts, and other manmade structures. In Humboldt Bay (HUM–3), McCraney *et al.* (2010, p. 3315) found that artificial fragmentation reduced dispersal and gene flow in these subpopulations. The same may be true for the Eel River estuary subpopulations with isolated populations that are genetically distinct from each other. Therefore, until additional information is available regarding population genetics, distribution, and other parameters, we consider these two areas, the Eel River North Area (Subunit-4a) and the Eel River South Area (Subunit–4b), to be distinct from each other. Artificially fragmented habitats in the Eel River estuary may have genetically isolated or weakened populations of tidewater goby, as has been identified in Humboldt Bay (HUM–3) (McCraney *et al.* 2010, p. 3315). Current and proposed estuarine restoration projects in the Eel River estuary may improve dispersal of tidewater goby, increase genetic diversity, and aid in recovery of the species in these locations as well.

Subunit-4a (Eel River North Area)

Subunit-4a encompasses approximately 16 ac (6 ha), and consists of 5 ac (2 ha) of State lands and 11 ac (4 ha) of private lands. Subunit-4a is located 3.3 mi (5.3 km) north of Subunit-4b, which is also the nearest extant subpopulation. This subunit is essential for the conservation of the species because it possesses ecological characteristics that are important in maintaining the species' ability to adapt to changing environments, including the ability to disperse into higher channels and marsh habitat during severe flood events. The Eel River delta includes a large, complex estuary with a network of diked and natural slough channels with suitable tidewater goby habitat. The Eel River delta contains many small unsurveyed slough channels and other backwater areas that provide suitable habitat for tidewater goby, but it also contains larger channels open to direct tidal influence that do not provide suitable habitat and are not included in this subunit. This subunit consists of backwater channels and immediately adjacent marsh contiguous to the known-occupied habitat.

This unit is subject to infrequent, yet severe, flooding from the nearby Eel River proper. The major flood event of 1964 (''Christmas Flood''), and other major floods during the past century, may have severely altered habitat in most channels, including those currently occupied. Tidewater goby may have survived the flood and resulting loss of habitat in the refugia provided in upper channels and swales. Alternatively, the species may have been extirpated at the Eel River delta during those severe events, and become reestablished through recolonization by individuals from Humboldt Bay populations (HUM–3). Of particular importance, the Eel River location is at the north end of one of the largest natural geographic gaps in the tidewater goby's geographic range. The gap

extends to the Ten Mile River (Mendocino County) to the south, representing a coastline distance in excess of 135 mi (217 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. Although Subunit-4a is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, Subunit-4a possesses a sandbar across the mouth of the lagoon or estuary during the majority of the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

Subunit-4b (Eel River South Area)

Subunit-4b encompasses approximately 23 ac (9 ha), and consists entirely of private lands. Subunit-4b is located 3.3 mi (5.3 km) south of Subunit-4a, which is also the nearest extant subpopulation. This subunit is essential for the conservation of the species because it possesses ecological characteristics that are important in maintaining the species' ability to adapt to changing environments, including the ability to disperse into higher channels and marsh habitat during severe flood events. The Southern Eel River delta includes a large complex estuary with a network of diked and natural slough channels, and other backwater areas that provide suitable habitat for tidewater goby. It also contains larger channels open to direct tidal influence that do not provide suitable habitat and are not included in this unit. This unit consists of backwater channels and immediately adjacent marsh contiguous to the known-occupied habitat.

This unit is subject to infrequent, yet severe, flooding from the nearby Eel River proper. The major flood event of 1964 (''Christmas Flood''), and other major floods during the past century, may have severely altered habitat in most channels, including those currently occupied. Tidewater goby may have survived the flood and resulting loss of habitat in the refugia provided in upper channels and swales. Alternatively, the species may have been extirpated at the Eel River delta during those severe events, and become reestablished through recolonization by individuals from Humboldt Bay populations (HUM–3). Of particular importance, the Eel River location is at the north end of one of the largest natural geographic gaps in the tidewater goby's geographic range. The gap extends to the Ten Mile River (Mendocino County) to the south, representing a coastline distance in excess of 135 mi (217 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. Although Subunit-4b was outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, Subunit-4b possesses a sandbar across the mouth of the lagoon or estuary during the majority of the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

MEN–1: Ten Mile River

MEN–1 consists of 73 ac (30 ha). This unit is located in Mendocino County, approximately 9.0 mi (14.5 km) north of the Town of Fort Bragg. The unit consists of 17 ac (7 ha) of State lands and 56 ac (23 ha) of private lands. MEN–1 is located 5.6 mi (8.9 km) north of the Virgin Creek (MEN–2), which is also the nearest extant subpopulation. MEN–1 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in MEN–1 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit. Furthermore, this unit is the largest block of habitat along the coast of Mendocino County, and is the first location on the southern end of one of the longest stretches of unsuitable habitat in the species' range (previously described under HUM–4). Thus, this unit is important to connect subpopulations within Mendocino County. South of Ten Mile River, only three other small isolated locations (MEN–2, 3, 4) occupied by the tidewater goby are known to exist across the more than 100 miles of rugged coastline between MEN–1 and SON–1 in south coastal Sonoma County.

On an intermittent basis, MEN–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MEN–2: Virgin Creek

MEN–2 consists of 4 ac (2 ha). This unit is located in Mendocino County, approximately 3.5 mi (5.6 km) north of the Town of Fort Bragg. The unit consists of 2 ac (1 ha) of State lands and 2 ac (1 ha) of private lands. MEN–2 is located 1.2 mi (2.0 km) north of Pudding Creek (MEN–3), which is also the nearest extant subpopulation.

MEN–2 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in MEN–2 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit.

On an intermittent basis, MEN–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MEN–3: Pudding Creek

MEN–3 consists of 17 ac (7 ha). This unit is located in Mendocino County, approximately 2.5 mi (4.0 km) north of the town of Fort Bragg. The unit consists of 10 ac (4 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 6 ac (2 ha) of private lands. MEN–3 is located 1.2 mi (2.0 km) south of Virgin Creek (MEN–2), which is also the nearest extant subpopulation.

MEN–3 was occupied by the tidewater goby at the time of listing.

This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the North Recovery Unit.

On an intermittent basis, MEN–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MEN–4: Davis Lake and Manchester State Park Ponds

MEN–4 consists of 29 ac (12 ha). This unit is located in Mendocino County, approximately 1.2 mi (1.9 ha) west of the community of Manchester. The unit consists entirely of State lands. MEN–4 is located 32.4 mi (52.2 km) south of Pudding Creek (MEN–3), which is also the nearest extant subpopulation.

MEN–4 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in MEN–4 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the North Coast Recovery Unit.

On an intermittent basis, MEN–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SON–1: Salmon Creek

SON–1 consists of 108 ac (44 ha). This unit is located in Sonoma County, approximately 7 mi (11.3 km) south of the community of Jenner. The unit consists of 47 ac (19 ha) of State lands, 14 ac (6 ha) local lands, and 47 ac (19 ha) of private lands. SON–1 is located 5.3 mi (8.5 km) north of the Estero Americano unit (MAR–1), which is also the nearest extant subpopulation.

SON–1 was occupied by tidewater goby at the time of listing. The geological feature known as Bodega Head separates Salmon Creek and Estero Americano, and could reduce the exchange of tidewater goby between these two locations. The tidewater goby population in this unit is likely a source population, and is therefore important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SON–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MAR–1: Estero Americano

MAR–1 consists of 465 ac (188 ha). This unit is located in Marin County, approximately 3.5 mi (5.7 km) south of Bodega Bay. The unit consists entirely of private lands. MAR–1 is located 2.2 mi (3.5 km) north of the Estero de San Antonio (MAR–2), which is also the nearest extant subpopulation.

MAR–1 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in MAR–1 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Greater Bay Area Recovery Unit.

On an intermittent basis, MAR–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MAR–2: Estero de San Antonio

MAR–2 consists of 285 ac (115 ha). This unit is located in Marin County, approximately 5.6 mi (9 km) south of Bodega Bay. The unit consists entirely of private lands. MAR–2 is located 2.2 mi (3.5 km) south of the Estero Americano (MAR–1), which is also the nearest extant subpopulation.

MAR–2 was occupied by tidewater goby at the time of listing. This critical habitat unit supports a source population of tidewater goby that likely provides individuals that are recruited into surrounding subpopulations. Given the close proximity of the MAR–1 and MAR–2 units and the dispersal capabilities of tidewater goby, it is likely that the two subpopulations have exchanged individuals in the past and will continue to exchange individuals in the future. Exchange between these subpopulations would bolster the continued sustainable existence of the two subpopulations, which would, together with unit SON–1, provide for natural colonization of available, but is considered to be currently unoccupied, estuaries within the region south of the Russian River and north of Point Reyes. This critical habitat unit provides habitat for a tidewater goby population that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, MAR–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MAR–3: Walker Creek

MAR–3 consists of 118 ac (48 ha). This unit is located in Marin County, approximately 2.5 mi (4 km) southwest of the Town of Tomales. The unit consists of 9 ac (4 ha) of State lands and 109 ac (44 ha) of private lands. MAR–3 is located 4.6 mi (7.4 km) southeast of the Estero de San Antonio unit (MAR–2), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing and is not considered to be currently occupied. However, tidewater gobies were collected at Walker Creek in 1897, but were not found in sampling efforts conducted in 1996 or 1999 (Service 2005a, p. C–8). This unit is identified in the Recovery Plan as a potential reintroduction site, and could provide habitat for maintaining the tidewater goby metapopulation in the region. MAR–3 is essential for the conservation of the species because establishing a tidewater goby population in this unit will support the recovery of the tidewater goby population within the Greater Bay Area Recovery Unit and help facilitate additional colonization of currently unoccupied locations.

Although MAR–3 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

MAR–4: Lagunitas (Papermill) Creek

MAR–4 consists of 998 ac (405 ha). This unit is located in Marin County, approximately 20.5 mi (33 km) south of Bodega Bay. The unit consists of 318 ac (129 ha) of Federal lands, 459 ac (186 ha) of State lands, and 221 ac (90 ha) of private lands. MAR–4 is located 15.5 mi (25.0 km) south of the Estero de San Antonio unit (MAR–2), which is also the nearest extant subpopulation. Records indicate tidewater goby occurred at this location historically.

This unit is outside the geographical area occupied by the species at the time of listing, but recent surveys have confirmed that the unit is currently occupied. This unit is essential for the conservation of the species because it is the only known location of the tidewater goby to remain within the greater Tomales Bay area. Without this subpopulation, there would be no source population within dispersal distance of Tomales Bay to maintain the metapopulation dynamics of subpopulations within the area. Tomales Bay is designated as ''wetlands of significant importance'' under the International Convention on Wetlands (*http://sanctuarysimon.org/farallones/sections/estuaries/overview.php*).

Although MAR–4 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. We do not have information that confirms that PCE 1c (a sandbar(s) across the mouth of the lagoon or estuary) is present within this unit on at least an intermittent basis. However, PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

MAR–5: Bolinas Lagoon

MAR–5 consists of 1,114 ac (451 ha). This unit is located in Marin County, approximately 0.5 mi (0.81 km) east of the community of Bolinas. The unit consists of 29 ac (12 ha) of Federal Lands, 1,048 ac (424 ha) of local lands, and 37 ac (15 ha) of private lands. MAR–5 is located 9.4 mi (15.1 km) northwest of the Rodeo Lagoon unit (MAR–6), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing and is not known to be currently occupied, and there are no historical tidewater goby records for this location. However, this unit is essential for the conservation of the species because it provides suitable habitat within potential dispersal distance of nearby occupied units, is identified in the Recovery Plan as a potential introduction site, and could help maintain tidewater goby metapopulations in the region. Bolinas Lagoon is designated as ''wetlands of significant importance'' under the International Convention on Wetlands (*http://sanctuarysimon.org/farallones/sections/estuaries/overview.php*).If a tidewater goby subpopulation is established in this unit, MAR–5 unit will support the recovery of the tidewater goby population within the Greater Bay Recovery Unit and help facilitate colonization of currently unoccupied locations.

Although MAR–5 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. We do not have information that confirms that PCE 1c (a sandbar(s) across the mouth of the lagoon or estuary) is present within this unit on at least an intermittent basis. However, PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

MAR–6: Rodeo Lagoon

MAR–6 consists of 40 ac (16 ha). This unit is located in Marin County, approximately 3.8 mi (6 km) north of San Francisco. The unit consists entirely of Federal lands. MAR–6 is located 9.4 mi (15.1 km) south of Bolinas Lagoon (MAR–5), and is separated from the nearest extant subpopulation to the south, San Gregorio Creek (SM–1), by 36 mi (58 km).

MAR–6 was occupied by tidewater goby at the time of listing. MAR–6 is the only known location where the tidewater goby remains within the greater San Francisco Bay Area. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). It also provides habitat for a subpopulation of tidewater goby that could disperse to other adjoining habitats. Maintaining this unit will reduce the chance of losing the tidewater goby in the Greater Bay Recovery Unit and help conserve genetic diversity within the species.

On an intermittent basis, MAR–6 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in

precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SM–1: San Gregorio Creek

SM–1 consists of 45 ac (18 ha). This unit is located in San Mateo County, approximately 28 mi (45 km) south of the San Francisco–San Mateo County line. The unit consists of 33 ac (13 ha) of State lands and 12 ac (5 ha) of private lands. SM–1 is located 1.5 mi (2.4 km) north of Pomponio Creek (SM–2), and is separated from the nearest extant subpopulation to the south, Pescadero–Butano Creek (SM–3), by 3.8 mi (6.1 km).

SM–1 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). This unit is noted for high densities of tidewater goby (Swenson 1993, p. 3).

On an intermittent basis, SM–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SM–2: Pomponio Creek

SM–2 consists of 7 ac (3 ha). This unit is located in San Mateo County, approximately 3.5 mi (5.6 km) north of the community of Pescadero. The unit consists of 1 ac (less than 1 ha) of State lands and 6 ac (2 ha) of private lands. SM–2 is located 1.5 mi (2.4 km) south of the San Gregorio Creek unit (SM–1), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics in the region.

Although SM–2 is outside the geographical area occupied at the time of listing, it does possess the PCE that supports tidewater goby. On an intermittent basis, SM–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SM–3: Pescadero–Butano Creek

SM–3 consists of 245 ac (99 ha). This unit is located in San Mateo County, approximately 32.0 mi (51.0 km) south of the San Francisco–San Mateo County line. This unit consists of 241 ac (97 ha) of State lands and 4 ac (2 ha) of private lands. SM–3 is located 2.2 mi (3.5 km) south of Pomponio Creek (SM–2), and is separated from the nearest extant subpopulation to the south, in Bean Hollow Creek (SM–4), by 3.0 mi (4.8 km).

SM–3 was occupied by tidewater goby at the time of listing. This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the Greater Bay Area Recovery Unit.

On an intermittent basis, SM–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring and early fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SM–4: Bean Hollow Creek (Arroyo de Los Frijoles)

SM–4 consists of 10 ac (4 ha). This unit is located in San Mateo County, approximately 34.8 mi (56.0 km) south of the San Francisco–San Mateo County line. The unit consists of 3 ac (1 ha) of State lands and 7 ac (3 ha) of private lands. SM–4 is located approximately 3.0 mi (4.8 km) south of the Pescadero–Butano Creek (SM–3), which is also the nearest extant subpopulation.

SM–4 was occupied by tidewater goby at the time of listing. Maintaining this unit, together with the two units to the north, will reduce the chance of losing the tidewater goby along this important coastal range and allow for connectivity between tidewater goby source populations, thereby supporting gene flow and metapopulation dynamics within the Greater Bay Recovery Unit.

On an intermittent basis, SM–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–1: Waddell Creek

SC–1 consists of 75 ac (30 ha). This unit is located in Santa Cruz County, approximately 18 mi (29 km) northwest of the city of Santa Cruz. The unit consists of 39 ac (16 ha) of State lands and 36 ac (14 ha) of private lands. SC–1 is located approximately 5.0 mi (8.0 km) north of the Scott Creek (SC–2), which is also the nearest extant subpopulation. This unit is at the northern extent of this metapopulation as described in the Recovery Plan. Tidewater gobies were present in low numbers in 1991 through 1996, but were not detected during surveys from 1997 to 2000 (Service 2005a, p. C–12). Tidewater gobies were again detected

during surveys in August 2012 (Rischbieter, i*n litt.* 2012).

SC–1 was occupied by tidewater goby at the time of listing. This unit provides habitat for tidewater gobies dispersing from Scott Creek (SC–2), which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the Greater Bay Area Recovery Unit.

On an intermittent basis, SC–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–2: Scott Creek

SC–2 consists of 74 ac (30 ha). This unit is located in Santa Cruz County, approximately 11.8 mi (19.0 km) northwest of the City of Santa Cruz. The unit consists of 66 ac (27 ha) of State lands, 6 ac (2 ha) of local lands, and 2 ac (1 ha) of private lands. SC–2 is located 5.0 mi (8.0 km) south of Waddell Creek (SC–1), and is separated from the nearest extant subpopulation to the south, in Laguna Creek (SC–3), by 6.0 mi (9.6 km).

SC–2 is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the Greater Bay Area Recovery Unit.

Although SC–2 is outside the geographical area occupied at the time of listing, it does possess the PCE that supports tidewater goby. On an intermittent basis, SC–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SC–3: Laguna Creek

SC–3 consists of 26 ac (11 ha). This unit is located in Santa Cruz County, approximately 7.5 mi (12.0 km) west of the City of Santa Cruz. The unit consists entirely of State lands. SC–3 is located 6.0 mi (9.6 km) south of Scott Creek (SC–2), the nearest extant population to the north, and is separated from the nearest extant subpopulation to the south, in Baldwin Creek (SC–4), by 2.0 mi (3.2 km).

SC–3 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby population that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Together with Baldwin Creek (SC–4) to the south, this unit helps conserve the genetic diversity of the species.

On an intermittent basis, SC–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–4: Baldwin Creek

SC–4 consists of 27 ac (11 ha). This unit is located in Santa Cruz County, approximately 6 mi (9.7 km) west of the City of Santa Cruz. The unit consists entirely of State lands. SC–4 is located 2.0 mi (3.2 km) south of Laguna Creek (SC–3), and is separated from the nearest extant subpopulation to the south, Lombardi Creek (not designated as critical habitat), by 0.7 mi (1.2 km).

SC–4 was occupied by tidewater goby at the time of listing. The tidewater goby population in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby population that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172) and, together with Laguna Creek (SC–3) to the north, helps conserve genetic diversity within the species.

On an intermittent basis, SC–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–5: Moore Creek

SC–5 consists of 15 ac (6 ha). This unit is located in Santa Cruz County, approximately 2.0 mi (3.2 km) west of the City of Santa Cruz. The unit consists entirely of Federal lands. SC–5 is located 4.0 mi (6.4) south of Baldwin Creek. SC–5 is separated from the nearest extant subpopulation to the north, Younger Lagoon (not designated as critical habitat), by 0.5 mi (0.8 km).

SC–5 was occupied by tidewater goby at the time of listing. Maintaining this unit will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SC–5 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The

physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–6: Corcoran Lagoon

SC–6 consists of 28 ac (11 ha). This unit is located in Santa Cruz County, approximately 3 mi (4.8 km) east of the City of Santa Cruz. This unit consists of 1 ac (less than 1 ha) of State lands, 6 ac (2 ha) of local lands, and 21 ac (8 ha) of private lands. SC–6 is located 4.0 mi (6.4 km) south of Moore Creek (SC–5), and the unit is separated from the nearest extant subpopulation to the south, in Moran Lake (not designated as critical habitat), by 0.7 mi (1.1 km).

SC–6 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby population that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SC–6 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–7: Aptos Creek

SC–7 consists of 9 ac (4 ha). This unit is located in Santa Cruz County, approximately 0.5 mi (0.8 km) southwest of the City of Aptos. The unit consists entirely of State lands. SC–7 is located 4.1 mi (6.6 km) east of Corcoran Lagoon (SC–6), and is separated from the nearest extant subpopulation to the north, Moran Lake (not designated as critical habitat), by 4.2 mi (6.75 km).

SC–7 was occupied by tidewater goby at the time of listing. The tidewater goby population in SC–7 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Greater Bay Area Recovery Unit.

On an intermittent basis, SC–7 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SC–8: Pajaro River

SC–8 consists of 215 ac (87 ha). This unit is located in Santa Cruz County, approximately 5 mi (8 km) southwest of the City of Watsonville. The unit consists of 158 ac (64 ha) of State lands, 11 ac (4 ha) of local lands, and 46 ac (19 ha) of private lands. SC–8 is located 9.7 mi (15.6 km) south of Aptos Creek (SC–7), and is separated from the nearest extant subpopulation to the south, in Bennett Slough (MN–1), by 3.0 mi (4.7 km).

SC–8 was occupied by tidewater goby at the time of listing. Maintaining this unit will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SC–8 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MN–1: Bennett Slough

MN–1 consists of 167 ac (68 ha). This unit is located in Monterey County, approximately 3.7 mi (6 km) northwest of the Town of Castroville. This unit consists of 108 ac (44 ha) of State lands, 5 ac (2 ha) of local lands, and 54 ac (22 ha) of private lands. MN–1 is located 4.1 mi (6.6 km) south of the Pajaro River (SC–8), and is separated from the nearest extant subpopulation to the south, Moro Cojo Slough (not designated as critical habitat), by 1.3 mi (2.1 km).

MN–1 was occupied by tidewater goby at the time of listing. The tidewater goby population in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby population that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172), and maintaining it will reduce the chance of losing the tidewater goby within the Greater Bay Area Recovery Unit, and help conserve genetic diversity within the species.

PCE 1c (a sandbar(s) across the mouth of lagoon or estuary) is not likely to occur within this unit because it has a navigable, dredged channel with a permanent open connection to the ocean that is maintained on a regular basis. However, PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

MN–2: Salinas River

MN–2 consists of 466 ac (189 ha). This unit is located in Monterey County, approximately 7.5 mi (12 km) north of the City of Seaside. The unit consists of 195 ac (79 ha) of Federal lands, 33 ac (13 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 237 ac (96 ha) of

private lands. Unit MN–2 is located 4.0 mi (8.0 km) south of the Bennett Slough unit (MN–1).

This unit is outside the geographical area occupied by the species at the time of listing and is not considered to be currently occupied; however, this unit is essential for the conservation of the species. Tidewater gobies were last collected here in 1951, but were not present during surveys in 1991, 1992, and 2004 (Service 2005a, p. C–16). This unit is identified in the Recovery Plan as a potential reintroduction site. This unit would provide habitat for tidewater goby that disperse from Bennett Slough and Moro Cojo Slough, either through natural means or by reintroduction, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit will also allow for connectivity between tidewater goby source populations, and thereby support gene flow and metapopulation dynamics within the Greater Bay Area Recovery Unit. Lastly, this unit is one of only three locations in Monterey County that have harbored tidewater goby and is one of the two subpopulations in the metapopulation as described in the Recovery Plan. Therefore, this unit is especially important for ensuring the viability of the metapopulation.

Although MN–2 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, MN–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SLO–1: Arroyo de la Cruz

SLO–1 consists of 33 ac (13 ha). This unit is located in San Luis Obispo County, approximately 8.0 mi (13.0 km) northwest of San Simeon. The unit consists of 25 ac (10 ha) of State lands and 8 ac (3 ha) of private lands. SLO–1 is located approximately 2.0 mi (3.2 km) north of the Arroyo de Corral unit (SLO–2), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing and is not known to be currently occupied, and there are no historical tidewater goby records for this location. However, this unit is essential for the conservation of the species because it provides habitat to nearby units and is identified in the Recovery Plan as a potential introduction site, and could provide habitat for maintaining the tidewater goby metapopulation in the region.

This unit will provide habitat for tidewater goby that disperse from Arroyo del Corral through introduction of the species, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit is one of two locations with suitable habitat within the Central Coast Recovery Subunit (CC 1), as described in the Recovery Plan. Therefore, this unit is especially important for ensuring the viability of the metapopulation because if the subpopulation within the Arroyo de Corral unit (SLO–2) is extirpated, the entire metapopulation would be lost.

Although SLO–1 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. SLO–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SLO–2: Arroyo del Corral

SLO–2 consists of 5 ac (3 ha). This unit is located in San Luis Obispo County, approximately 6 mi (9.7 km) northwest of San Simeon. The unit consists of 4 ac (2 ha) of State lands and 1 ac (less than 1 ha) of private lands. SLO–2 is located 2 mi (3.2 km) south of Arroyo de la Cruz (SLO–1) and is separated from the nearest extant subpopulation to the south, Oak Knoll Creek (SLO–3), by 4.3 mi (6.9 km).

SLO–2 was occupied at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Central Coast Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SLO–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–3: Oak Knoll Creek (Arroyo Laguna)

SLO–3 consists of 5 ac (3 ha). This unit is located in San Luis Obispo County, approximately 2 mi (3.2 km) northwest of San Simeon. The unit consists of 4 ac (2 ha) of State lands and 1 ac (less than 1 ha) of private lands. SLO–3 is located 4.3 mi (6.9 km) south of Arroyo del Corral (SLO–2) and is separated from the nearest extant subpopulation to the south, in Arroyo de Tortuga (not designated as critical habitat), by 0.5 mi (0.8 km).

SLO–3 was occupied at the time of listing. This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the Central Coast Recovery Unit.

On an intermittent basis, SLO–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–4: Little Pico Creek

SLO–4 consists of 9 ac (4 ha). This unit is located in San Luis Obispo County, approximately 6.7 mi (10.8 km) northwest of the Town of Cambria. The

unit consists of 2 ac (1 ha) of State lands and 7 ac (3 ha) of private lands. SLO–4 is located 3.7 mi (5.9 km) south of Oak Knoll Creek (SLO–3). The unit is separated from the nearest extant subpopulation to the north, in Broken Bridge Creek (not designated as critical habitat), by 1.4 mi (2.2 km).

SLO–4 was occupied at the time of listing. The tidewater goby subpopulation in SLO–4 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Central Coast Recovery Unit.

On an intermittent basis, SLO–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–5: San Simeon Creek

SLO–5 consists of 17 ac (7 ha). This unit is located in San Luis Obispo County, approximately 3.3 mi (5.3 km) northwest of the Town of Cambria. The unit consists entirely of State lands. SLO–5 is located 3.8 mi (6.1 km) south of Little Pico Creek (SLO–4), and is separated from the nearest extant subpopulation to the south, in Santa Rosa Creek (not designated as critical habitat), by 2.6 mi (4.2 km).

SLO–5 was occupied at the time of listing. The tidewater goby subpopulation in SLO–5 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Central Coast Recovery Unit.

On an intermittent basis, SLO–5 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–6: Villa Creek

SLO–6 consists of 15 ac (7 ha). This unit is located in San Luis Obispo County, approximately 9.6 mi (15.4 km) southeast of Cambria. The unit consists of 14 ac (6 ha) of State lands and 1 ac (less than 1 ha) of private lands. SLO–6 is located 12.3 mi (19.8 km) south of San Simeon Creek (SLO–5), and is separated from the nearest extant subpopulation to the south, in San Geronimo Creek (SLO–7), by 2.3 mi (3.7 km).

SLO–6 was occupied at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Central Coast Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SLO–6 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–7: San Geronimo Creek

SLO–7 consists of 1 ac (less than 1 ha). This unit is located in San Luis Obispo County, approximately 7.6 mi (12.2 km) northwest of the Town of Morro Bay, and approximately 1.4 mi (2.5 km) west of the Town of Cayucos. The unit consists entirely of State lands. SLO–7 is located 2.3 mi (3.7 km) south of Villa Creek (SLO–6), and is separated from the nearest extant subpopulation to the south, in Cayucos Creek (not designated as critical habitat), by 1.5 mi (2.4 km).

SLO–7 was occupied at the time of listing. The tidewater goby subpopulation in SLO–7 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Central Coast Recovery Unit.

On an intermittent basis, SLO–7 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–8: Toro Creek

SLO–8 consists of 9 ac (4 ha). This unit is located in San Luis Obispo County, approximately 2.3 mi (3.7 km) south of the Town of Cayucos. The unit consists of 1 ac (less than 1 ha) of State lands and 8 ac (3 ha) of private lands. SLO–8 is located 5 mi (8.0 km) south of San Geronimo Creek (SLO–7), and is separated from the nearest extant subpopulation to the north, in Old Creek (not designated as critical habitat), by 1.8 mi (2.9 km).

SLO–8 was occupied at the time of listing. Maintaining this unit will reduce the chance of losing the tidewater goby within the Central Coast Recovery Unit, and help conserve genetic diversity within the species. On an intermittent basis, SLO–8 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular

time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–9: Los Osos Creek

SLO–9 consists of 73 ac (30 ha). This unit is located in San Luis Obispo County, within the Town of Baywood. The unit consists of 62 ac (25 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 10 ac (4 ha) of private lands. The unit is separated from the nearest extant subpopulation to the north, in Toro Creek (SLO–8), by 8.0 mi (12.8 km). Tidewater gobies were present during surveys in 2001 (Service 2005a, p. C–21). Prior to the observations in 2001, tidewater goby had not been seen here since 1981 (Service 2005a, p. C–21).

Therefore, SLO–9 is outside the geographical area occupied by the species at the time of listing but is currently occupied. This unit is essential for the conservation of the species because it provides habitat to nearby units and is identified in the Recovery Plan as a potential introduction site, and could provide habitat for maintaining the tidewater goby metapopulation in the region. Maintaining this unit will also reduce the chance of losing the tidewater goby within the Central Coast Recovery Unit.

Although SLO–9 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. PCE 1c (a sandbar(s) across the mouth of lagoon or estuary) is not likely to occur within this unit because it has a navigable channel with an open connection to Morro Bay, which is dredged on a regular basis. However, PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SLO–10: San Luis Obispo Creek

SLO–10 consists of 31 ac (12 ha). This unit is located in San Luis Obispo County, within the Town of Avila Beach. The unit consists of 3 ac (1 ha) of local lands, and 28 ac (11 ha) of private lands. The unit is separated from the nearest extant subpopulation to the south, in Pismo Creek (SLO–11), by 7.0 mi (11.2 km).

SLO–10 was occupied at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). On an intermittent basis, SLO–10 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–11: Pismo Creek

SLO–11 consists of 20 ac (9 ha). This unit is located in San Luis Obispo County, within the Town of Pismo Beach. The unit consists of 14 ac (6 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 5 ac (2 ha) of private lands. SLO–11 is located 7 mi (11.2 km) south of San Luis Obispo Creek (SLO–10). The unit is separated from the nearest extant subpopulation to the south, in Arroyo Grande Creek (not designated as critical habitat), by 2.6 mi (4.2 km).

SLO–11 was occupied at the time of listing. The tidewater goby subpopulation in SLO–11 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Conception Recovery Unit. On an intermittent basis, SLO–11 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SLO–12: Oso Flaco Lake

SLO–12 consists of 171 ac (69 ha). This unit is located in San Luis Obispo County, approximately 5 mi (8.0 km) northwest of the City of Santa Maria. The unit consists of 165 ac (67 ha) of State lands and 6 ac (2 ha) of private lands. The unit is separated from the nearest extant subpopulation to the south, the Santa Maria River (SB–1), by 4 mi (6.4 km).

This unit is outside the geographical area occupied by the species at the time of listing and is not known to be currently occupied, and there are no historical tidewater goby records for this location. However, this unit is essential for the conservation of the species because it provides habitat to nearby units and is identified in the Recovery Plan as a potential introduction site, and could provide habitat for maintaining the tidewater goby metapopulation in the region. This unit will provide habitat for tidewater goby that disperse from Arroyo Grande Creek and the Santa Maria River, either through natural means or by introduction, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit would also allow for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics in this region. Although tidewater goby may be presently precluded from this location due to water quality impairments, the California Regional Water Control Board is currently working with the Service to remedy these impairments. Therefore, we anticipate the habitat at this location will be suitable for tidewater goby in the future and have determined that this unit is essential for the conservation of the species as described above.

Although SLO–12 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, SLO–12 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby

provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SB–1: Santa Maria River

SB–1 consists of 474 ac (192 ha). This unit is located in Santa Barbara County, approximately 13 mi (21 km) west of the City of Santa Maria. The unit consists of 42 ac (17 ha) of local lands and 432 ac (175 ha) of private lands. SB–1 is located 4 mi (6.4 km) south of Oso Flaco Lake (SLO–12), and is separated from the nearest extant subpopulation to the south, in Shuman Canyon (not designated as critical habitat; see *Application of Section 4(a)(3) of the Act*—Vandenberg Air Force Base section below), by 8.6 mi (13.9 km).

SB–1 was occupied at the time of listing. The tidewater goby subpopulation in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the Conception Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, SB–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–2: Cañada de las Agujas

SB–2 consists of 1 ac (less than 1 ha). This unit is located in Santa Barbara County, approximately 7.2 mi (11.6 km) west of Gaviota. The unit consists entirely of private lands. SB–2 is located 38.8 mi (62.5 km) south of the Santa Maria River (SB–1), and is separated from the nearest extant subpopulation to the south, in Arroyo El Bulito (not designated as critical habitat), by 0.4 mi (0.7 km).

SB–2 was occupied at the time of listing. This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within Conception Recovery Unit. Furthermore, this unit, and units SB–3, SB–4, SB–5, and SB–6, likely act as a metapopulation as defined in the Background section. These units are no more than 2.0 mi (3.3 km) from each other, which facilitates higher dispersal rates between sites. Because these units are of relatively small size in area (1 to 9 ac (less than 1 to 4 ha)), they are more susceptible to drying or shrinking due to drought conditions, which increases the likelihood of local extirpation. Lastly, because these units are small, they are likely to be dependent upon some degree of periodic exchange of tidewater goby between units for any one unit to persist over time. Therefore, designation of critical habitat at these five locations is necessary for the conservation of the tidewater goby along the Gaviota Coast in Santa Barbara County.

On an intermittent basis, SB–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–3: Cañada de Santa Anita

SB–3 consists of 3 ac (1 ha). This unit is located in Santa Barbara County, approximately 5.2 mi (8.4 km) west of Gaviota. The unit consists entirely of private lands. SB–3 is located 2.0 mi (3.2 km) south of Cañada de las Agujas (SB–2), and is separated from the nearest extant subpopulation to the north, in Cañada del Agua (not designated as critical habitat), by 0.4 mi (0.7 km).

SB–3 was occupied at the time of listing. This unit is important to the conservation of the species because it allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the Conception Recovery Unit. Furthermore, as described above in SB–2, this unit, and units SB–2, SB–4, SB–5, and SB–6, likely act as a metapopulation as defined in the Background section, and designation of critical habitat at these five locations is necessary for the conservation of the tidewater goby along the Gaviota Coast in Santa Barbara County.

On an intermittent basis, SB–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–4: Cañada de Alegria

SB–4 consists of 2 ac (1 ha). This unit is located in Santa Barbara County, approximately 3.2 mi (5.1 km) west of Gaviota. The unit consists entirely of private lands. SB–4 is located 2.0 mi (3.3 km) south of Cañada de Santa Anita (SB–3), and is separated from the nearest extant subpopulation to the south, in Cañada del Agua Caliente (SB–5), by 1.1 mi (1.8 km).

SB–4 was occupied at the time of listing. This unit is important to the conservation of the species because it allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics in this region. Furthermore, as described above in SB–2, this unit, and units SB–2, SB–3, SB–5, and SB–6, likely act as a metapopulation as defined in the Background section, and designation of critical habitat at these five locations is necessary for the conservation of the tidewater goby along the Gaviota Coast in Santa Barbara County.

On an intermittent basis, SB–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or

partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–5: Cañada del Agua Caliente

SB–5 consists of 1 ac (less than 1 ha). This unit is located in Santa Barbara County, approximately 2.1 mi (3.4 km) west of Gaviota. This unit consists entirely of private lands. SB–5 is located 1.1 mi (1.8 km) south of Cañada de Alegria (SB–4), which is also the nearest extant subpopulation.

SB–5 was occupied at the time of listing. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). This unit helps conserve genetic diversity within the species. This unit also allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics in this region. Furthermore, as described above in SB–2, this unit, and units SB–2, SB–3, SB–4, and SB–6, likely act as a metapopulation as defined in the Background section, and designation of critical habitat at these five locations is necessary for the conservation of the tidewater goby along the Gaviota Coast in Santa Barbara County.

On an intermittent basis, SB–5 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–6: Gaviota Creek

SB–6 consists of 11 ac (5 ha). This unit is located in Santa Barbara County, approximately 0.8 mi (1.3 km) west of Gaviota. This unit consists of 10 ac (4 ha) of State lands and 1 ac (less than 1 ha) of private lands. SB–6 is located 1.5 mi (2.4 km) south of Cañada del Agua Caliente (SB–5), which is also the nearest extant subpopulation.

SB–6 was occupied at the time of listing. This unit is important to the conservation of the species because maintaining it will reduce the chance of losing the tidewater goby within the Conception Recovery Unit. It also allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics in this region. Furthermore, as described above in SB–2, this unit, and units SB–2, SB–3, SB–4, and SB–5, likely act as a metapopulation as defined in the Background section, and designation of critical habitat at these five locations is necessary for the conservation of the tidewater goby along the Gaviota Coast in Santa Barbara County.

On an intermittent basis, SB–6 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–7: Arroyo Hondo

SB–7 consists of 1 ac (less than 1 ha). This unit is located in Santa Barbara County, approximately 5.0 mi (8.0 km) east of Gaviota. This unit consists entirely of private lands. SB–7 is located 5.0 mi (8.0 km) south of Gaviota Creek (SB–6), and is separated from the nearest extant subpopulation to the south, in Arroyo Quemado (not designated as critical habitat), by 1.3 mi (2.0 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat to nearby units and could provide habitat for maintaining the tidewater goby metapopulation within the Conception Recovery Unit. Maintaining this unit will reduce the chance of losing the tidewater goby within the Conception Recovery Unit, and help conserve genetic diversity within the species.

Although SB–7 is outside the geographical area occupied at the time of listing, it does possess the PCE that supports tidewater goby. On an intermittent basis, SB–7 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SB–8: Winchester/Bell Canyon

SB–8 consists of 6 ac (3 ha). This unit is located in Santa Barbara County, approximately 2.2 mi (3.5 km) west of the community of El Encanto Heights. The unit consists of 1 ac (less than 1 ha) of local lands and 5 ac (2 ha) of private lands. SB–8 is located 6.0 mi (9.6 km) north of Goleta Slough (SB–9), and is separated from the nearest extant subpopulation to the north, Tecolote Canyon (not designated as critical habitat), by 0.3 mi (0.4 km).

SB–8 was occupied at the time of listing. This unit is important to the conservation of the species because it allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics in this region. On an intermittent basis, SB–8 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or*

Protection section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–9: Goleta Slough

SB–9 consists of 190 ac (76 ha). This unit is located in Santa Barbara County, within the City of Goleta. The unit consists of 164 ac (66 ha) of local lands and 26 ac (10 ha) of private lands. SB–9 is located 6.0 mi (9.6 km) south of Winchester/Bell Canyon (SB–8), and is separated from the nearest extant subpopulation to the north, Devereux Slough (not designated as critical habitat), by 4.0 mi (6.4 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the Conception Recovery Unit.

Although SB–9 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, SB–9 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SB–10: Arroyo Burro

SB–10 consists of 3 ac (1 ha). This unit is located in Santa Barbara County, approximately 3.6 mi (5.8 km) west of the City of Santa Barbara. The unit consists entirely of local lands. SB–10 is located 4.0 mi (6.4 km) north of Mission Creek–Laguna Channel (SB–11), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the Conception Recovery Unit.

Although SB–10 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, SB–10 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SB–11: Mission Creek–Laguna Channel

SB–11 consists of 7 ac (3 ha). This unit is located in Santa Barbara County, within the City of Santa Barbara. The unit consists of 3 ac (1 ha) of State lands and 4 ac (2 ha) of local lands. SB–11 is located 4.0 mi (6.4 km) south of Arroyo Burro (SB–10), and is separated from the nearest extant subpopulation to the south, in Sycamore Creek (not designated as critical habitat), by 1.0 mi (1.5 km).

SB–11 was occupied at the time of listing. The tidewater goby subpopulation in SB–11 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the Conception Recovery Unit.

On an intermittent basis, SB–11 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

SB–12: Arroyo Paredon

SB–12 consists of 3 ac (1 ha). This unit is located in Santa Barbara County, within the City of Santa Barbara. The unit consists of 1 ac (less than 1 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 1 ac (less than 1 ha) of private lands. SB–12 is located 8.0 mi (12.8 km) south of Mission Creek-Laguna Channel (SB–11), and is separated from the nearest extant subpopulation to the south, in Carpinteria Creek (not designated as critical habitat), by 2.7 mi (4.3 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the Conception Recovery Unit.

Although SB–12 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, SB–12 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

VEN–1: Ventura River

VEN–1 consists of 50 ac (21 ha). This unit is located in Ventura County, within the City of Ventura. The unit consists of 25 ac (10 ha) of State lands, 16 ac (7 ha) of local lands, and 9 ac (4 ha) of private lands. VEN–1 is located 4.3 mi (7.0 km) north of the Santa Clara River (VEN–2), which is also the nearest extant subpopulation.

VEN–1 was occupied at the time of listing. The tidewater goby population in this unit is likely a source population and is, therefore, important for maintaining metapopulation dynamics. This critical habitat unit provides habitat for a tidewater goby subpopulation that is important to the conservation of one of the genetically distinct recovery units as described in the Recovery Plan (Dawson *et al.* 2001, p. 1172). Maintaining this unit will reduce the chance of losing the tidewater goby within the LA/Ventura Recovery Unit, and help conserve genetic diversity within the species.

On an intermittent basis, VEN–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The

physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

VEN–2: Santa Clara River

VEN–2 consists of 323 ac (130 ha). This unit is located in Ventura County, approximately 4 mi (6.4 km) southeast of the City of Ventura. This unit consists of 199 ac (80 ha) of State lands, 14 ac (6 ha) of local lands, and 110 ac (44 ha) of private lands. VEN–2 is located 4.3 mi (7.0 km) south of the Ventura River unit (VEN–1), which is also the nearest extant subpopulation.

VEN–2 was occupied by tidewater goby at the time of listing. The tidewater goby subpopulation in VEN–2 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the LA/Ventura Recovery Unit Recovery Unit. This unit is known to have tens of thousands of tidewater goby during certain times of the year (Dellith, pers. comm. 2010), and is considered one of the largest tidewater goby populations in southern California.

On an intermittent basis, VEN–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

VEN–3: J Street Drain–Ormond Lagoon

VEN–3 consists of 121 ac (49 ha). This unit is located in Ventura County, approximately 1 mi (1.6 km) east of Port Hueneme. This unit consists of 5 ac (2 ha) of State lands, 49 ac (20 ha) of local lands, and 67 ac (27 ha) of private lands. VEN–3 is located 4.3 mi (6.9 km) south of the Santa Clara River (VEN–2), which is also the nearest extant subpopulation.

VEN–3 was occupied at the time of listing. This unit allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the LA/Ventura Recovery Unit. On an intermittent basis, VEN–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

VEN–4: Big Sycamore Canyon [Note that the Recovery Plan refers to this location as ''Sycamore Canyon'']

VEN–4 consists of 1 ac (less than 1 ha). This unit is located in Ventura County, approximately 12.0 mi (19.3 km) northwest of the City of Malibu. The unit consists entirely of State lands. VEN–4 is located 5.0 mi (8.0 km) north of Arroyo Sequit (LA–1), and is separated from the nearest extant subpopulation to the north, in the Calleguas Creek (not designated as critical habitat), by 5.0 mi (8.0 km).

This unit is outside the geographical area occupied by the species at the time of listing, but is considered to be currently occupied. This unit is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the LA/Ventura Recovery Unit.

Although VEN–4 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, VEN–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

LA–1: Arroyo Sequit

LA–1 consists of 1 ac (less than 1 ha). This unit is located in Los Angeles County, approximately 7.5 mi (12.0 km) northwest of the City of Malibu. The unit consists entirely of State lands. LA–1 is located 5.0 mi (8 km) south of Big Sycamore Canyon (VEN–4), which is the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, is not known to be currently occupied, and there are no historical tidewater goby records for this location. However, this unit is essential for the conservation of the species because it is identified in the Recovery Plan as a potential introduction site, and could provide habitat for maintaining the tidewater goby metapopulation in the region. This unit will provide habitat for tidewater goby that may be introduced, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit would also allow for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the LA/Ventura Recovery Unit.

Although LA–1 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, LA–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

LA–2: Zuma Canyon

LA–2 consists of 5 ac (2 ha). This unit is located in Los Angeles County, approximately 7.5 mi (12.0 km) northwest of the City of Malibu. The unit consists entirely of local lands administered by Los Angeles County. LA–2 is located 6.8 mi (11 km) south of Arroyo Sequit (LA–1), and is separated from the nearest extant subpopulation to the south, in the Malibu Lagoon (LA–3), by 10.0 mi (16.0 km).

LA–2 is outside the geographical area occupied by the species at the time of listing, is not known to be currently occupied, and there are no historical tidewater goby records for this location. However, this unit is essential for the

conservation of the species because it could provide habitat to nearby occupied units and is identified in the Recovery Plan as a potential introduction site, and it could provide habitat for maintaining the tidewater goby metapopulation within the LA/Ventura Recovery Unit. This unit will provide habitat for tidewater goby that are introduced, which may serve to decrease the risk of extirpation of this metapopulation through stochastic events. This unit would also allow for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the LA/Ventura Recovery Unit.

Although LA–2 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, LA–2 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

LA–3: Malibu Lagoon

LA–3 consists of 64 ac (27 ha). This unit is located in Los Angeles County, approximately 0.6 mi (1 km) east of Malibu Beach. The unit consists of 41 ac (27 ha) of State lands, 1 ac (less than 1 ha) of local lands, and 22 ac (9 ha) of private lands. LA–3 is located 6.0 mi (9.6 km) north of Topanga Canyon (LA–4), which is also the nearest extant subpopulation.

LA–3 was occupied at the time of listing. The tidewater goby subpopulation in LA–3 is likely a source population, which is important in maintaining metapopulation dynamics, and hence the long-term viability, of the LA/Ventura Recovery Unit. LA–3 supports one of the two remaining extant populations of tidewater goby within Los Angeles County.

On an intermittent basis, LA–3 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation. The physical or biological features essential to the conservation of the species in this unit may require special management considerations or protection to address threats described in Table 2. Please see *Special Management Considerations or Protection* section of this rule for a discussion of the threats to tidewater goby habitat and potential management considerations.

LA–4: Topanga Creek

LA–4 consists of 6 ac (2 ha). This unit is located in Los Angeles County, approximately 5.5 mi (8.9 km) northwest of the City of Santa Monica. The unit consists of 4 ac (1 ha) of State lands and 2 ac (1 ha) of private lands. LA–4 is located 6.0 mi (9.6 km) south of Malibu Lagoon (LA–3), which is also the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, but is currently occupied. Tidewater gobies were first detected at this locality in 2001 (Service 2005a, p. C–30). Tidewater goby in Topanga Creek are probably derived from fish that dispersed from Malibu Creek. This unit is essential for the conservation of the species because it allows for connectivity between tidewater goby source populations, and thereby supports gene flow and metapopulation dynamics within the LA/Ventura Recovery Unit. This location is one of the two remaining locations in Los Angeles County known to be occupied by tidewater goby.

Although LA–4 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, LA–4 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

OR–1: Aliso Creek

OR–1 consists of 14 ac (5 ha). This unit is located in Orange County, within the City of Laguna Beach. The unit consists of 8 ac (3 ha) of local lands and 6 ac (2 ha) of private lands. OR–1 is located 13.5 mi (21.7 km) north of the San Mateo Creek (not designated as critical habitat, see *Application of Section 4(a)(3) of the Act*—Marine Corps Base Camp Pendleton section below), which supports the nearest extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, and is not known to be currently occupied. OR–1 was last known to be occupied in 1977 (Swift *et al.* 1989, p. 1). The reason for the extirpation of the historical subpopulation at this site is unknown. However, this unit is essential for the conservation of the species because it would aid recovery of the tidewater goby in the genetically unique South Coast Recovery Unit. The Recovery Plan notes that the species should be reintroduced into as many localities as possible to the north and south of MCB Camp Pendleton (Service 2005a, p. G–16). Aliso Creek is identified in the Recovery Plan as a potential reintroduction site (Service 2005a, p. G–20). If tidewater goby become established at this location, this unit's primary function would be to help maintain the genetic diversity of the Southern Coast Recovery Unit (especially Recovery Subunit SC1). Moreover, a level of population redundancy would help prevent the extirpation of a metapopulation in which only one or two occupied sites remain, which is the case for Recovery Subunit SC1.

Although OR–1 is outside the geographical area occupied at the time of listing and is not currently occupied, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, OR–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

SAN–1: San Luis Rey River

SAN–1 consists of 56 ac (23 ha). This unit is located in San Diego County, within the City of Oceanside. The unit consists of 3 ac (1 ha) of State lands, 49 ac (20 ha) of local lands, and 4 ac (2 ha) of private lands. SAN–1 is located approximately 2.5 mi (4.0 km) south of the Santa Margarita River (not designated as critical habitat; see *Application of Section 4(a)(3) of the Act*—Marine Corps Base Camp Pendleton section below), which supports the nearest known extant subpopulation.

This unit is outside the geographical area occupied by the species at the time of listing, but tidewater gobies were detected at this location in 2010

(Lafferty 2010, not paginated), which indicates that this location is one of the suite of occupied and intermittently occupied locations that contributes to tidewater goby metapopulation on MCB Camp Pendleton. This unit is essential for the conservation of the species because it serves as one of a limited number of locations that contribute toward metapopulation dynamics of the genetically unique South Coast Recovery Unit. As discussed in the *Metapopulation Dynamics* section, the number of subpopulations is important to the long-term stability of a metapopulation. As such, SAN–1 will help the species to survive and support the recovery of the tidewater goby population within the South Coast Recovery Unit, even potentially facilitating natural recolonization of currently unoccupied locations to the south. The Recovery Plan notes that the species should be reintroduced into as many localities as possible to the north and south of MCB Camp Pendleton (Service 2005a, p. G–16). The San Luis Rey River was identified in the Recovery Plan as a potential reintroduction site (Service 2005a, p. G–20). Prior to 2010, tidewater gobies were last detected in this unit in 1958 (Lafferty, pers. comm. 2010). This unit now represents the southernmost occupied area of the species' distribution, and is important for maintaining the tidewater goby metapopulation in the region.

Although SAN–1 is outside the geographical area occupied at the time of listing, it does possess the PCE that is needed to support tidewater goby. On an intermittent basis, SAN–1 possesses a sandbar across the mouth of the lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, and thereby provides relatively stable conditions (PCE 1c). PCE 1a and 1b occur throughout the unit, although their precise location during any particular time period may change in response to seasonal fluctuations in precipitation and tidal inundation.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, or are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for tidewater goby. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that

designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the tidewater goby. These activities include, but are not limited to:

(1) Actions that would channelize or divert water reducing the amount of space that is available for individual and population growth and normal behavior, and reduce or eliminate sites for breeding, reproduction, and rearing (or development) of offspring.

(2) Actions that would substantially alter the natural hydrologic regime upstream of the designated critical habitat units. Such activities could include, but are not limited to, ground water pumping or surface water diversion activities, construction of impoundments or flood control structures, or the release of water in excess of levels that historically occurred. These activities could result in atypical reduction or increases in the amount of water that is present in the aquatic habitats that tidewater goby occupy, and alter salinity conditions that support this species.

(3) Actions that would substantially alter the channel morphology of the designated critical habitat units, or the areas up-gradient from these units. Such activities could include, but are not limited to, channelization projects, road and bridge projects, removal of substrates, destruction and alteration of riparian vegetation, reduction of available floodplain, and removal of gravel or floodplain terrace materials. These activities could result in increased water velocities and flush large numbers of tidewater goby into the ocean especially during flood events.

(4) Actions that would result in the discharge of agricultural and sewage effluents, or chemical or biological pollutants into the aquatic habitats where tidewater goby occur. Such activities could include, but are not limited to, grazing, fertilizer application, sewage treatment, pesticide application, and herbicide application. These activities could degrade the water quality where tidewater goby live, introduce toxic substances that can poison individual fish, adversely affect fish immune systems, and decrease the amount of oxygen in aquatic habitats where the species occurs.

(5) Actions that would cause atypical levels of sedimentation in coastal wetland habitats or remove vegetative cover that stabilizes stream banks. Such activities could include, but are not limited to, grazing or mining activities, road construction projects, off-road vehicle use, and other watershed and floodplain-disturbance activities. These activities could have the potential to alter the amount and composition of the substrate in the habitats where tidewater goby occur, and thereby affect the species' ability to construct breeding burrows.

(6) Actions that would result in the artificial breaching of lagoon habitats. Such activities could include, but are not limited to, lagoon breaching for mosquito control, flood management, and recreational opportunities such as creating surf breaks. These activities could reduce the amount of space that is available for individual and population growth; strand and desiccate tidewater goby adults, fry, or eggs; and increase the risk they will be preyed upon by native or nonnative predators as they become concentrated and exposed as water levels drop.

(7) Actions that would create barriers that prevent tidewater goby from accessing areas they would normally be able to access. These activities, which may include, but are not limited to, water diversions, road crossings, and sills. These activities could reduce the amount of space that is available for individual and population growth, and reduce the number and extent of sites for breeding, reproduction, and rearing (or development) of offspring.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

We consulted with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the critical habitat designation for tidewater goby to determine if they are exempt under section 4(a)(3) of the Act. The following areas are Department of Defense lands with completed, Service-approved INRMPs within the areas identified as meeting the definition of critical habitat.

Approved INRMPs

Vandenberg Air Force Base (VAFB) and Marine Corps Base (MCB) Camp Pendleton have approved INRMPs. The U.S. Air Force and Marine Corps (on VAFB and MCB Camp Pendleton, respectively) have committed to working closely with us, and the State (California Department of Fish and Game (CDFG) and California Department of Parks and Recreation (CDPR)) with regard to lands leased by MCB Camp Pendleton, to continually refine the existing INRMPs as part of the Sikes Act's INRMP review process. Based on our review of the INRMPs for these military installations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the lands within these installations identified as meeting the definition of critical habitat are subject to the INRMPs, and that conservation efforts identified in these INRMPs will provide a benefit to the tidewater goby (see the following sections that detail this determination for each installation). Therefore, lands within these installations are exempt from critical habitat designation under section

4(a)(3)(B) of the Act. We are not including approximately 727 ac (294 ha) of habitat on VAFB, and approximately 1,156 ac (468 ha) of habitat on MCB Camp Pendleton, in this critical habitat designation because of this exemption.

Table 3 below provides approximate areas (ac, ha) of lands that meet the definition of critical habitat, but are exempt from designation under section 4(a)(3)(B) of the Act.

TABLE 3—EXEMPTIONS FROM CRITICAL HABITAT DESIGNATION FOR THE TIDEWATER GOBY UNDER SECTION 4(A)(3) OF THE ACT

Specific area	Areas meeting the definition of critical habitat in acres (Hectares)	Areas exempted in acres (Hectares)
Shuman Canyon	16 (7)	16 (7)
San Antonio Creek	63 (25)	63 (25)
Santa Ynez River	638 (258)	638 (258)
Cañada Honda	4 (2)	4 (2)
Jalama Creek	6 (2)	6 (2)
San Mateo Creek	73 (30)	73 (30)
San Onofre	20 (8)	20 (8)
Las Flores/Las Pulgas Creek	36 (14)	36 (14)
Hidden Lagoon	39 (16)	39 (16)
Aliso Canyon	65 (26)	65 (26)
French Lagoon	60 (24)	60 (24)
Cockleburr Canyon	74 (30)	74 (30)
Santa Margarita River	789 (319)	789 (319)
Totals	1,883 (762)	1,883 (762)

Vandenberg Air Force Base

VAFB is headquarters for the 30th Space Wing, the Air Force's Space Command unit that operates VAFB and the Western Test Range/Pacific Missile Range. VAFB operates as an aerospace center supporting west coast launch activities for the Air Force, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. The three primary operational missions of VAFB are to launch, place, and track satellites in near-polar orbit; to test and evaluate the intercontinental ballistic missile systems; and to support aircraft operations in the western range. VAFB lies on the south-central California coast, approximately 275 mi (442 km) south of San Francisco, 140 mi (225 km) northwest of Los Angeles, and 55 mi (88 km) northwest of Santa Barbara. The 99,100-ac (40,104-ha) base extends along approximately 42 mi (67 km) of Santa Barbara County coast, and varies in width from 5 to 15 mi (8 to 24 km).

The VAFB INRMP was prepared to provide strategic direction to ecosystem and natural resources management on VAFB. The long-term goal of the INRMP is to integrate all management activities in a manner that sustains, promotes, and restores the health and integrity of VAFB ecosystems using an adaptive management approach. The INRMP was designed to: (1) Summarize existing management plans and natural resources literature pertaining to VAFB; (2) identify and analyze management goals in existing plans; (3) integrate the management goals and objectives of individual plans; (4) support base compliance with applicable regulatory requirements; (5) support the integration of natural resource stewardship with the Air Force mission; and (6) provide direction for monitoring strategies.

VAFB completed an INRMP in 2011, which benefits the tidewater goby by: (1) Avoiding the tidewater goby and its habitat, whenever possible, in project planning; (2) scheduling activities that may affect tidewater goby outside of the peak breeding period (March to July); (3) coordinating with VAFB water quality staff to prevent degradation and contamination of aquatic habitats; and (4) prohibiting the introduction of nonnative fishes into streams on-base (VAFB 2011, Tab D, p. 15). Furthermore, VAFB's environmental staff reviews projects and enforces existing regulations and orders that, through their implementation, avoid and minimize impacts to natural resources, including the tidewater goby and its habitat. In addition, VAFB's INRMP protects aquatic habitats for the tidewater goby by excluding cattle from wetlands and riparian areas through the installation and maintenance of fencing.

Habitat features essential to the conservation of the tidewater goby exist on VAFB, and activities occurring on VAFB are currently being conducted in a manner that minimizes impacts to tidewater goby habitat. This military installation has an approved INRMP that provides a benefit to the tidewater goby, and VAFB has committed to work closely with the Service and the CDFG to continually refine their existing INRMP as part of the Sikes Act's INRMP review process. Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2011 INRMP for VAFB provide a benefit to the tidewater goby and its habitat. This includes habitat located in the following areas: Shuman Canyon, San Antonio Creek, Santa Ynez River, Cañada Honda, and Jalama Creek. Therefore, lands subject to the INRMP for VAFB, which includes the lands leased from the Department of Defense by other parties, are exempt from critical habitat designation under section 4(a)(3)(B) of the Act, and we are not including approximately 727 ac (294 ha) of habitat in this critical habitat designation because of this exemption.

Marine Corps Base Camp Pendleton

MCB Camp Pendleton is the Marine Corps' premier amphibious training installation, and its only west coast amphibious assault training center. The installation has been conducting air, sea, and ground assault training since World War II. MCB Camp Pendleton occupies over 125,000 ac (50,586 ha) of coastal southern California in the northwest corner of San Diego County. Aside from nearly 10,000 ac (4,047 ha) that are developed, most of the installation consists of undeveloped land used for training. MCB Camp Pendleton is situated between two major metropolitan areas: Los Angeles, 82 mi (132 km) to the north, and San Diego,

38 mi (61 km) to the south. Nearby communities include Oceanside to the south, Fallbrook to the east, and San Clemente to the northwest. Aside from a portion of the installation's border that is shared with the San Mateo Wilderness Area and the Fallbrook Naval Weapons Station, the surrounding land use is urban development, rural residential development, and agricultural farming and ranching. The largest single leaseholder on the installation is California State Parks, which includes a 50-year real estate lease granted on September 1, 1971, for 2,000 ac (809 ha) that encompass San Onofre State Beach.

The MCB Camp Pendleton INRMP is a planning document that guides the management and conservation of natural resources under the installation's control. The INRMP was prepared to assist installation staff and users in their efforts to conserve and rehabilitate natural resources consistent with the use of MCB Camp Pendleton to train Marines and set the agenda for managing natural resources on MCB Camp Pendleton. MCB Camp Pendleton completed its INRMP in 2001, followed by a revised and updated version in 2007 to address conservation and management recommendations within the scope of the installation's military mission, including conservation measures for tidewater goby (MCB Camp Pendleton 2007, Appendix F, Section F.22, pp. F–78–F–85). Additionally, according to the 2007 INRMP, California State Parks is required to conduct its natural resources management consistent with the philosophies and objectives of the revised 2007 INRMP (MCB Camp Pendleton 2007, Chapter 2, p. 31).

The tidewater goby receives programmatic protection from training and other installation activities within the estuarine component of its habitat, as outlined and required in both the Estuarine and Beach Ecosystem Conservation Plan and the Riparian Ecosystem Conservation Plan (MCB Camp Pendleton 2007, Appendices B and C, respectively). Management and protection measures that benefit the tidewater goby identified in Appendix B of the INRMP include, but are not limited to, the following: (1) Maintaining connectivity of beach and estuarine ecosystems with riparian and upland ecosystems; (2) promoting natural hydrological processes to maintain estuarine water quality and quantity; and (3) maximizing the probability of tidewater goby metapopulation existence within the lagoon complex (MCB Camp Pendleton 2007, Appendix B, pp. B5–B7).

Management and protection measures that benefit tidewater goby identified in Appendix C of the INRMP include, but are not limited to, the following: (1) Eliminating nonnative invasive species (such as *Arundo donax* (giant reed)) on the installation and off the installation in partnership with upstream landowners to enhance ecosystem value; (2) providing viable riparian corridors and promoting connectivity of native riparian habitats; (3) providing for unimpeded hydrologic and sedimentary floodplain dynamics to support the maintenance and enhancement of biota; (4) maintaining natural floodplain processes and extent of these areas by avoiding and minimizing further permanent loss of floodplain habitats; (5) maintaining to the maximum extent possible natural flood regimes; (6) maintaining to the extent practicable stream and river flows needed to support riparian habitat; (7) monitoring and maintaining groundwater levels and basin withdrawals to avoid loss and degradation of habitat quality; (8) restoring areas to their original condition after disturbance, such as following project construction or fire damage; and (9) promoting increased tidewater goby populations in watersheds through perpetuation of natural ecosystem processes and programmatic instruction application for avoidance and minimization of impacts (MCB Camp Pendleton 2007, Appendix C, pp. C5–C8).

Current environmental regulations and restrictions apply to all threatened and endangered species on the installation (including tidewater goby) and are provided to all users of ranges and training areas to guide activities and protect the species and its habitat. First, specific conservation measures are applied to the tidewater goby and its habitat that include: (1) Controlling nonnative animal species (such as bullfrogs) and nonnative plant species (such as *Arundo donax* and *Rorippa* spp. (watercress)); and (2) restricting military-related traffic use within riparian areas to existing roads, trails, and crossings. Second, MCB Camp Pendleton's environmental security staff review projects and enforce existing regulations and orders that, through their implementation, avoid and minimize impacts to natural resources, including the tidewater goby and its habitat. Third, MCB Camp Pendleton provides training to personnel on environmental awareness for sensitive resources on the base, including the tidewater goby and its habitat. As a result of these regulations and restrictions, activities occurring on MCB Camp Pendleton are currently conducted in a manner that minimizes impacts to tidewater goby habitat.

MCB Camp Pendleton's INRMP also benefits tidewater goby through ongoing monitoring and research efforts. The installation conducts monitoring of tidewater goby populations at least once every 3 years, and also conducts monitoring to determine impacts of relocation of effluent infiltration ponds (MCB Camp Pendleton 2007, Appendix B, p. B8). Data are provided to all necessary personnel through MCB Camp Pendleton's GIS database on sensitive resources and in their published resource atlas. Additionally, MCB Camp Pendleton collaborated with the U.S. Geological Survey's Biological Resources Division to develop and implement a rigorous science-based monitoring protocol for tidewater goby populations throughout the installation, including monitoring water quality variables at all historically occupied sites regardless of current occupation status (Lafferty 2010, pp. 10–11).

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that conservation efforts identified in the 2007 INRMP for MCB Camp Pendleton provide a benefit to the tidewater goby and its habitat. This includes habitat located in the following areas: San Mateo Creek, San Onofre Creek, Las Flores/Las Pulgas Creek, Hidden Lagoon, Aliso Canyon, French Lagoon, Cockleburr Canyon, and Santa Margarita River (names of areas follow those used in the Recovery Plan (Service 2005a, pp. B21–22)). Therefore, lands subject to the INRMP for MCB Camp Pendleton, which includes the lands leased from the Department of Defense by other parties, are exempt from critical habitat designation under section 4(a)(3)(B) of the Act, and we are not including approximately 1,156 ac (468 ha) of habitat in this critical habitat designation because of this exemption.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he

determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The statute on its face, as well as the legislative history, is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor in making that determination.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis of the proposed critical habitat designation (Industrial Economics Incorporated (IEc) 2012). The draft analysis, dated March 16, 2012, was made available for public review from July 24, 2012, through August 23, 2012 (77 FR 43222). Following the close of the comment period, a final analysis of the potential economic effects of the designation was developed taking into consideration the public comments and any new information.

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for tidewater goby; some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both ''with critical habitat'' and ''without critical habitat.'' The ''without critical habitat'' scenario represents the baseline for the analysis, considering protections already in place for the species (for example, under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The ''with critical habitat'' scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decisionmakers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 1994 (year of the species' listing) (59 FR 5494), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The FEA quantifies economic impacts of tidewater goby conservation efforts associated with the following categories of activity: (1) Water management, (2) cattle grazing, (3) transportation (roads, highways, bridges), (4) utilities (oil and gas pipelines), (5) residential, commercial, and industrial development, and (6) natural resource management.

Baseline protections for the tidewater goby address a broad range of habitat threats within a significant portion of the proposed critical habitat area. A key consideration in the incremental analysis is that, where tidewater goby critical habitat overlaps with steelhead (*Oncorhynchus mykiss*) critical habitat, steelhead conservation measures would be sufficiently protective for tidewater goby as well, and, therefore, few incremental project modification costs are anticipated in these areas. Across the designation, incremental costs primarily include costs of administrative efforts associated with new and reinitiated consultations to consider adverse modification of critical habitat for tidewater goby. In addition, only minor incremental project modification costs are forecast to result from critical habitat. This result is attributed to the following key findings: (1) Baseline protections exist for tidewater goby, (2) steelhead critical habitat overlaps with a large portion of the unoccupied units, and (3) minimal economic activity occurs on private lands in the study area.

In total, the incremental impacts to all economic activities are estimated to be $558,000 over the 20-year timeframe, or $49,300 on an annualized basis (assuming a 7 percent discount rate). Approximately 98 percent of these incremental costs result from administrative costs of considering adverse modification in section 7 consultations.

Incremental conservation efforts are estimated to be $11,500 over the 20-year timeframe or $1,090 on an annualized basis (both assuming a 7 percent discount rate). These include the costs of adding the tidewater goby to the environmental impact reports (EIR) required for projects that are being proposed in critical habitat unit MAR–5 Bolinas Lagoon and SLO–12 Oso Flaco Lake, as well as additional surveying for tidewater goby in Oso Flaco Lake. Our economic analysis did not identify any disproportionate costs that are likely to result from the designation.

After considering the economic impacts, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the tidewater goby based on economic impacts.

A copy of the FEA with supporting documents may be obtained by contacting the Ventura Fish and Wildlife Office (see **ADDRESSES**) or by downloading from the Internet at *http://www.regulations.gov.*

Exclusions Based on National Security Impacts

In preparing this final rule, we have exempted from the designation of critical habitat those Department of Defense lands subject to completed INRMPs determined to provide a benefit to the tidewater goby. We have also determined that the remaining lands within the designation of critical habitat for the species are not owned or managed by the Department of Defense, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not exercising his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are

conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs or other management plans for tidewater goby, and the final designation does not include any tribal lands or trust resources. We anticipate no impact on tribal lands, partnerships, or HCPs from this critical habitat designation. Accordingly, the Secretary is not exercising his discretion to exclude any areas from this final designation based on other relevant impacts.

Summary of Comments and Recommendations

We requested written comments from the public on the proposed revised designation of critical habitat for the tidewater goby during two comment periods. The first comment period associated with the publication of the proposed rule (76 FR 64996) opened on October 19, 2011, and closed on December 19, 2011. We also requested comments on the proposed revised critical habitat designation and associated draft economic analysis during a comment period that opened July 24, 2012, and closed on August 23, 2012 (77 FR 43222). We did not receive any requests for a public hearing. We also contacted appropriate Federal, State, and local agencies; scientific organizations; and other interested parties and invited them to comment on the proposed rule and draft economic analysis during these comment periods.

During the first comment period, we received 10 comment letters directly addressing the proposed revised critical habitat designation. During the second comment period, we received three comment letters addressing the proposed revised critical habitat designation or the draft economic analysis. All substantive information provided during comment periods has either been incorporated directly into this final determination or addressed below. Comments received were grouped into four general issues specifically relating to the proposed revised critical habitat designation for tidewater goby, and are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles associated with tidewater goby. We received responses from four of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the tidewater goby. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* Two peer reviewers suggested that the proposed critical habitat designation contained too few areas to allow for establishment of a more continuous metapopulation dynamic in the north coast and central coast regions.

Our Response: We agree with the reviewers that it is important to maintain metapopulation dynamics throughout the range of the tidewater goby, including the north coast and central coast regions. Accordingly, we included connectivity in our criteria for determining critical habitat (see *Criteria Used To Identify Critical Habitat* section), and we designated those sites that are an integral part of metapopulation dynamics.

Section 3(5)(C) of the Act states that, except in particular circumstances determined by the Secretary, critical habitat shall not include the entire geographical area that can be occupied by the threatened or endangered species. It is not the intent of the Act to designate critical habitat for every population and every documented historical location of a species, nor is it the intent to designate all areas supporting metapopulations as critical habitat. We have considered all existing and potential habitat for the tidewater goby, and using the best scientific and commercial data available, we have designated all areas that meet the definition of critical habitat. However, the purpose of critical habitat designations is not to signal that habitat outside the designation is unimportant or may not contribute to recovery of the species, and we also recognize that the designation of critical habitat may not include all of the habitat that may eventually be determined to be necessary for the recovery of the tidewater goby. Also, areas outside the final revised critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, regulatory protections afforded by the section 7(a)(2) jeopardy standard, and the prohibitions of section 9 of the Act. These protections and conservation tools will continue to contribute to recovery of this species.

(2) *Comment:* One peer reviewer suggested that we give consideration in our PCE to habitats that tidewater goby must periodically traverse, but that are otherwise unoccupied, and that we expand the PCE to include population connectivity allowing for metapopulation dynamics to function.

Our Response: Expanding the PCE to include areas of the ocean and large bays (Humboldt Bay and San Francisco Bay) would not address the threat of fragmentation because isolation of the components of a metapopulation is the result of the loss of locations (i.e., lagoons, estuaries, saltmarshes, etc.) that support tidewater goby. When a location is lost, the distance between the components of a metapopulation may be too great to allow the species to disperse through otherwise inhospitable conditions. Furthermore, we are not aware of any threats to these stretches of coastline within the Pacific Ocean that need special management in terms of tidewater goby dispersal within and between metapopulations. Consequently, designating areas of the ocean and large bays to accommodate this dispersal would not be essential to the conservation of the species, nor would it be practical.

(3) *Comment:* Two peer reviewers recommended that we designate subunits within Humboldt Bay unit (HUM–3) in a manner similar to the approach used for the Eel River unit (HUM–4). The peer reviewers' reasoning for this approach includes: (a) Research indicates that a metapopulation dynamic may not be currently occurring within Humboldt Bay (McCraney *et al.* 2010) due to isolation by tidegates and other artificial features theoretically rendering each location occupied by tidewater gobies as a separate subpopulation. (Available evidence indicates that these subpopulations are isolated from one another and are not continuously distributed despite their relatively close proximity (McCraney *et al.* 2010).); and (b) the extent of connectivity between Humboldt Bay to

nearby areas such as the Eel River is uncertain. The reviewers noted that, because of the great distance (approximately 18.4 mi (29.6 km)) between Humboldt Bay and the Eel River, genetic exchange is unlikely to occur naturally. Therefore, the reviewers stated it is important to identify separate units in Humboldt Bay and reestablish connectivity between those locations.

Our Response: We respectfully disagree with the two peer reviewers. We have designated Humboldt Bay (HUM–3) as a single, large unit because of the relatively close proximity of the locations that are occupied by tidewater goby within the bay. Although as the reviewers pointed out these locations may be threatened by reduced genetic and life-history diversity, assigning subunits (or not) will not increase (or decrease) the level of protection under the Act for the tidewater goby. Rather, at this time the threats to the habitat at these locations are the same or similar and conservation of the species will be better served by including them in a single unit.

In contrast to Humboldt Bay (HUM–3), we identified Eel River unit (HUM–4) as consisting of two subunits because of the greater separation of the subunits within the Eel River unit, and because the southern Eel River subunit was only recently discovered and the metapopulation dynamic between the two subunits is unclear.

(4) *Comment:* Two peer reviewers suggested that we consider an additional threat to the tidewater goby and its habitat involving projects categorized as habitat restoration. The reviewers noted that it is not uncommon for proposed estuary and lagoon alterations to include ''restoration'' projects that are proposed to ''restore connectivity'' or ''improve water quality.'' These projects sometimes involve elimination of backwaters, which may be crucial for flood refuge for the tidewater goby, because they may have poor water quality in late summer.

Our Response: We acknowledge that coastal lagoon restoration projects may be a threat to tidewater goby habitat. As such, we have added language in this rule to reflect this potential threat (see *Special Management Considerations or Protection* section above).

Federal Agency Comments

(5) *Comment:* The U.S. Army Corps of Engineers (ACOE) opposed designating locations as critical habitat that were unoccupied at the time of listing regardless of their historical or current occupancy (see Table 1 for a list of locations that were unoccupied at the time of listing). The ACOE also opposed designating locations that are not currently occupied even if they were occupied at the time of listing (see Table 1), and are opposed to designating those that have never been known to be occupied (areas that meet this criteria are footnoted in Table 1). They contend that the lack of detection of tidewater gobies in an area is an indication that the habitat is not suitable for this species. For this reason, the ACOE requested the Service withdraw the proposed rule, revise it, and then recirculate the proposed rule for more comments.

Our Response: We respectfully disagree with the ACOE's contention that the lack of detection of tidewater gobies in an area is an indication that the habitat is not suitable for this species. The lack of detection of tidewater gobies in a particular area does not necessarily indicate that suitable habitat is not present or in some cases could not be restored. As summarized below, we used the best available scientific data to identify the specific areas that meet the definition of critical habitat, and we are appropriately designating those areas.

We developed criteria for determining the specific areas within the geographical area occupied at the time of listing that have the physical or biological features essential to the conservation of the tidewater goby. These criteria consist of the following:

(1) Areas that support source populations (populations where local reproductive success is greater than local mortality (Meffe and Carroll 1994, p. 187)). For the purposes of this designation, we identified areas supporting source populations as those that are currently occupied and have been consistently occupied for 3 or more consecutive years based on survey data and published reports. Source populations are more likely to be capable of maintaining populations over many years and are, therefore, capable of providing individuals to recruit into surrounding subpopulations.

(2) Areas that support subpopulations within each metapopulation in addition to source populations in the event that the source population is extirpated due to a natural episodic catastrophic event such as a major flood or drought.

(3) Areas that provide connectivity between metapopulations. These areas are likely to act as ''stepping stones'' between more isolated populations, and thereby contribute to metapopulation persistence and genetic exchange. For the purposes of this designation, we generally identified locations that provide connectivity as those within approximately 6 mi (10 km) of another location.

After determining the specific areas within the geographical area occupied at the time of listing that have the physical or biological features essential to the conservation of the tidewater goby, we concluded that they were not adequate to ensure the conservation of the species. Therefore, we developed criteria for determining the specific areas outside the geographical area occupied by the species at the time it is listed that are essential for the conservation of the species. In some cases, these areas were known to be historically occupied but not occupied at the time of listing. Others were not occupied at the time of listing but are currently occupied, while a few areas have never been known to be occupied.

The criteria for determining the specific areas outside the geographical area occupied at the time of listing that are essential for the conservation of the tidewater goby are:

(1) Areas of aquatic habitat in coastal lagoons and estuaries with still-to-slow-moving water that allow for the conservation of viable metapopulations under varying environmental conditions, such as, for example, drought.

(2) Areas that provide connectivity between source populations or may provide connectivity in the future. These areas are likely to act as ''stepping stones'' between more isolated populations, and thereby contribute to metapopulation persistence and genetic exchange. For the purposes of this designation, we generally identified locations that provide connectivity as those within approximately 6 mi (10 km) of another location.

(3) Additional areas that may be more isolated but may represent unique adaptations to local features (habitat variability, hydrology, microclimate).

The areas outside the geographical area occupied at the time of listing that were selected for designation are essential for the conservation of the tidewater goby for various reasons depending on their location. Some of these areas are essential because they provide habitat for maintaining tidewater goby metapopulations where the distances between units that were occupied at the time of listing make it difficult for tidewater goby to disperse. Other areas are essential to help prevent the extirpation of a metapopulation in which only one or two occupied sites remain. As discussed in the *Metapopulation Dynamics* section, the number of subpopulations is important to the long-term stability of a

metapopulation. Furthermore, some of these areas were selected or expanded to take into account sea-level rise as projected by climate change models.

All of these areas have also been identified in the Recovery Plan as being important for the conservation of the species. As mentioned previously, the goal of the Recovery Plan is to preserve the diversity of habitats that occur within the range of the species, the metapopulation structure of the species, and genetic diversity (Service 2005a, p. 28).

(6) *Comment:* The ACOE recommended that we remove sites that are 1 ac (0.4 ha) or less from the designation because the proposed rule states that these locations tend not to be suitable for breeding. These sites include San Geronimo Creek (SLO–7), Cañada de las Agujas (SB–2), Cañada del Agua Caliente (SB–5), Arroyo Hondo (SB–7), Big Sycamore Canyon (VEN–4), and Arroyo Sequit (LA–1). The ACOE also commented that the extent of the designation on Aliso Creek (OR–1) extends beyond a barrier and the unit should be revised.

Our Response: While there is a general trend for sites 1 ac (0.4 ha) or less not to be suitable for breeding there are some important exceptions; for example San Geronimo Creek (SLO–7) is a source population, as evidenced by its tidewater goby population's persistence during severe drought conditions (Swift *et al.* 1991, p. 33), that is capable of maintaining its current population levels and capable of providing individuals to recruit into subpopulations found in adjacent areas despite being less than 1 ac (0.4 ha) in area. Additionally, suitable breeding habitat was not the only criteria we used in selecting units to be included in the designation. We also considered important connectivity sites that are an integral part of metapopulation dynamics. Without maintaining the connectivity between source populations, we are likely to see entire metapopulations become extirpated, which would hinder recovery. The remaining locations 1 ac (0.4 ha) or less that the commenter recommended be removed are important connectivity sites and meet the definition of critical habitat.

In regard to the potential barrier on unit OR–1 (Aliso Creek), we reviewed our information on the extent of the designation and the specific site identified as a barrier. After further review and discussion with the ACOE, the area was more appropriately characterized as a grade control structure about 2–3 ft (0.6–2 m) in height (T. Keeney, Senior Ecologist, Corps, pers. comm. 2013). Based on the Service's evaluation of the information on the site and review of the our record for this designation, we determined the subject location corresponds to a riffle area we are already aware of on Aliso Creek. We have determined the riffle area does not present a barrier to fish passage.

(7) *Comment:* The ACOE stated that the San Luis Rey River (SAN–1) does not contain the PCE as described in the proposed rule. Specifically, this commenter claimed that PCE 1a, 1b, and 1c have not been met. The ACOE also commented that the upstream limit of the unit is not appropriate.

Our Response: To designate critical habitat within the geographical area occupied by the species at the time of listing, we are required to identify the physical or biological features essential to the conservation of the species. We have determined the specific areas within the geographical area occupied at the time of listing that contain the PCE essential to the conservation of the species and have included these areas in the designation. When designating critical habitat outside the geographical area occupied by a species at the time it was listed, we are required to determine that such areas are essential for the conservation of the species; the presence of one or more PCE(s) is not required by the Act to designate such areas as critical habitat. Unit SAN–1 is outside the geographical area occupied by the tidewater goby at the time of listing; thus, the presence of the PCE is not required.

Although the presence of the PCE is not required in this case, we include the San Luis Rey in the designation of critical habitat because (1) it is identified in the recovery plan as a potential site for reintroduction (see Table G–1 in the recovery plan); (2) the site was naturally recolonized in 2010 and is now considered occupied; and (3) it is essential for the conservation of the species because it serves as one of a limited number of locations that contribute toward metapopulation dynamics of the genetically unique South Coast Recovery Unit (Service 2005a, pp. 32–39).

Natural recolonization of the San Luis Rey in 2010 shows that a metapopulation dynamic is still occurring within the suite of occupied and potentially occupiable sites within the recovery plan's South Coast Recovery Unit. The natural recolonization of the San Luis Rey River by tidewater goby in 2010 further demonstrates the area is capable of supporting the species and possesses the PCE needed to support the tidewater goby. As discussed in the *Metapopulation Dynamics* section, the number of subpopulations is important to the long-term stability of a metapopulation. As such, SAN–1 will help the species to survive and will help support the recovery of the tidewater goby population within the South Coast Recovery Unit, even potentially facilitating natural recolonization of currently unoccupied locations to the south. This unit now represents the southernmost occupied area of the species' distribution, and is important for maintaining the tidewater goby metapopulation in the region.

With regard to the delineation of the proposed critical habitat boundary, the Service reviewed information in its files used to develop the designation. Available information indicates the upstream boundary of unit SAN–1 was determined, in part, to account for expected sea-level rise. The upstream extent of the unit in the San Luis Rey River included almost all the area predicted to be inundated by the ''Mean Higher High Water (MHHW) 2100'' model. The MHHW 2100 model is a GIS-based model predicting the area inundated after a 1.4-meter sea-level rise—the scenario for year 2100. Given the timeframe of the model's projection, the critical habitat boundary does extend beyond what is currently estuary in order to accommodate predicted changes in estuarine and riverine habitats over time.

(8) *Comment:* Implying that the San Luis Rey River (SAN–1) should not be designated as critical habitat or should be excluded under section 4(b)(2) of the Act, the ACOE noted that the area is part of the City of Oceanside's proposed Subarea Habitat Conservation Plan/ Natural Communities Conservation Plan (HCP/NCCP) and that the area will also be managed per the ACOE-proposed Adaptive Habitat Management Plan (AHMP) for the San Luis Rey River Flood Risk Management Project.

Our Response: Based on our review of the best available data, the San Luis Rey River should be designated as critical habitat for the tidewater goby. Per section 3(5)(A)(ii) of the Act and its implementing regulations, designating critical habitat outside the geographical area occupied by the tidewater goby at the time of listing is based upon a determination that such areas are essential for the conservation of the species. As explained in the unit description for SAN–1, we have made that determination. However, under section 4(b)(2) of the Act, the Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits

of specifying such area as part of the critical habitat.

Collaborative processes, such as those mentioned by the commenter, can benefit listed and sensitive species, including the tidewater goby. When considering whether a current land management or conservation plan (HCPs as well as other types) provides adequate management or protection for the tidewater goby and its habitat, we consider a number of factors, including, but not limited to, the following:

(1) Whether the plan is complete and provides the same or better level of protection from adverse modification or destruction than that provided through a consultation under section 7 of the Act;

(2) Whether there is a reasonable expectation that the conservation management strategies and actions will be implemented for the foreseeable future and effective, based on past practices, written guidance, or regulations; and

(3) Whether the plan provides adaptive management and conservation strategies and measures consistent with currently accepted principles of conservation biology.

We have been working with the City of Oceanside for several years; however, the City's HCP/NCCP plan is not yet finalized. The City's plan will be an individually permitted Subarea Plan under the Multiple Habitat Conservation Program (MHCP). The MHCP Subregional Plan, finalized in 2003, is a comprehensive, multiple jurisdictional planning program in northwestern San Diego County (SANDAG 2003, entire). It serves as the ''umbrella'' document for individual Subarea Plans under its jurisdiction. The combination of the MHCP Subregional Plan and the City's Subarea Plan will serve as a multiple species HCP pursuant to Section 10(a)(1)(B) of the Act. The MHCP Subregional Plan does not address the tidewater goby. At the time this rule was prepared, the City of Oceanside had no plans to include the tidewater goby in its Subarea Plan, and the City has indicated it is not likely to seek coverage for the goby in the near future. Thus, at this time, we have found no basis to support exclusion of the area.

The AHMP for the San Luis Rey River Flood Risk Management Project is being developed as part of a flood control project on the lower San Luis Rey River. The ACOE consulted with us on this project to address impacts to several federally listed species; however, the tidewater goby was not one of them (Service 2005b, entire; Service 2006, entire). At the time this rule was prepared, the AHMP had not been finalized, and the geographical scope of the AHMP, as currently planned, will be the portion of the lower San Luis Rey River that is upstream of the Interstate 5 bridge. Only 19 ac (8 ha), or 33 percent, of the area designated as critical habitat for the tidewater goby in SAN–1 is above the bridge; the remainder is downstream. More importantly, the AHMP does not address the tidewater goby.

Therefore, after considering the proposed HCP/NCCP and AHMP plans, the Secretary is not exercising his discretion under section 4(b)(2) of the Act to exclude unit SAN–1 from the final revised designation of critical habitat. We will continue to work with the City of Oceanside and the ACOE on the respective plans, including addressing the tidewater goby and unit SAN–1 should the parties deem it appropriate to do so.

Comments From States

Section 4(i) of the Act states, ''the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.'' We received no comments from the State regarding the proposal to designate critical habitat for the tidewater goby.

Public Comments

Public Comments on Criteria Used To Identify Critical Habitat

(9) *Comment:* Several commenters opposed designating locations as critical habitat that were unoccupied at the time of listing (see Table 1 for a list of locations that were unoccupied at the time of listing). One commenter opposed designating locations that are not currently occupied (see Table 1), and one commenter opposed designating locations that have never been known to be occupied (see Table 1).

Our Response: Please refer to our response to Comment 5 above.

(10) *Comment:* One commenter opposed designating the Salinas River (MN–2) because a resource plan is under development for that area, which would provide for conservation of the species.

Our Response: Please refer to our response to Comment 8 above for the types of factors we consider when evaluating the conservation benefits provided by a land management or conservation plan (HCPs as well as other types).

At this time, we have not received a complete final resource management plan for the Salinas River, and the Secretary is not exercising his discretion under section 4(b)(2) of the Act to exclude unit MN–2 from the final revised designation of critical habitat.

(11) *Comment:* One commenter opposed expanding critical habitat in Cañada de Alegria (SB–4) because the Service has concurred with a 2009 petition that downlisting the species to threatened is warranted.

Our Response: In our 90-day finding on a petition to downlist the tidewater goby from endangered to threatened, we determined that the petition presented substantial scientific or commercial information indicating that the petitioned action *may* be warranted and that we would conduct a review of the status of the species (76 FR 3069; January 19, 2011). This determination was based in part on our 5-year review of the species. Section 4(b)(3)(A) of the Act (16 U.S.C. 1533(b)(3)(A)) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. Our standard for substantial scientific or commercial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted'' (50 CFR 424.14(b)). If we find that substantial scientific or commercial information meeting the above definition was presented, we are required to promptly conduct a species status review, which we subsequently summarize in our 12-month finding. However, we have not yet made a final determination as to whether or not the downlisting of the tidewater goby is warranted. More importantly, regardless of the status of threatened or endangered, we are still required under the Act to designate critical habitat.

(12) *Comment:* One commenter requested that we exclude private lands in Arroyo de la Cruz (SLO–1), Arroyo del Corral (SLO–2), Oak Knoll Creek (SLO–3), and Little Pico Creek (SLO–4) from the designations because an existing conservation easement and associated management plan includes those areas.

Our Response: We value our partnerships with Federal and State agencies and local jurisdictions. Collaborative processes, such as those mentioned by the commenter, can benefit listed and sensitive species,

including the tidewater goby. Please refer to our response to Comment 8 above for the types of factors we consider when evaluating the conservation benefits provided by a current land management or conservation plan (HCPs as well as other types).

As noted in the Recovery Plan and Table 2, threats that may require special management in these units include: highway construction, which may remove aquatic habitat, and grazing of aquatic and riparian habitats. These threats do not appear to be adequately addressed in the conservation easement and associated management plan. After considering the existing conservation easement and associated management plan, the Secretary is not exercising his discretion under section 4(b)(2) of the Act to exclude units SLO–1, SLO–2, SLO–3, and SLO–4 from the final revised designation of critical habitat.

(13) *Comment:* One commenter questioned why we expanded critical habitat by 1 ac (0.4 ha) in Cañada de Alegria (SB–4) and requested that we exclude this additional area from the final designation because it is protected by a preserve.

Our Response: We value our partnerships with Federal and State agencies and local jurisdictions. Collaborative processes, such as those mentioned by the commenter, can benefit listed and sensitive species, including the tidewater goby. Please refer to our response to Comment 8 above for the types of factors we consider when evaluating the conservation benefits provided by a current land management or conservation plan (HCPs as well as other types).

As noted in the Recovery Plan and Table 2, threats that may require special management in this additional area include: roadway maintenance that may affect aquatic habitat, upstream water diversions, alterations of water flows, groundwater overdrafting, and upstream grazing of aquatic and riparian habitats. These threats do not appear to be adequately addressed in the management of the preserve. After considering the preserve, the Secretary is not exercising his discretion under section 4(b)(2) of the Act to exclude the additional area in unit SB–4 from the final revised designation of critical habitat.

(14) *Comment:* One commenter is opposed to designating critical habitat in the Goleta Slough (SB–9) because of a belief that drainages within the slough do not have the PCE for the tidewater goby.

Our Response: To designate critical habitat within the geographical area occupied by the species at the time of listing, we are required to identify the physical or biological features essential to the conservation of the species. We have determined the specific areas within the geographical area occupied at the time of listing that contain the PCE essential to the conservation of the species and have included these areas in this designation. When designating critical habitat outside the geographical area occupied by a species at the time it was listed, we are required to determine that such areas are essential for the conservation of the species; the presence of one or more PCE(s) is not required by the Act to designate such areas as critical habitat. Unit SB–9 is outside the geographical area occupied by the tidewater goby at the time of listing; thus, the presence of the PCE is not required. Although the presence of the PCE is not required in this case, we do note in our discussion of SB–9 that it appears that SB–9 possesses the PCE needed to support the tidewater goby. SB–9 is essential for the conservation of the species because it provides habitat for the species, allows for connectivity between tidewater goby source populations from nearby units, supports gene flow, and provides for metapopulation dynamics within the Conception Recovery Unit. As discussed in the *Metapopulation Dynamics* section, the number of subpopulations is important to the long-term stability of a metapopulation. As such, SB–9 will help the species to survive and will help support the recovery of the tidewater goby population within the Conception Recovery Unit.

(15) *Comment:* One commenter stated that designated critical habitat should not extend beyond the lower 750 feet of Arroyo Paredon Creek (SB–12) because suitable habitat for the tidewater goby does not exist upstream of this reach and the stream gradient is too steep.

Our Response: In response to this comment, we reexamined the boundaries of unit SB–12. Based on information we obtained from a field investigation and recently available high-resolution LiDAR (Light Detection and Ranging) elevation data, we have identified a steep gradient that could act as a barrier to upstream dispersal and refuge for tidewater goby. Therefore, we have revised the upstream limit of the unit and removed those areas that we determined are not accessible to tidewater goby downstream of the gradient, and thus not part of the critical habitat unit. The changes resulted in a net decrease of approximately 1 ac (less than 1 ha) for the designated area in unit SB–12 (see Summary of Changes From Previously Designated Critical Habitat and 2011 Proposed Revised Critical Habitat Designation section for more information).

Public Comments Regarding Legal or Policy Compliance

(16) *Comment:* One commenter stated that laws enacted since the time of listing have reduced the need for critical habitat designation. One commenter also claimed that threats to the tidewater goby have been reduced or the nature of the threat is less serious than originally believed to be the case; therefore, the need for critical habitat is reduced.

Our Response: Although the combined effectiveness of existing laws and regulations, including the protections afforded a listed species under the Act, have substantially reduced large-scale habitat loss and alteration, numerous small-scale projects do have an effect on tidewater goby habitat. Furthermore, while some threats to the tidewater goby have been reduced, numerous threats to the species and its habitat still exist. While some of these threats can singly have a substantial impact on individual tidewater goby localities, in most cases it is the cumulative impact that has and will continue to threaten the species. Regardless, the tidewater goby remains listed as an endangered species and therefore designation of critical habitat is required under section 4(a)(3)(A) of the Act.

(17) *Comment:* One commenter claims that provisions of the Act have been ignored by including areas of habitat that ''can be occupied,'' even though there is no evidence that such areas are essential for the conservation of the species. Furthermore, one commenter, citing 16 U.S.C. 1533(a)(3), disputes the legality to designate unoccupied critical habitat based on speculation that it may be needed in the future.

Our Response: We are required by the Act to designate areas that are essential for the conservation of the species. Conservation is defined as ''the use of all methods and procedures, which are necessary to bring an endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary'' (16 U.S.C. 1532(3)). Because the designation of critical habitat is thus focused on the future recovery of listed species, it is by necessity a forward-looking exercise. Therefore, we are designating critical habitat, based on the best available science, to ensure tidewater goby recovery is not precluded, even if this designation is

made in response to a future threat to the species or the need to restore habitat so that the species may be reintroduced there. The areas designated as critical habitat in this rule are essential for the conservation of the tidewater goby for various reasons depending on their location. Some of these areas are essential because they provide habitat for maintaining tidewater goby metapopulations where the distances between units that were occupied at the time of listing make it difficult for tidewater goby to disperse. Other areas are essential to help prevent the extirpation of a metapopulation in which only one or two occupied sites remain. As discussed in the *Metapopulation Dynamics* section, the number of subpopulations is important to the long-term stability of a metapopulation. In addition to serving as ''stepping stones'' between subpopulations, these areas have also been identified in the Recovery Plan as being important for the conservation of the species because they would serve as a buffer, decreasing the vulnerability of an entire metapopulation to natural episodic catastrophic events, maintaining its genetic diversity, and increasing its probability of persistence.

(18) *Comment:* One commenter suggested we provide site-specific explanations for why we did not propose some occupied sites and some of the potential reintroduction sites identified in the Recovery Plan.

Our Response: The 2005 Recovery Plan lists all areas known to be occupied or to have been historically occupied or to have the potential for being occupied if habitat is restored. However, it is not the intent of the Act to designate critical habitat for every population and every documented historical location of a species. Rather, the Act requires that we designate only specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. In addition, the Act requires that we determine whether specific areas outside the geographical area occupied by the species at the time it is listed are essential for the conservation of the species.

In the *Criteria Used To Identify Critical Habitat* section above, we used the best scientific and commercial data available to set out the criteria for identifying the areas that meet the requirements of the Act. These criteria include: areas that support source populations; areas that support subpopulations in addition to source populations within each metapopulation; areas that provide connectivity between metapopulations; areas of aquatic habitat in coastal lagoons and estuaries with still-to-slow-moving water that allow for the conservation of viable metapopulations under varying environmental conditions; areas that provide connectivity between source populations or may provide connectivity in the future; and additional areas that may be more isolated but may represent unique adaptations to local features. We applied these criteria to all existing and potential habitat for the tidewater goby in this designation, and have designated the areas that meet the definition of critical habitat. In some cases we included areas recommended as potential introduction and reintroduction sites that, because of their location, could provide important connectivity. In addition, occupied areas outside the final revised critical habitat designation will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act, regulatory protections afforded by the section 7(a)(2) jeopardy standard, and the prohibitions of section 9 of the Act. These protections and conservation tools will continue to contribute to recovery of this species.

(19) *Comment:* One commenter suggested the final revised critical habitat designation should not interrupt ongoing management plans and projects, and should not require reinitiation of consultation for existing permits and consultations.

Our Response: Because the critical habitat designation only applies to actions that are authorized, funded, or carried out by a Federal agency, ongoing management plans and projects may be unaffected by the final designation. Only those plans and projects where a Federal agency has continuing discretionary authority may be affected. The regulations that implement section 7(a)(2) of the Act require reinitiation of formal consultation when certain criteria are met, including when a new species is listed or critical habitat is designated that may be affected by the action (50 CFR 402.16). Therefore, we cannot formulate the final rule to eliminate the requirement to reinitiate formal consultation when an ongoing project under continuing Federal discretionary authority may affect the designated critical habitat. However, if an ongoing management plan or project upon which we had previously consulted would not have an adverse effect on the designated critical habitat, reinitiation would not be required.

Public Comments Regarding Threats to the Species

(20) *Comment:* One commenter disputed the listing of the tidewater goby based on a lack of scientific research on threats to tidewater goby.

Our Response: The final rule to list the tidewater goby was published in the **Federal Register** on February 4, 1994 (59 FR 5494). The final rule determined the tidewater goby to be an endangered species in part because of past and continuing losses of coastal and riparian habitats within the historical range of the species. Since the publication of the final listing rule, we have published a recovery plan for the species (2005), and a 5-Year Review (2007), both of which contain a threats analysis describing threats to the species and present the best available scientific information regarding the status of the species.

(21) *Comment:* One commenter opposed the expansion of critical habitat, and has a specific issue with the citation of ''cattle grazing and feral pig activity that results in increased sedimentation of coastal lagoons and riparian habitats, removal of vegetative cover, increased ambient water temperatures and elimination of plunge pools and undercut banks utilized by the tidewater goby'' as a threat.

Our Response: Threats to the tidewater goby due to poor livestock grazing practices are well-documented in the scientific literature. Adverse effects occur through watershed alteration and subsequent changes in the natural flow regime, sediment production, and stream channel morphology (Platts 1990, pp. I–9–I–11; Belsky *et al.* 1999, pp. 1–3, 8–10; Service 2001, pp. 50–67). Livestock grazing can destabilize stream channels and disturb riparian ecosystem functions (Platts 1990, pp. I–9–I–11; Armour *et al.* 1991, pp. 7–10; Tellman *et al.* 1997, pp. 20–21, 33, 47, 101–102; Wyman *et al.* 2006, pp. 5–7). Furthermore, improper livestock grazing can negatively affect tidewater goby through removal of riparian vegetation (Propst *et al.* 1986, p. 3; Clary and Webster 1989, p. 1; Clary and Medin 1990, p. 1; Schulz and Leininger 1990, p. 295; Fleishner 1994, pp. 631– 633, 635–636), which can result in reduced bank stability and higher water temperatures (Kauffman and Krueger 1984, pp. 432–434; Platts and Nelson 1989, pp. 453, 455; Fleishner 1994, pp. 635–636; Belsky *et al.* 1999, pp. 2–5, 9–10). Livestock grazing can also cause increased sediment in the stream channel due to streambank trampling

and riparian vegetation loss (Weltz and Wood 1986, pp. 364–368; Pearce *et al.* 1998, pp. 302, 307; Belsky *et al.* 1999, p. 10). Livestock can physically alter the streambank through trampling and shearing, leading to bank erosion (Trimble and Mendel 1995, pp. 243–244; Belsky *et al.* 1999, p. 1). In combination, loss of riparian vegetation and bank erosion can alter channel morphology, including increased erosion and deposition, increased sediment loads, downcutting, and an increased width-to-depth ratio, all of which lead to a loss of tidewater goby habitat components. Lastly, livestock grazing management also continues to include construction and maintenance of open stocktanks, which are often stocked with nonnative aquatic species that are harmful to tidewater goby if they escape or are transported to waters where the tidewater goby occurs. In some cases, stocktanks are used to stock nonnative fish for sportfishing, or they may support other nonnative aquatic species such as African clawed frogs, or bullfrogs. In cases where stocktanks are in close proximity to live streams, they may occasionally be breached or flooded, resulting in nonnative fish escaping from the stocktank and entering stream habitats (Hedwall and Sponholtz 2005, pp. 1–2; Stone *et al.* 2007, p. 133).

(22) *Comment:* One commenter stated that we have neglected to take the benefits of grazing into consideration and have omitted mention of the effects of feral pigs throughout the proposed rule with the one exception of the first mention on page 64999. The commenter also states that the censure of cattle grazing and its effects on the tidewater goby discounts an entire body of scientific work, which has determined that proper monitoring and grazing of riparian zones has helped to provide habitat for the tidewater goby.

Our Response: We acknowledge that improved livestock grazing practices have reduced impacts to native fishes including the tidewater goby. However, although adverse effects are less than in the past, livestock grazing within watersheds where tidewater goby and its habitat are located continues to cause adverse effects, and on Federal lands, improvements occurred primarily by discontinuing grazing in riparian and stream corridors (Service 1997, pp. 121–129, 137–141; Service 2001, pp. 50–67). Furthermore, we do recognize that feral pigs are a threat in this final critical habitat rule (see ''Threats'' section), the final listing rule (59 FR 5494), and the Recovery Plan (Service 2005, p. 16).

(23) *Comment:* One commenter suggested that, in lieu of designating critical habitat, we should implement existing grazing programs and Federal programs to minimize impacts to habitat.

Our Response: Please refer to our response to Comment 21 above. Impacts from livestock grazing on species such as the tidewater goby are decreasing due to improved management on Federal lands. However, implementation of the existing grazing programs and Federal programs only minimizes impacts to a certain extent, and livestock grazing within watersheds where tidewater goby and its habitat is located continues to cause adverse effects.

(24) *Comment:* One commenter implied that eliminating grazing activities from areas designated as critical habitat will not improve tidewater goby habitat or recover the species.

Our Response: Although we are not suggesting in this critical habitat designation for the tidewater goby that all livestock grazing activities be eliminated from critical habitat, studies on Federal lands found that improvements occurred primarily by discontinuing grazing in riparian and stream corridors (Service 1997, pp. 121–129, 137–141; Service 2001, pp. 50–67).

Public Comments Regarding Climate Change

(25) *Comment:* One commenter suggested we augment the connection we draw between the designation of unoccupied critical habitat and the threat of global warming.

Our Response: We agree and have added a discussion on climate change in the ''Background'' section accordingly.

(26) *Comment:* One commenter states there is a discrepancy in the proposed rule regarding the expansion of critical habitat in anticipation of sea-level rise. The commenter points out that we have stated in the 5-Year Review (Service 2007) that information currently available on the effects of global climate change is not sufficiently precise to determine what additional areas, if any, may be appropriate to include in the revised critical habitat designation for this species to address the effects of climate change.

Our Response: We have added a discussion on climate change in the ''Background'' section of this rule that includes information on sea level rise published subsequent to the 5-year review.

Substantial advances in our ability to predict changes that will occur as a result of climate change such as sea level rise have been made since the publication of the 5-year review in 2007. For example, between 1897 and 2006, the observed sea level rise has been approximately 2 millimeters (0.08 in) per year, or a total of 20 cm (8 in) over that period (Heberger *et al.* 2009, p. 6). Estimates prior to the 2007 5-year review projected that sea level rise along the California coast would follow a similar rate and reach 0.2–0.6 m (0.7–2 ft) by 2100 (IPCC 2007). Observations and modeling conducted since the 2007 5-year review indicate that earlier projections were conservative and ignored some critical factors, such as melting of the Greenland and Antarctica ice sheets (Heberger *et al.* 2009, p. 6). Heberger *et al.* (2009, p. 8) have updated the sea level rise projections for California to 1.0–1.4 m (3.3–4.6 ft) by 2100, while Vermeer and Rahmstorf (2009, p. 21530) calculate the sea level rise globally at 0.57–1.9 m (2.4–6.2 ft); in both cases, recent estimates were more than twice earlier projections.

Based on the information above and in the ''Background'' section, sea levels have been rising and are continuing to rise. Rising sea levels will affect the tidewater goby and its habitat in several ways. Many coastal lagoons and estuaries where tidewater goby occur will be converted from brackish to primarily saltwater bodies. In addition, more severe storms that are likely to result from climate change (Cayan *et al.* 2009, p. 38), combined with the higher than normal sea levels, will breach sand bars at lagoon mouths more frequently. Therefore, it is appropriate to include the threat of global climate change as a basis for the designation of critical habitat units for the tidewater goby.

Comments Related to the Draft Economic Analysis

(27) *Comment:* One commenter expressed concern over the use of annualized values in the DEA. This comment suggests that the use of values annualized over a 20-year period mischaracterizes the impact of the proposed rule because all costs will be one-time costs.

Our Response: The DEA adopts the standard practice of reporting both present value and annualized impacts. Incremental project modification costs are assigned to the year in which they are assumed to occur. In cases where the timing of project modification costs is unknown, the DEA conservatively assumes that the costs occur in the first year of the study period. For example, the incorporation of tidewater goby into two habitat conservation plans in units MAR–5 and SLO–12 is assumed to occur immediately following the designation of critical habitat in year 2012. Species surveying in unit SLO–12 is assumed to occur every 2 years

beginning in 2012. Lacking information on when administrative impacts due to potential section 7 consultations will occur, the DEA assumes these costs are spread evenly over the 20-year analysis period.

(28) *Comment:* One commenter asserted that the DEA fails to mention compliance costs, such as the cost of fencing riparian grazing areas that may be required as a result of consultation.

Our Response: As described in Section 2.4.4 of the DEA, we are unlikely to request additional conservation efforts to avoid the destruction or adverse modification of critical habitat compared to efforts to avoid jeopardy of the species. As a result, project modifications such as fencing are considered baseline impacts in areas occupied by the tidewater goby. While these types of project modifications are discussed in the DEA (see Exhibit 3–1), baseline impacts are not monetized in the DEA. In areas not considered occupied by the tidewater goby, potential incremental project modifications are identified through communication with land managers and are described and monetized in the DEA. We did not identify any areas where incremental project modifications to grazing activities would be expected to occur as a result of critical habitat designation for the tidewater goby.

(29) *Comment:* One commenter expressed concern that the designation of critical habitat could result in increased State regulation. This comment suggests that the DEA should consider potential indirect impacts of additional conservation measures requested by State agencies.

Our Response: Chapter 2 of the DEA acknowledges the potential for several types of indirect impacts, including increased State and local regulation. There is no indication that States or local agencies will change the types of conservation efforts requested following the designation of critical habitat for the tidewater goby. In addition, we believe that the public is well aware of areas considered to be critical habitat given the lengthy history of the designation and the existence of the tidewater goby recovery plan. As a result, the DEA does not anticipate any costs associated with increased State regulation.

(30) *Comment:* One commenter noted that Del Norte County has suffered economically in recent years, in part due to cumulative effects of regulatory restrictions. This comment implies that the designation of critical habitat for the tidewater goby would have a substantial economic impact on the County.

Our Response: As described in Section 2.4.4 of the DEA, we are unlikely to request additional conservation efforts to avoid the destruction or adverse modification of critical habitat compared to efforts to avoid jeopardy of the species. Because all critical habitat within Del Norte County is considered occupied by the tidewater goby, no incremental conservation measures are anticipated. The DEA does forecast administrative impacts associated with the additional consideration of adverse modification of critical habitat in three section 7 consultations within Del Norte County over a 20-year period. Appendix A of the DEA identifies Del Norte County as a small governmental jurisdiction and evaluates the likelihood that these incremental administrative impacts will substantially affect the County's economy. For this analysis, the DEA makes the conservative assumption that all three forecast consultations will occur in the same year, and concludes that impacts will not exceed one percent of annual County revenues.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for tidewater goby will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts on these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (for example, water management, transportation and utilities, livestock grazing, natural resource management). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. However, the SBREFA does not

explicitly define ''substantial number'' or ''significant economic impact.'' Consequently, to assess whether a ''substantial number'' of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the tidewater goby. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the ''Adverse Modification Standard''* section).

In our final economic analysis (FEA) of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the designation of critical habitat. The analysis is based on the estimated impacts associated with the rulemaking as described in Chapters 1 through 6 and Appendix A of the analysis and evaluates the potential for economic impacts related to: (1) Water management; (2) cattle grazing; (3) transportation (roads, highways, bridges); (4) utilities (oil and gas pipelines); (5) residential, commercial, and industrial development; and (6) natural resource management.

As described in Chapters 4 and 5 of the FEA, estimated incremental impacts consist primarily of administrative costs and time delays associated with section 7 consultation. The Service and the Federal action agency are the only entities with direct compliance costs associated with this proposed critical habitat designation, although small entities may participate in section 7 consultation as an applicant. It is therefore possible that the small entities may spend additional time considering critical habitat during section 7 consultation for the tidewater goby. The FEA indicated that the incremental impacts potentially incurred by small entities are limited to development, natural resource management, transportation, utilities, and water management activities.

Chapter 5 of the FEA discusses the potential for proposed revised critical habitat to affect development through additional costs of section 7 consultation. These costs are borne by developers and existing landowners, depending on whether developers are able to pass all or a portion of their costs back to landowners in the form of lower prices paid for undeveloped land. Of the total number of entities engaged in land subdivision and residential, commercial, industrial and institutional construction, nearly 99 percent are small entities.

Whether individual developers are affected depends on the specific characteristics of a particular land parcel as well as the availability of land within the affected region. If land is not scarce, the price of a specific parcel will likely incorporate any regulatory restrictions on that parcel. Therefore, any costs associated with conservation efforts for tidewater goby will likely be reflected in the price paid for the parcel. In this case, the costs of conservation efforts are ultimately borne by the current landowner in the form of reduced land values. Many of these landowners may be individuals or families that are not legally considered to be businesses.

If, however, land in the affected region is scarce, or the characteristics of the specific parcel are unique, the price of a parcel may not incorporate regulatory restrictions associated with that parcel. In this case, the project developer may be required to incur the additional costs associated with the section 7 consultation process. To understand the potential impacts on small entities, we conservatively assumed that all of the private owners of developable lands affected by proposed revised critical habitat designation are developers.

In Chapter 5 of the FEA, we estimated that a total of 20 formal, informal, and technical assistance consultations, plus one reinitiation, may require additional effort to consider adverse modification of revised critical habitat. Assuming that each consultation is undertaken by a separate entity, we estimate that 21 developers may be affected by the designation. For purposes of this analysis, and because nearly 99 percent of developers in the study area are small, we assume that all 21 are small entities. These developers represent less than 0.1 percent of small developers in the study area.

Excluding costs borne by Federal agencies, costs per consultation range from $260 for technical assistance to $1,800 for reinitiation of a formal consultation. Because we were unable to identify the specific entities affected, the impact relative to those entities' annual revenues or profits is unknown. However, assuming the average small entity has annual revenues of approximately $5.1 million, this maximum annualized impact of $1,800 represents less than 0.1 percent of annual revenues.

The consultation history for natural resource management projects suggests that these projects are generally undertaken by Federal and State agencies, or County departments. The DEA estimated incremental administrative costs for section 7 consultation on natural resource management in every County except Orange County. Only one of these entities, Del Norte County, meets the threshold for small governmental jurisdiction. Del Norte County is anticipated to incur administrative costs associated with addressing adverse modification in approximately three consultations, including one reinitiation. Even if all consultations occur in the same year, total impacts to Del Norte County will be less than 1 percent of the County's annual revenue.

The consultation history for tidewater goby includes several consultations regarding utilities and oil and gas development. In Chapter 5 of the FEA, we estimate that 24 consultations involving utility activities will occur during the 20-year period. Based on the overall percentage of all small entities in the study area (56 percent), we estimated that 14 of the 24 total entities that will be affected over the 20-year period are small entities. Excluding costs to Federal agencies, the cost per entity of addressing adverse modification in section 7 consultation ranges from $260 for technical assistance to $880 for a formal consultation (no reinitiations are predicted for utility activities.). Because we are unable to identify the specific entities affected, the impact relative to those entities' annual revenues or profits is unknown. However, assuming the average small entity in this industry has annual revenues of approximately $9.3 million, this maximum annualized impact of $880 represents less than 0.01 percent of annual revenues.

Chapter 5 of the FEA also discusses the potential for water management

activities to be affected by the designation. Over the 20-year period, we estimate that 125 consultations involving water management activities, including reinitiations, will occur. Based on the overall percentage of all small entities in the study area (83 percent), we estimate that 104 of the 125 total entities that will be affected over the 20-year period are small entities. Excluding costs to Federal agencies, the cost per entity of addressing adverse modification in section 7 consultation ranges from $260 for technical assistance to $1,800 for reinitiation of a formal consultation. Because we are unable to identify the specific entities affected, the impact relative to those entities' annual revenues or profits is unknown. However, assuming the average small entity in this industry has annual revenues of approximately $5.0 million, this maximum annualized impact of $1,800 represents less than 0.1 percent of annual revenues.

The DEA also concludes that none of the government entities with which we might consult on tidewater goby for transportation or recreation meet the definitions of small as defined by the Small Business Act (SBE) (IEC 2012, p. A–6); therefore, impacts to small government entities due to transportation and recreation are not anticipated. A review of the consultation history for tidewater goby suggests that future section 7 consultations on livestock grazing (for example, ranching operations) are unlikely, and as a result are not anticipated to be affected by the critical habitat designation (IEC 2012, p. 5–13). Please refer to the DEA for a more detailed discussion of potential economic impacts.

In summary, we considered whether this designation would result in a significant economic impact on a substantial number of small entities. Based on the above reasoning and currently available information, we are certifying that the designation of critical habitat for tidewater goby will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute ''a significant adverse effect'' when compared to not taking the regulatory action under consideration. Chapter 5 of the economic analysis discusses the potential for critical habitat to affect utilities through the additional cost of considering adverse modification in section 7 consultation. Excluding the portion of administrative costs accruing to Federal agencies, we forecast incremental costs of less than $9,700 over 20 years to be incurred by the energy and utility industry for section 7 consultations. In annualized terms, this represents less than $500 annually. The additional costs are unlikely to increase the costs of energy production or distribution in the United States in excess of one percent.

The economic analysis finds that none of the nine outcomes are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with tidewater goby conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because it would not produce a Federal mandate of $100 million or greater in any year; that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The FEA concludes only Del Norte County meets the threshold for small governmental jurisdiction. Del Norte County is anticipated to incur administrative costs associated with addressing adverse modification in approximately three consultations, including one reinitiation. Even if all consultations occur in the same year, total impacts to Del Norte County will be less than one percent of the County's annual revenue, which was $65 million in 2012. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for tidewater goby in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The FEA has concluded that this critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for tidewater goby does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this rule does not have significant Federalism effects. A federalism impact summary statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this critical habitat designation with appropriate State resource agencies in California. We solicited but did not receive comments from the California Department of Parks and Recreation, California Department of Fish and Game, California Coastal Conservancy, and California Coastal Commission. The designation of critical habitat for the tidewater goby may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have some incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands within the geographical area occupied by the tidewater goby at the time of listing that contain the features essential for conservation of the species, and no tribal lands outside the geographical area occupied by the tidewater goby at the time of listing that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the tidewater goby on tribal lands.

References Cited

A complete list of all references cited is available on the Internet at *http://www.regulations.gov* and upon request from the, Ventura Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this rulemaking are the staff members of the Ventura Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245 unless otherwise noted.

■ 2. In § 17.95(e), revise the entry for ''Tidewater goby (*Eucyclogobius newberryi*)'', to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Tidewater Goby (*Eucyclogobius newberryi*)

(1) Critical habitat units are depicted for Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego Counties, California, on the maps below.

(2) Within these areas, the primary constituent element of the physical or biological features essential to the conservation of tidewater goby consist of persistent, shallow (in the range of approximately 0.3 to 6.6 ft (0.1 to 2 m)), still-to-slow-moving lagoons, estuaries, and coastal streams with salinity up to 12 parts per thousand (ppt), which provides adequate space for normal behavior and individual and population growth that contain:

(i) Substrates (e.g., sand, silt, mud) suitable for the construction of burrows for reproduction;

(ii) Submerged and emergent aquatic vegetation, such as *Potamogeton pectinatus, Ruppia maritima, Typha latifolia,* and *Scirpus* spp., that provides protection from predators and high flow events; or

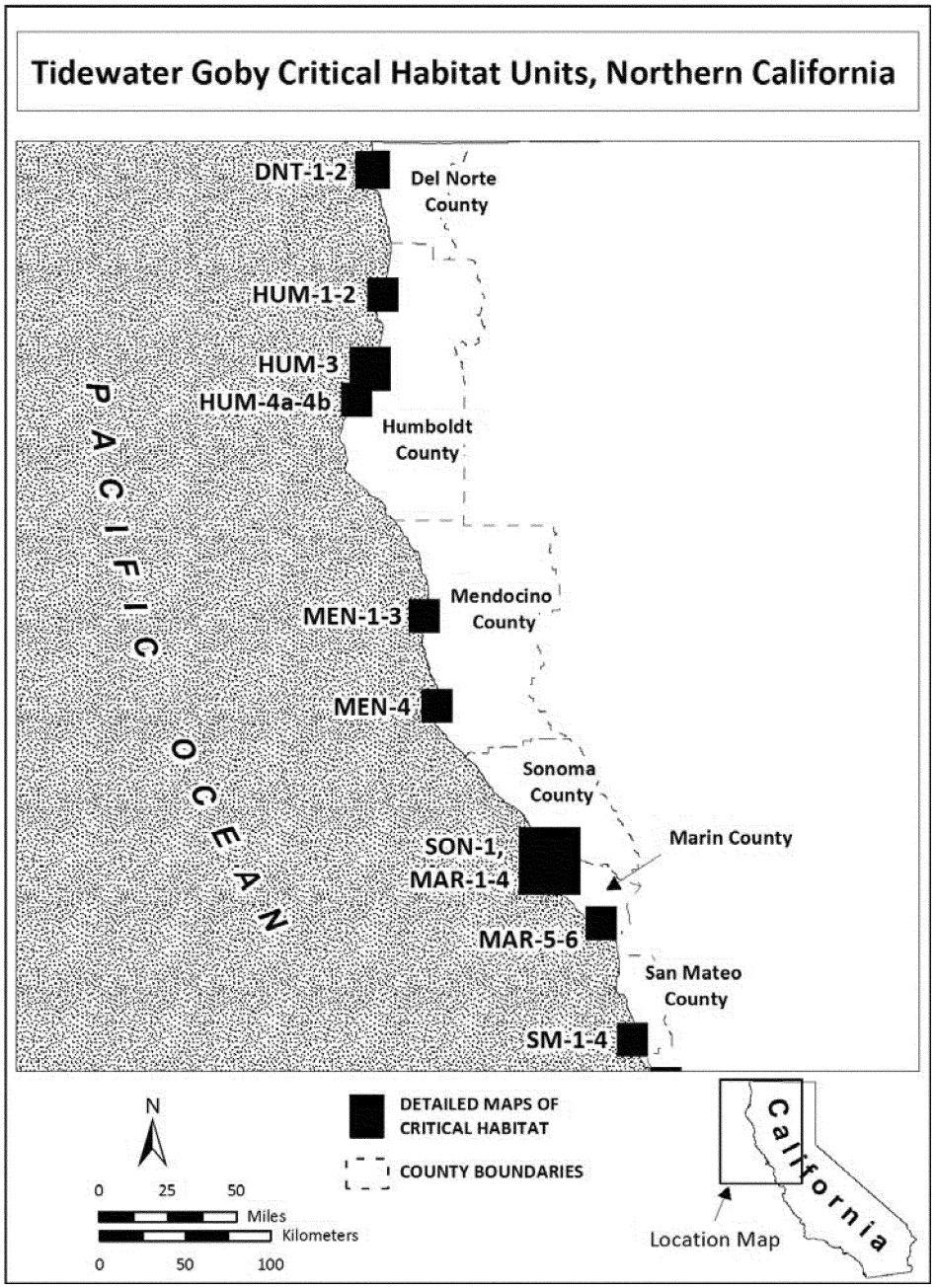
(iii) Presence of a sandbar(s) across the mouth of a lagoon or estuary during the late spring, summer, and fall that closes or partially closes the lagoon or estuary, thereby providing relatively stable water levels and salinity.

(3) Critical habitat does not include manmade structures (such as bridges, docks, aqueducts, and other paved areas) and the land on which they are located existing within the legal boundaries on March 8, 2013.

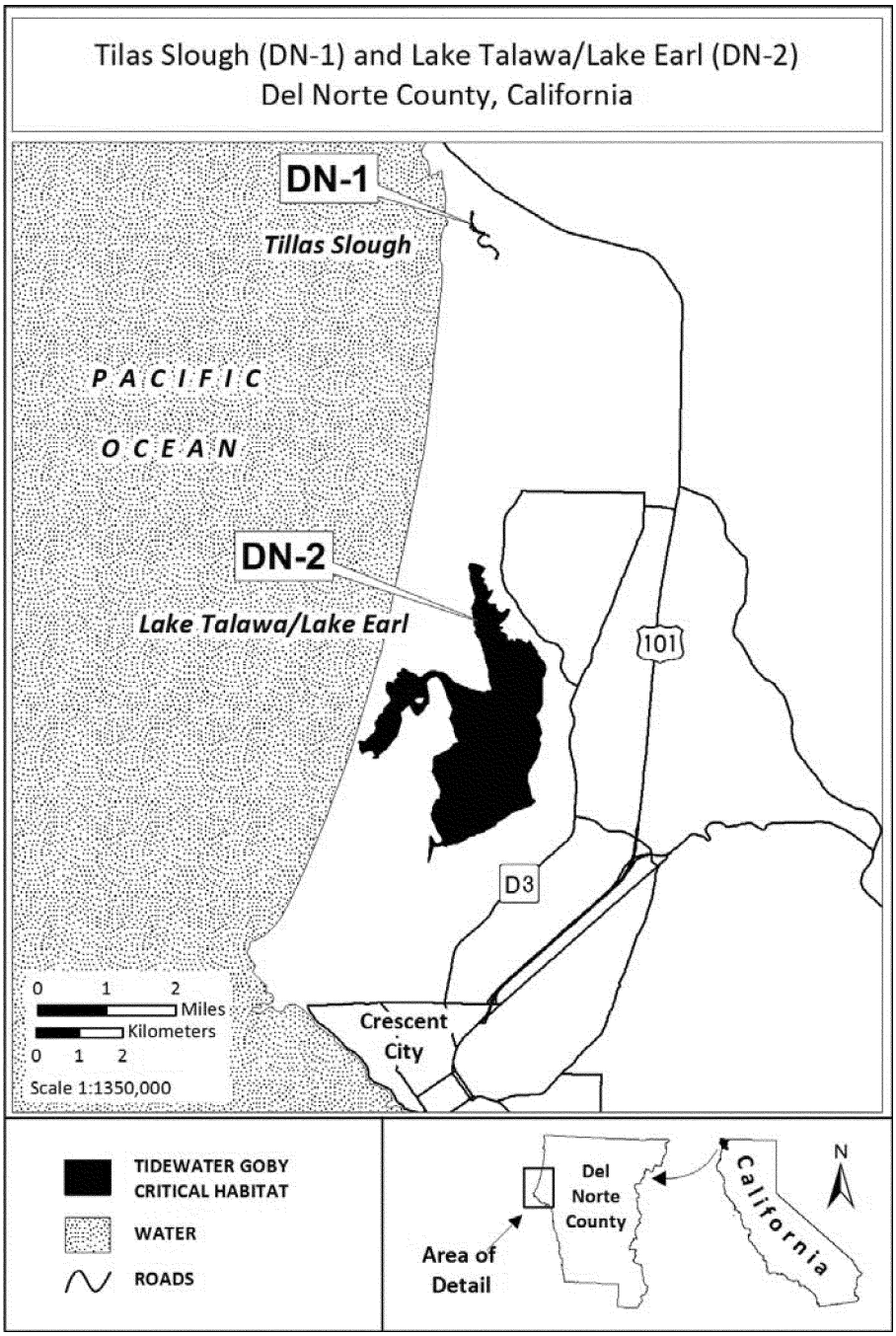
(4) *Critical habitat map units.* Data layers defining map units were created for most units using National Wetlands Inventory (NWI) data (both published data available over the Internet and in publication provisional data). Where NWI data was lacking, unit boundaries were digitized directly on imagery from the Department of Agriculture's National Aerial Imagery Program data (NAIP) acquired in 2005. Critical habitat units were mapped using Universal Transverse Mercator (UTM), zones 10 and 11. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which each map is based are available to the public at the Service's internet site, *http://www.fws.gov/ventura/,* http://*www.regulations.gov* at Docket No. FWS–R8–ES–2011–0085, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) Index map of critical habitat units for the tidewater goby (*Eucyclogobius newberryi*) in Northern California follows:

BILLING CODE 4310–55–P

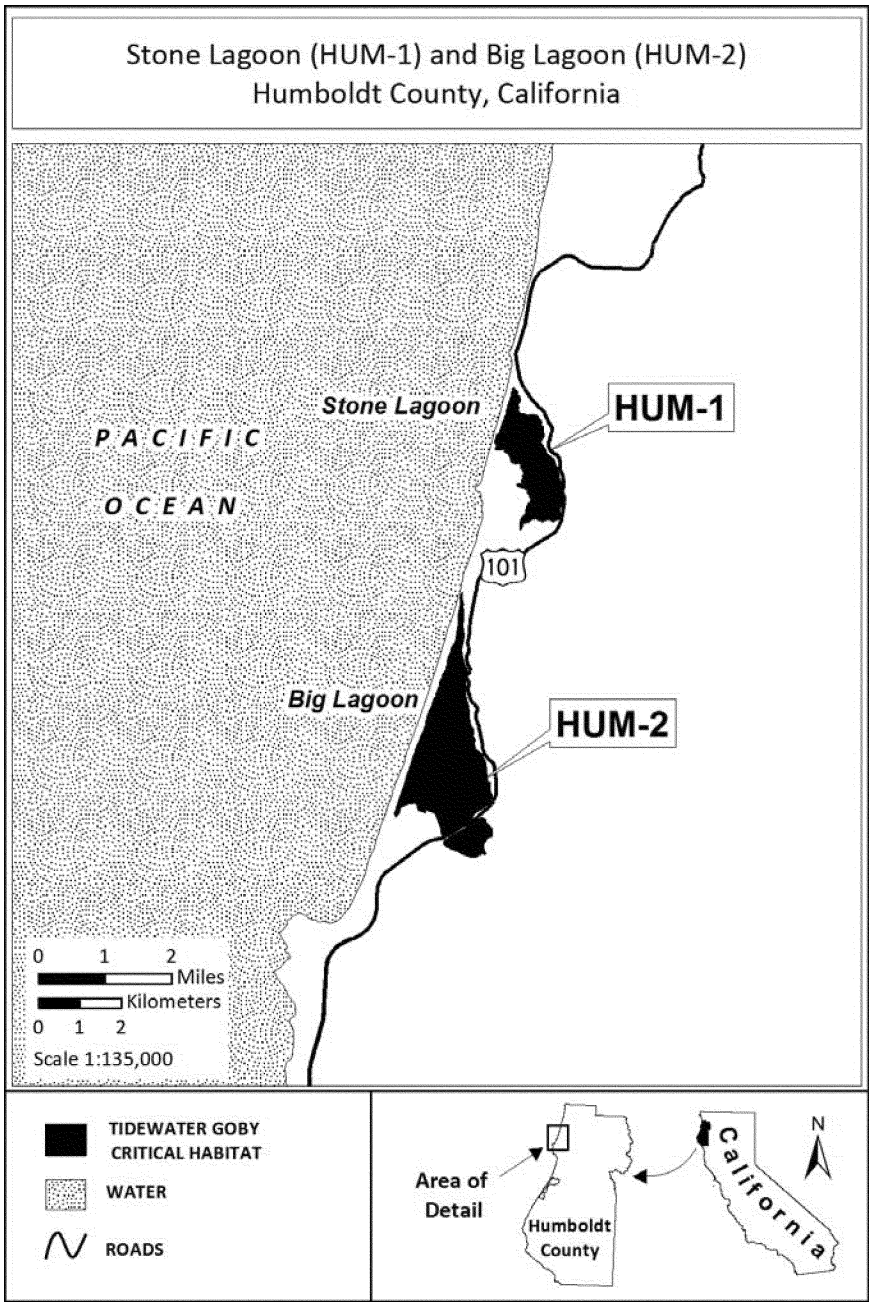


(6) Unit DN 1: Tillas Slough, Del Norte County California. Map of Units DN 1 and DN 2 follows:



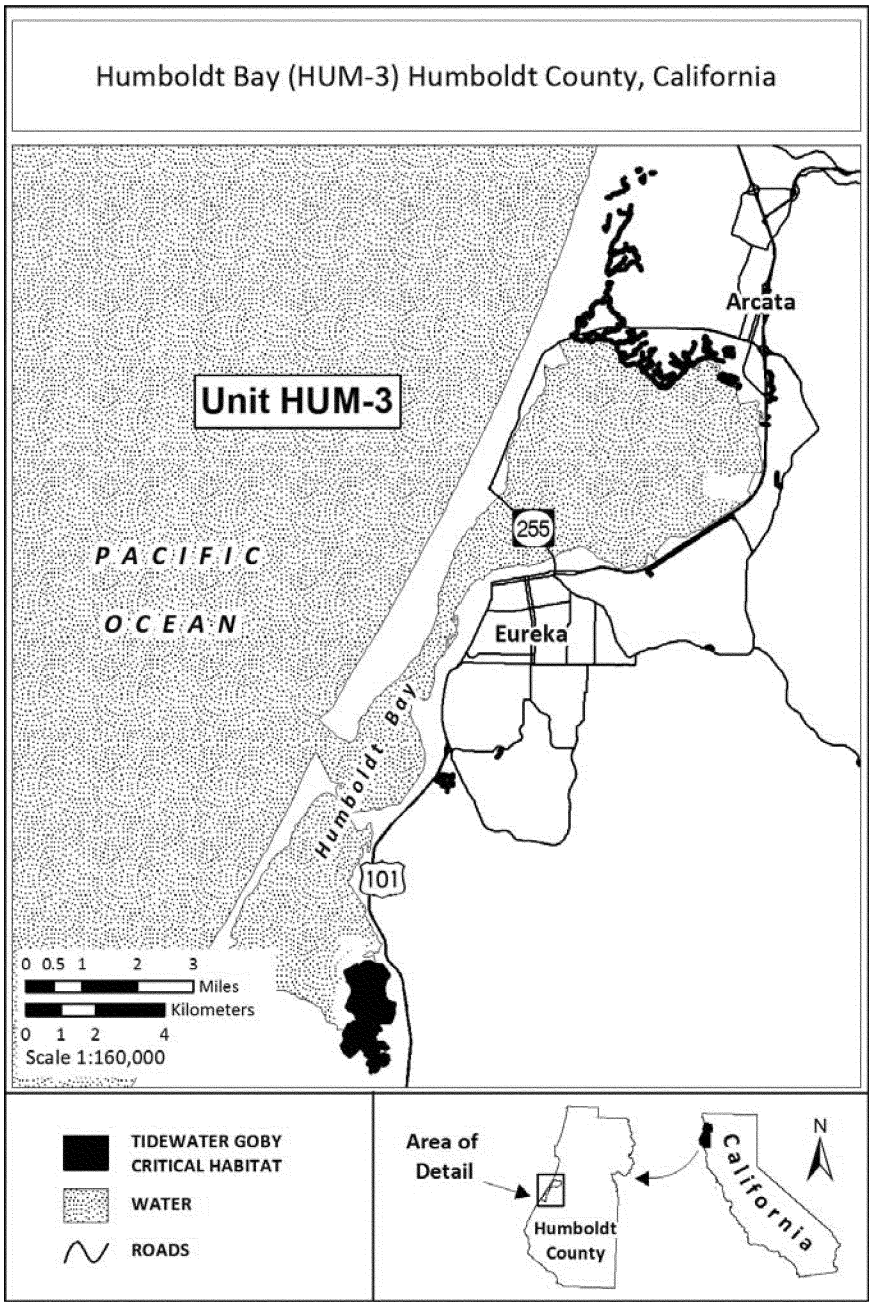
(7) Unit DN 2: Lake Talawa/Lake Earl, Del Norte County, California. Map of Unit DN 1 and DN 2 is provided at paragraph (6) of this entry.

(8) Unit HUM 1: Stone Lagoon, Humboldt County California. Map of Units HUM 1 and HUM 2 follows:

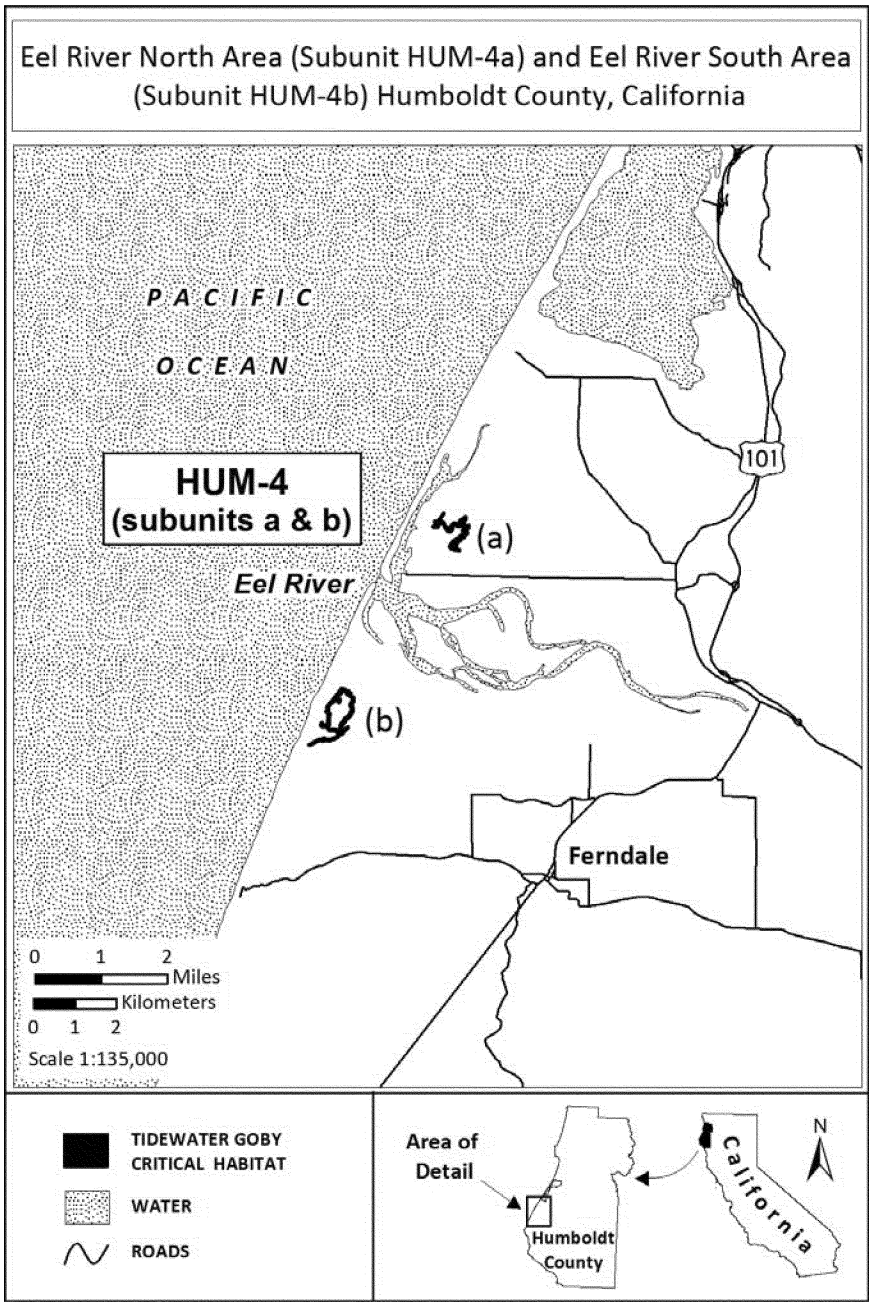


(9) Unit HUM 2: Big Lagoon, Humboldt County, California. Map of Units HUM 1 and HUM 2 is provided at paragraph (8) of this entry.

(10) Unit HUM 3: Humboldt Bay, Humboldt County, California. Map follows:

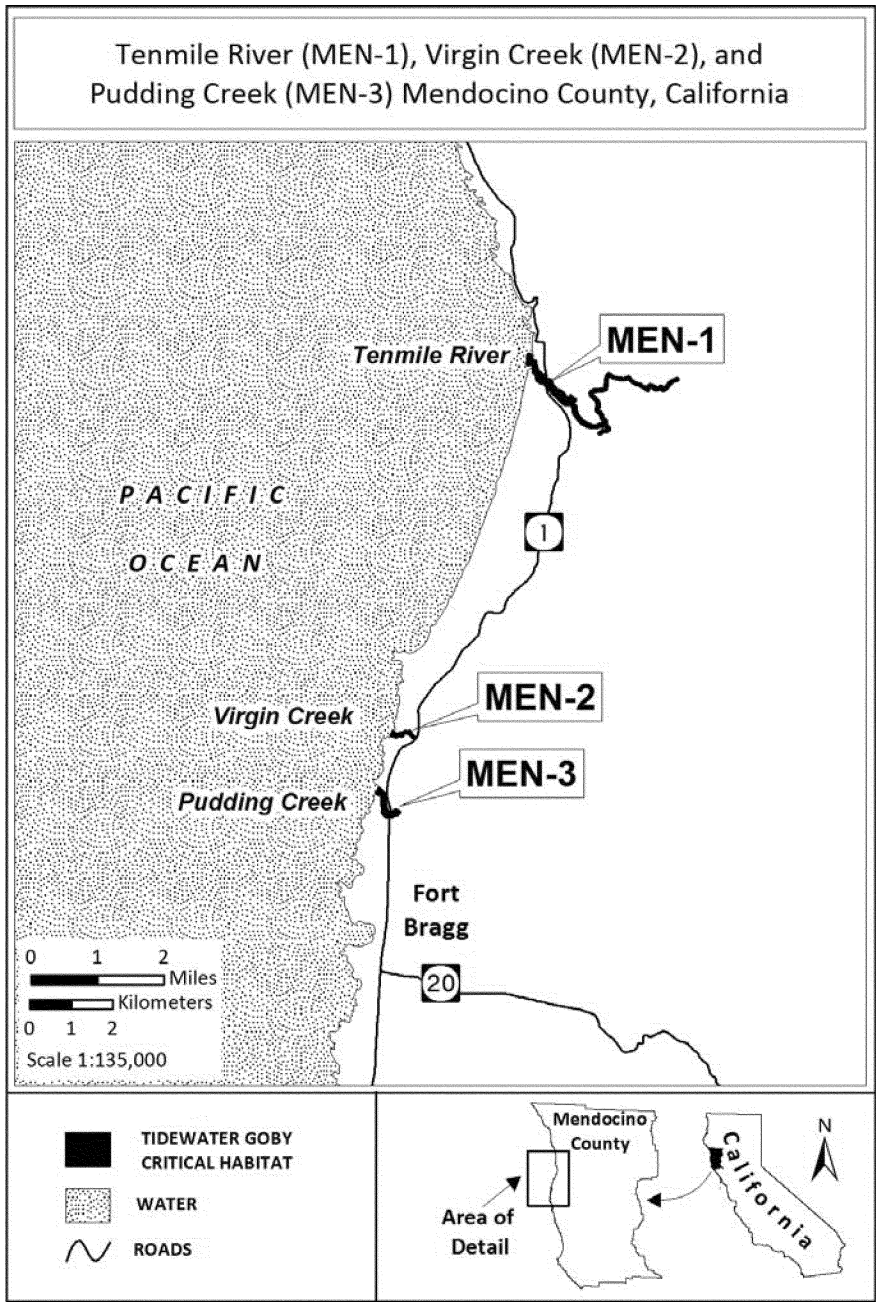


(11) Subunit HUM 4a: Eel River North Area. Map of Subunits HUM 4a and HUM 4b follows:



(12) Subunit HUM 4b: Eel River South Area. Map of Subunits HUM 4a and HUM 4b is provided at paragraph (11) of this entry.

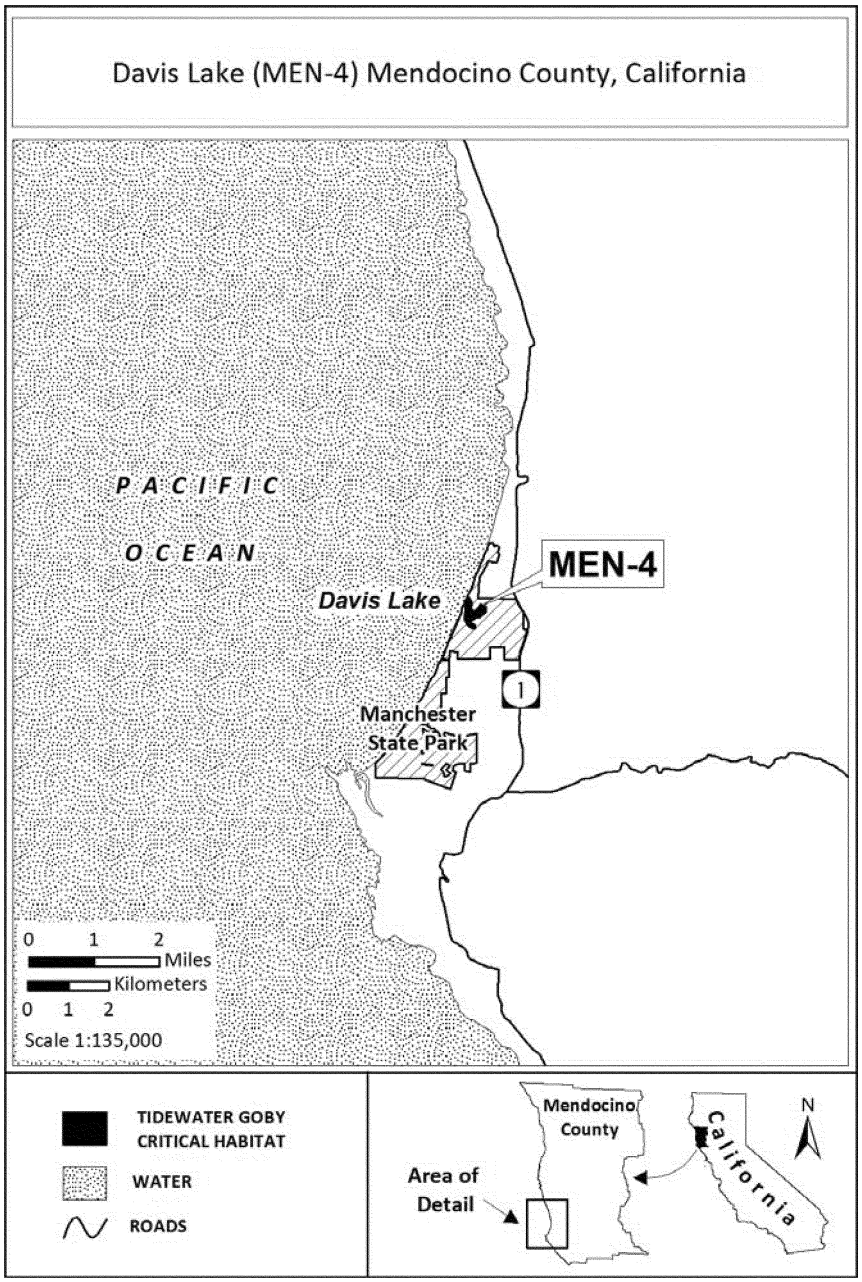
(13) Unit MEN 1: Tenmile River, Mendocino County, California. Map of Units MEN 1, MEN 2, and MEN 3 follows:



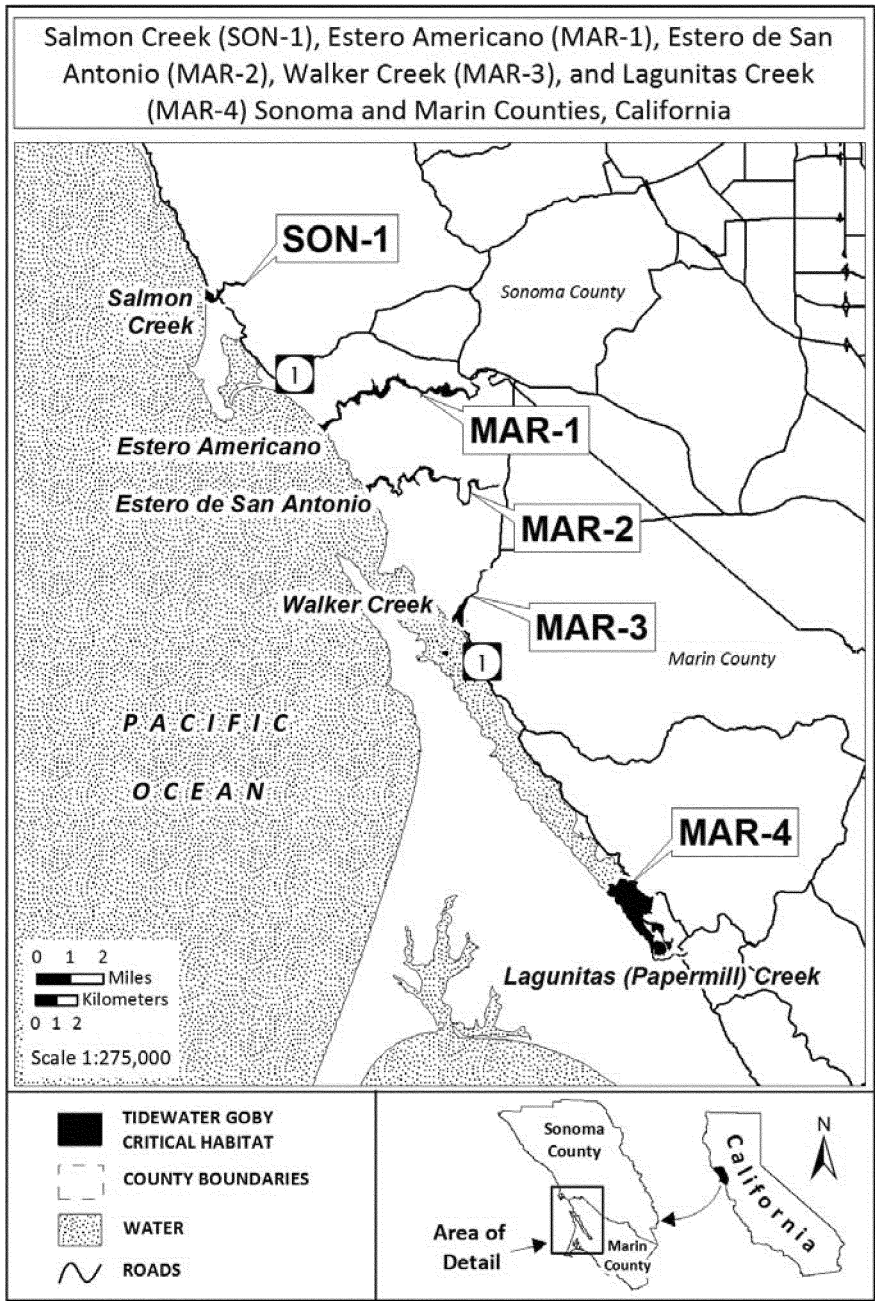
(14) Unit MEN 2: Virgin Creek, Mendocino County, California. Map of Units MEN 1, MEN 2, and MEN 3 is provided at paragraph (13) of this entry.

(15) Unit MEN 3: Pudding Creek, Mendocino County, California. Map of Units MEN 1, MEN 2, and MEN 3 is provided at paragraph (13) of this entry.

(16) Unit MEN 4: Davis Lake and Manchester Sate Park Ponds, Mendocino County, California. Map follows:



(17) Unit SON 1: Salmon Creek, Sonoma County California. Map of Units SON 1, MAR 1, MAR 2, MAR 3, and MAR 4 follows:



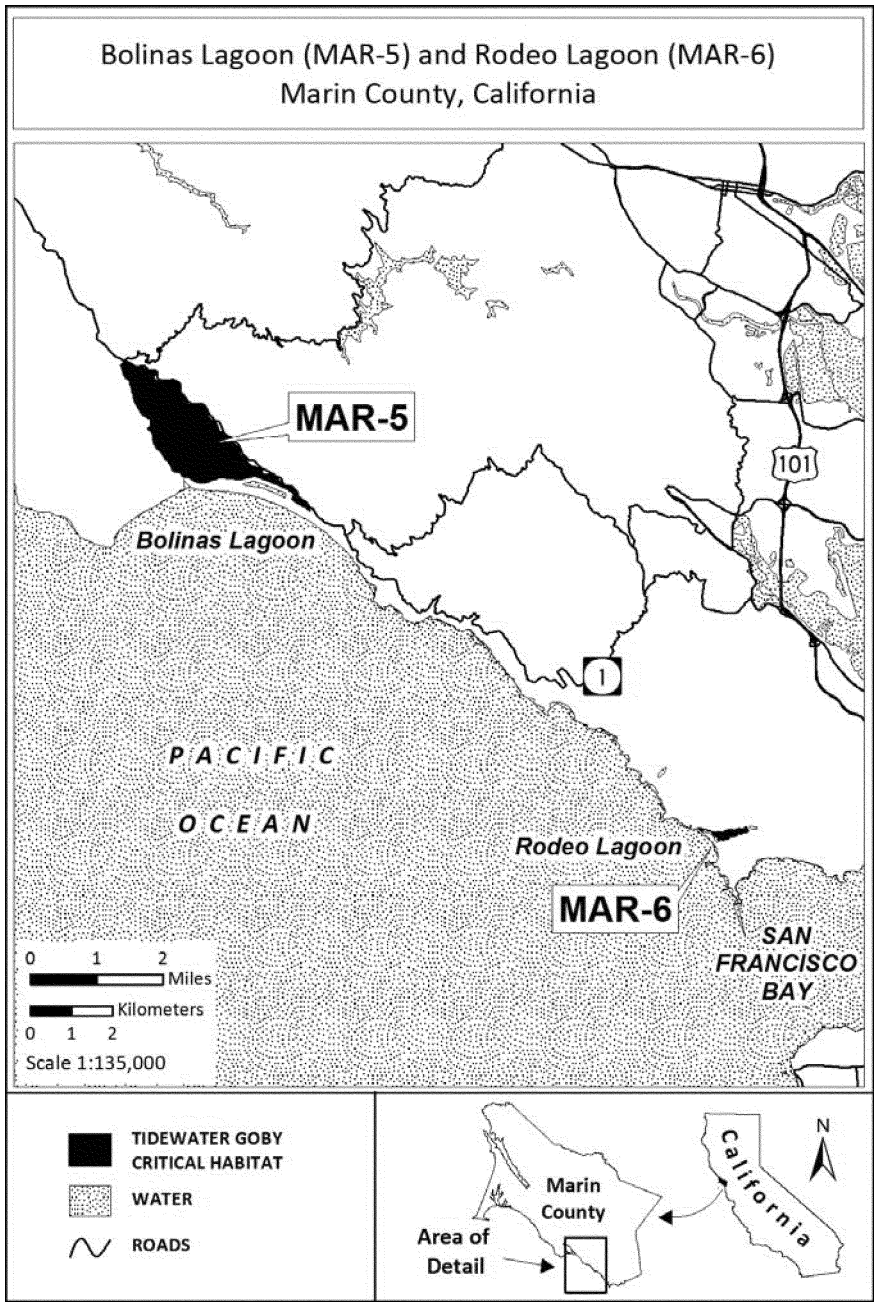
(18) Unit MAR 1: Estero Americano, Marin County, California. Map of Units SON 1, MAR 1, MAR 2,MAR 3 and MAR 4 is provided at paragraph (17) of this entry.

(19) Unit MAR 2: Estero de San Antonio, Marin County, California. Map of Units SON 1, MAR 1, MAR 2, MAR 3, and MAR 4 is provided at paragraph (17) of this entry.

(20) Unit MAR 3: Walker Creek, Marin County, California. Map of Units SON 1, MAR 1, MAR 2, MAR 3, and MAR 4 is provided at paragraph (17) of this entry.

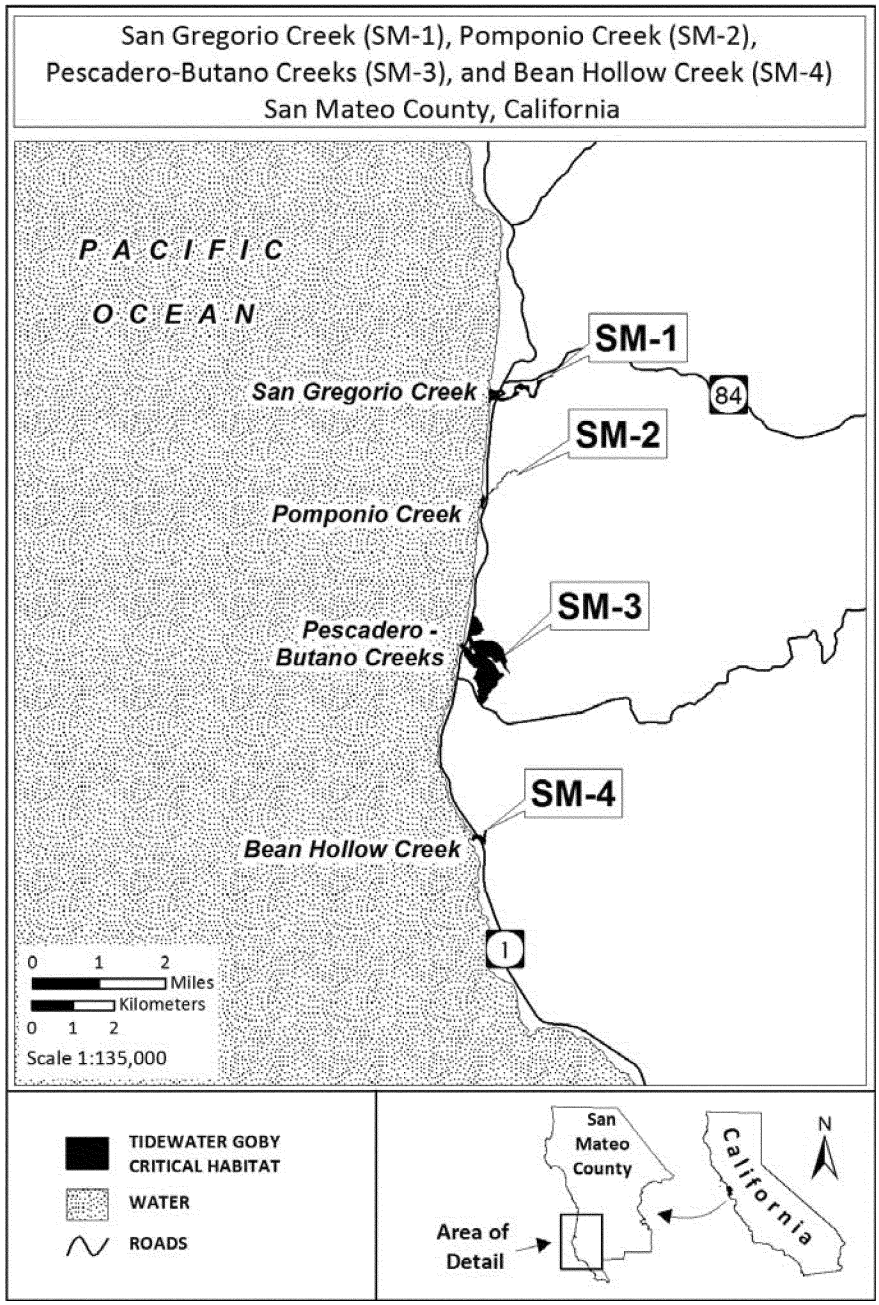
(21) Unit MAR 4: Lagunitas (Pepermill) Creek, Marin County, California. Map of Units SON 1, MAR 1, MAR 2, MAR 3, and MAR 4 is provided at paragraph (17) of this entry.

(22) Unit MAR 5: Bolinas Lagoon, Marin County, California. Map of Units MAR 5 and MAR 6 follows:



(23) Unit MAR 6: Rodeo Lagoon, Marin County, California. Map of Units MAR 5 and MAR 6 is provided at paragraph (21) of this entry.

(24) Unit SM 1: San Gregorio Creek, San Mateo County, California. Map of Units SM 1, SM 2, SM 3, and SM 4 follows:

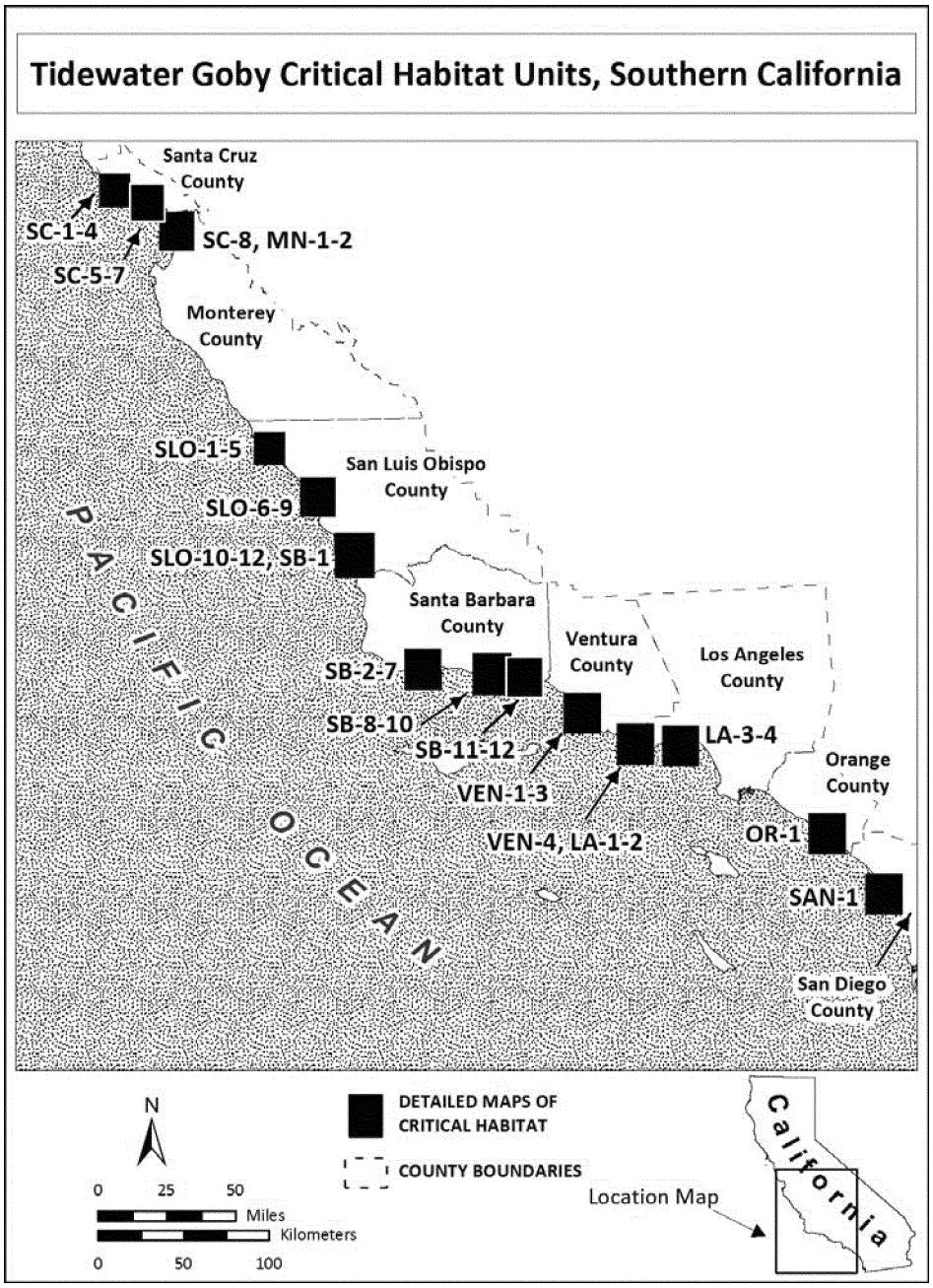


(25) Unit SM 2: Pomponio Creek, San Mateo County, California. Map of Units SM 1, SM 2, SM 3, and SM 4 is provided at paragraph (24) of this entry.

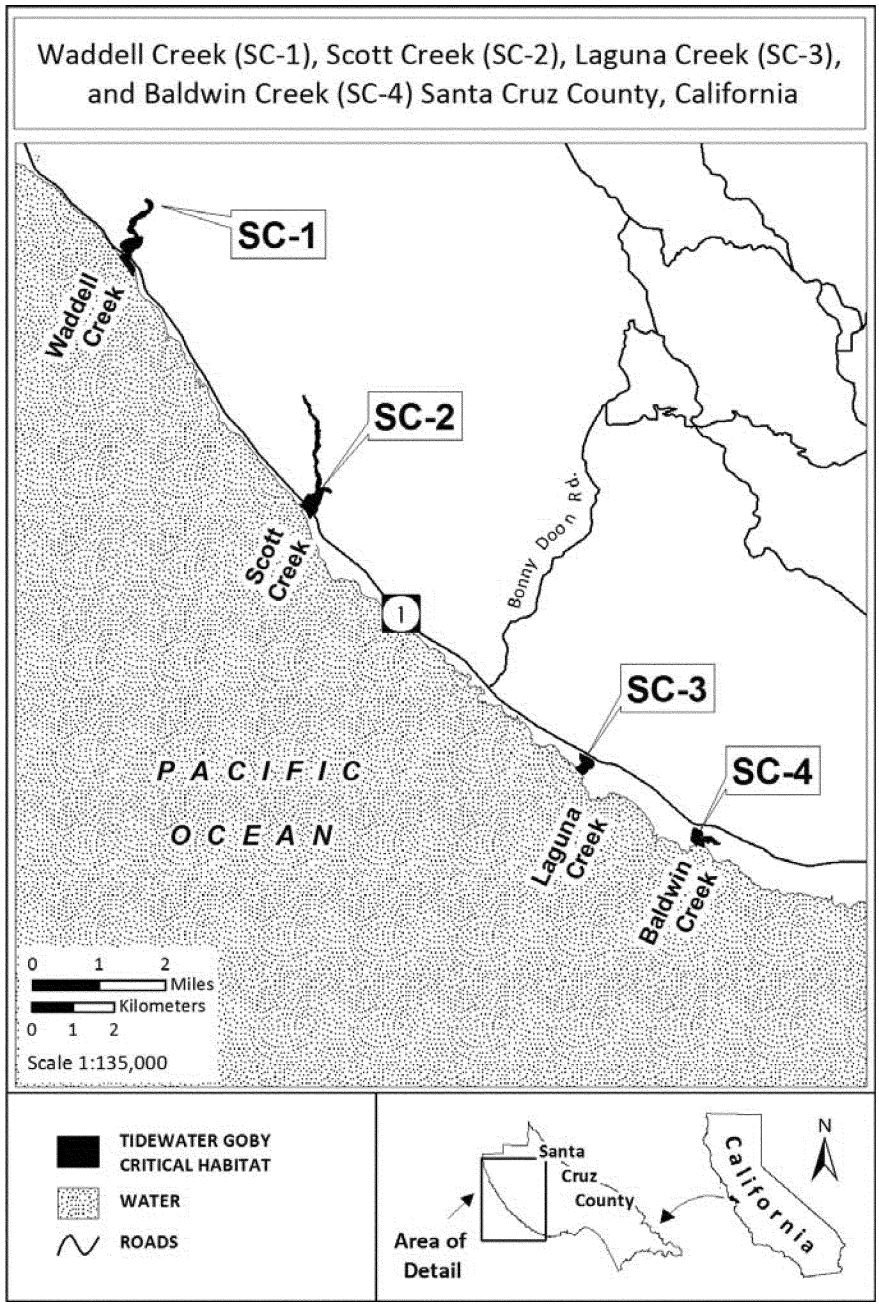
(26) Unit SM 3: Pescadero-Butano Creeks, San Mateo County, California. Map of Units SM 1, SM 2, SM 3, and SM 4 is provided at paragraph (24) of this entry.

(27) Unit SM 4: Bean Hollow Creek, San Mateo County, California. Map of Units SM 1, SM 2, SM 3, and SM 4 is provided at paragraph (24) of this entry.

(28) Index map of critical habitat units for the tidewater goby (*Eucyclogobius newberryi*) in Southern California follows:



(29) Unit SC 1: Waddell Creek, Santa Cruz County, California. Map of Unit SC 1, SC 2, SC 3, and SC 4 follows:

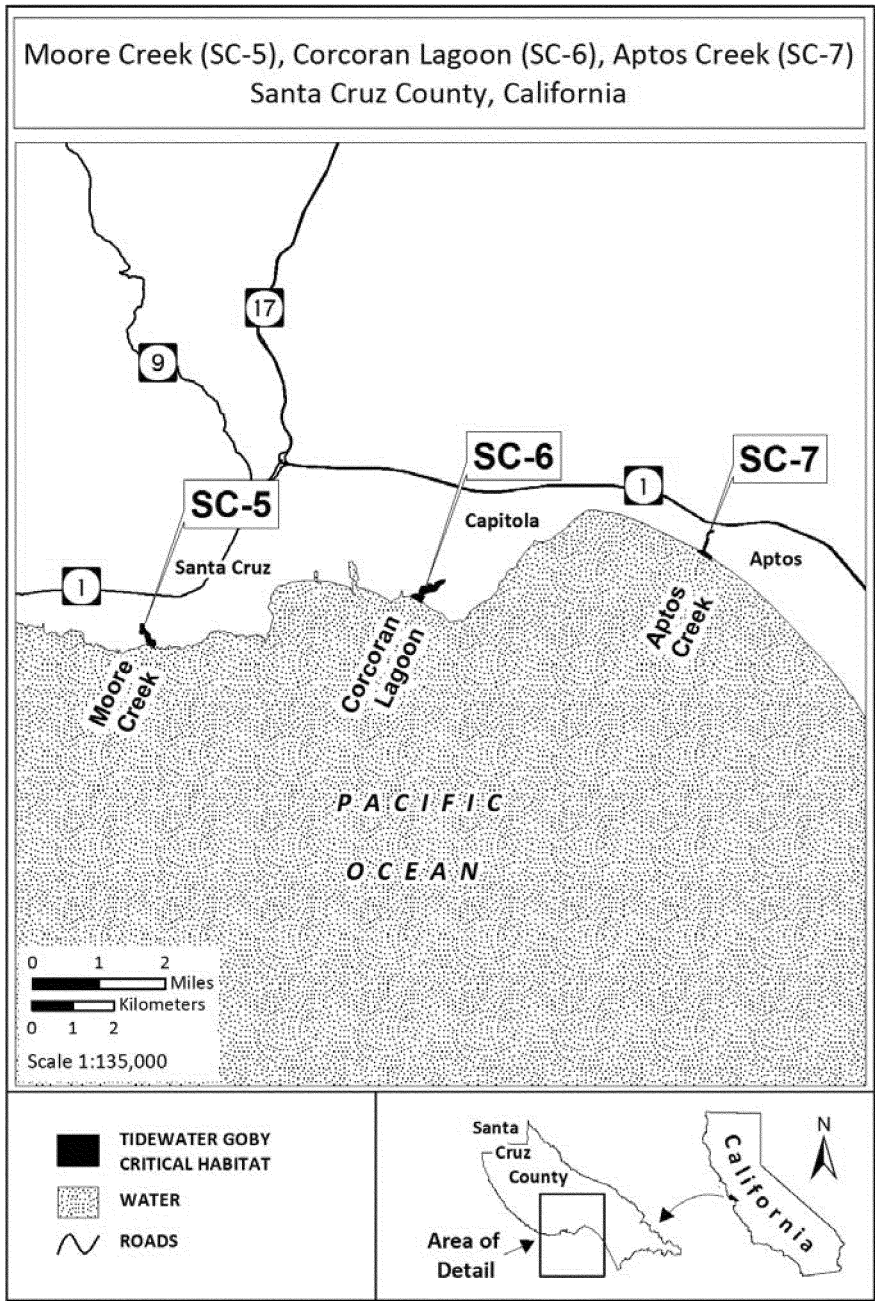


(30) Unit SC 2: Scott Creek, Santa Cruz County, California. Map of Units SC 1, SC 2, SC 3, and SC 4 is provided at paragraph (29) of this entry.

(31) Unit SC 3: Laguna Creek, Santa Cruz County, California. Map of Units SC 1, SC 2, SC 3, and SC 4 is provided at paragraph (29) of this entry.

(32) Unit SC 4: Baldwin Creek, Santa Cruz County, California. Map of Units SC 1, SC 2, SC 3, and SC 4 is provided at paragraph (29) of this entry.

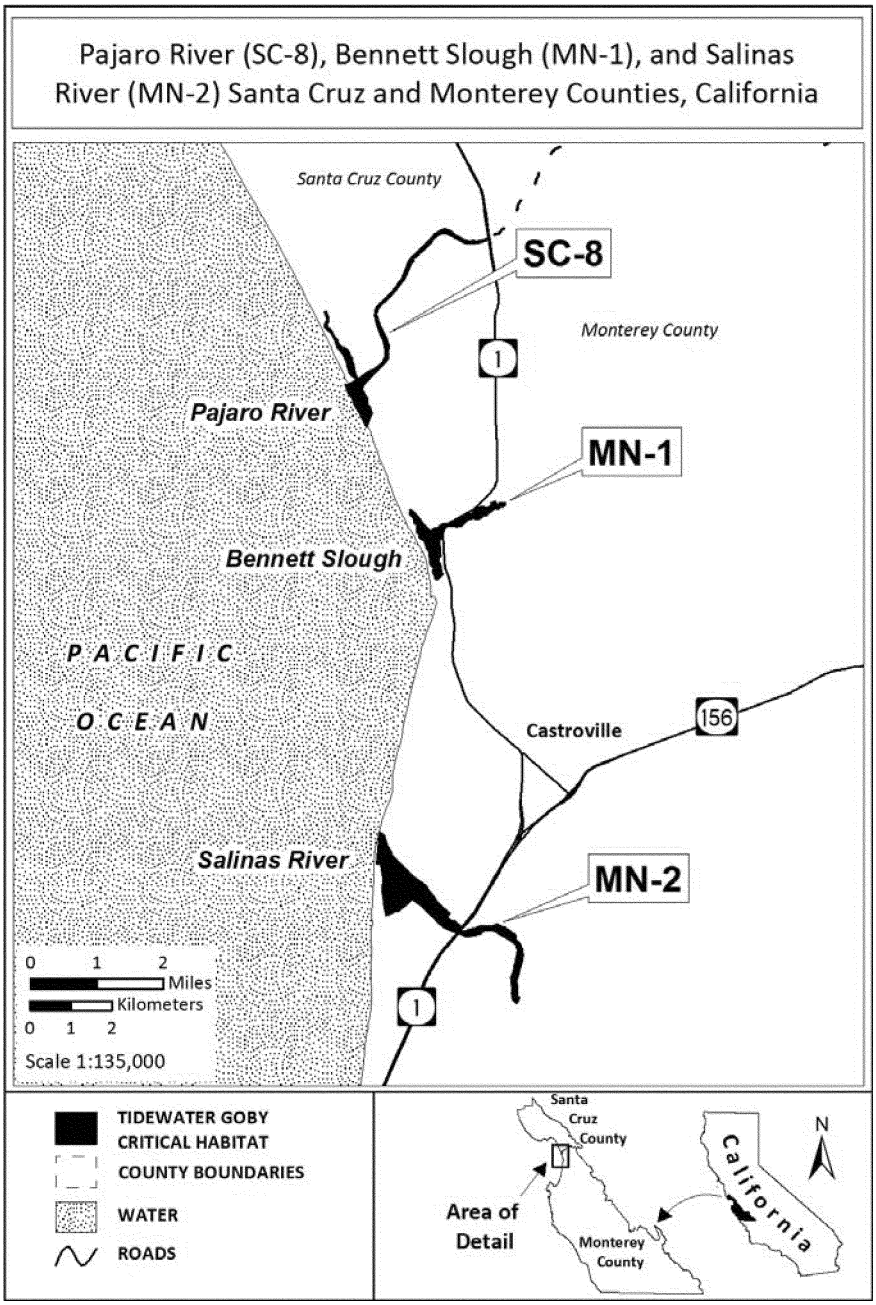
(33) Unit SC 5: Moore Creek, Santa Cruz County, California. Map of Units SC 5, SC 6, and SC 7 follows:



(34) Unit SC 6: Corcoran Lagoon, Santa Cruz County, California. Map of Units SC 5, SC 6, and SC 7 is provided at paragraph (33) of this entry.

(35) Unit SC 7: Aptos Creek, Santa Cruz County, California. Map of Units SC 5, SC 6, and SC 7 is provided at paragraph (33) of this entry.

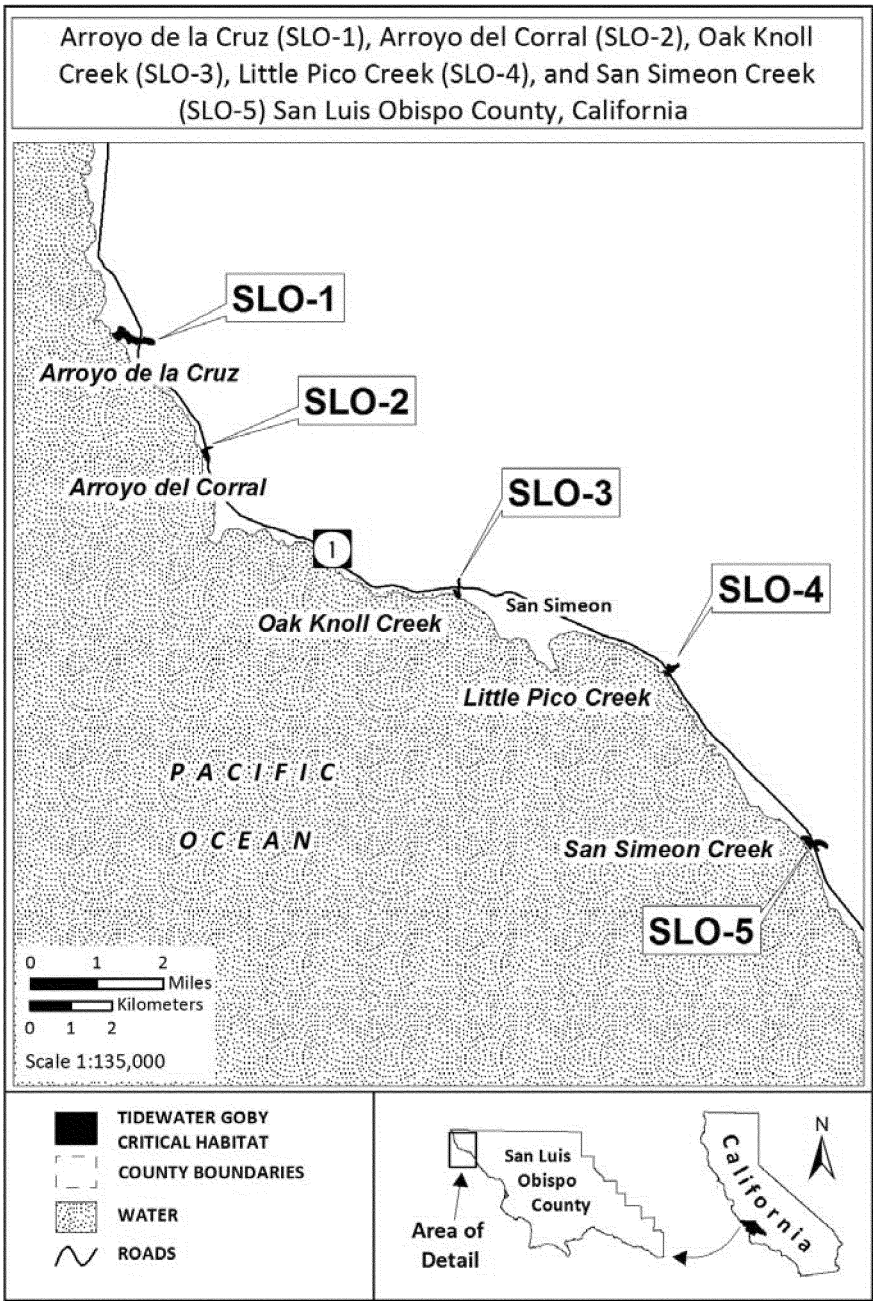
(36) Unit SC 8: Pajaro River, Santa Cruz County, California. Map of Units SC 8, MN 1, and MN 2 follows:



(37) Unit MN 1: Bennett Slough, Monterey County, California. Map of Units SC 8, MN 1, and MN 2 is provided at paragraph (36) of this entry.

(38) Unit MN 2: Salinas River, Monterey County, California. Map of Units SC 8, MN 1, and MN 2 is provided at paragraph (36) of this entry.

(39) Unit SLO 1: Arroyo de la Cruz, San Luis Obispo County, California. Map of Unit SLO 1, SLO 2, SLO 3, SLO 4, and SLO 5 follows:



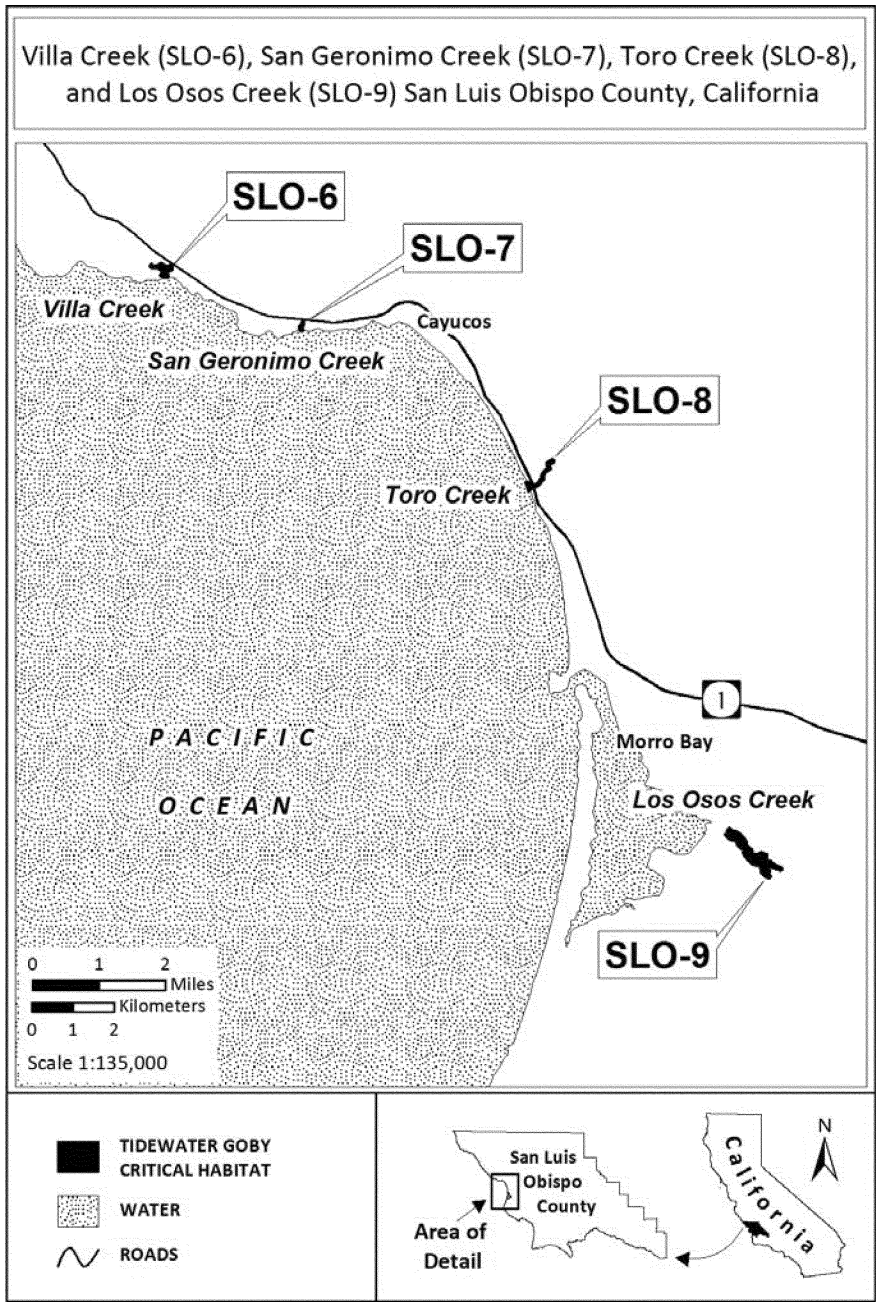
(40) Unit SLO 2: Arroyo del Corral, San Luis Obispo County, California. Map of Units SLO 1, SLO 2, SLO 3, SLO 4 and SLO 5 is provided at paragraph (39) of this entry.

(41) Unit SLO 3: Oak Knoll Creek, San Luis Obispo County, California. Map of Units SLO 1, SLO 2, SLO 3, SLO 4 and SLO 5 is provided at paragraph (39) of this entry.

(42) Unit SLO 4: Little Pico Creek, San Luis Obispo County, California. Map of Units SLO 1, SLO 2, SLO 3, SLO 4 and SLO 5 is provided at paragraph (39) of this entry.

(43) Unit SLO 5: San Simeon Creek, San Luis Obispo County, California. Map of Units SLO 1, SLO 2, SLO 3, SLO 4 and SLO 5 is provided at paragraph (39) of this entry.

(44) Unit SLO 6: Villa Creek, San Luis Obispo County, California. Map of Units SLO 6, SLO 7, SLO 8 and SLO 9 follows:

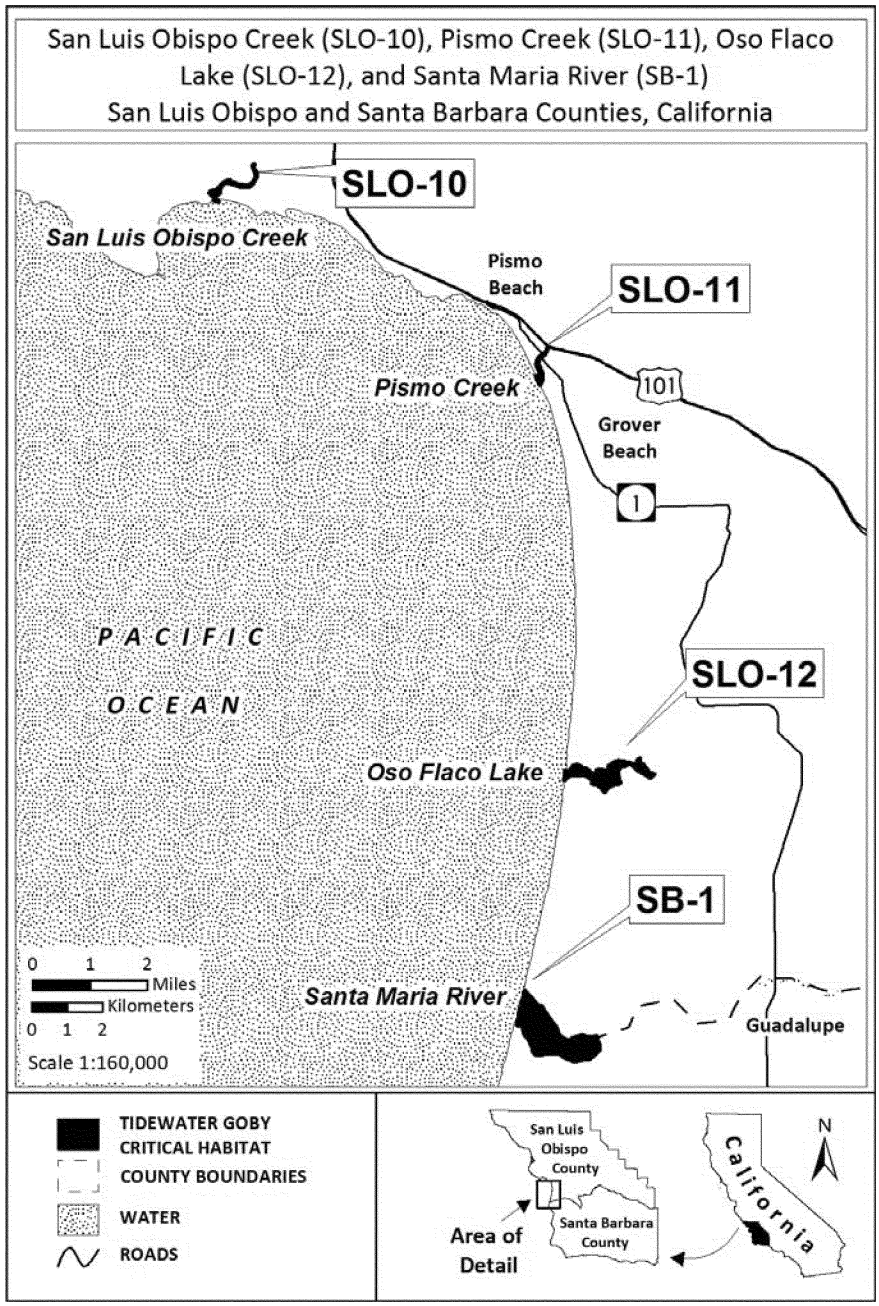


(45) Unit SLO 7: San Geronimo Creek, San Luis Obispo County, California. Map of Units SLO 6, SLO 7, SLO 8, and SLO 9 is provided at paragraph (44) of this entry.

(46) Unit SLO 8: Toro Creek, San Luis Obispo County, California. Map of Units SLO 6, SLO 7, SLO 8, and SLO 9 is provided at paragraph (44) of this entry.

(47) Unit SLO 9: Los Osos Creek, San Luis Obispo County, California. Map of Units SLO 6, SLO 7, SLO 8, and SLO 9 is provided at paragraph (44) of this entry.

(48) Unit SLO 10: San Luis Obispo Creek, San Luis Obispo County, California. Map of Units SLO 10, SLO 11, SLO 12, and SB 1 follows:

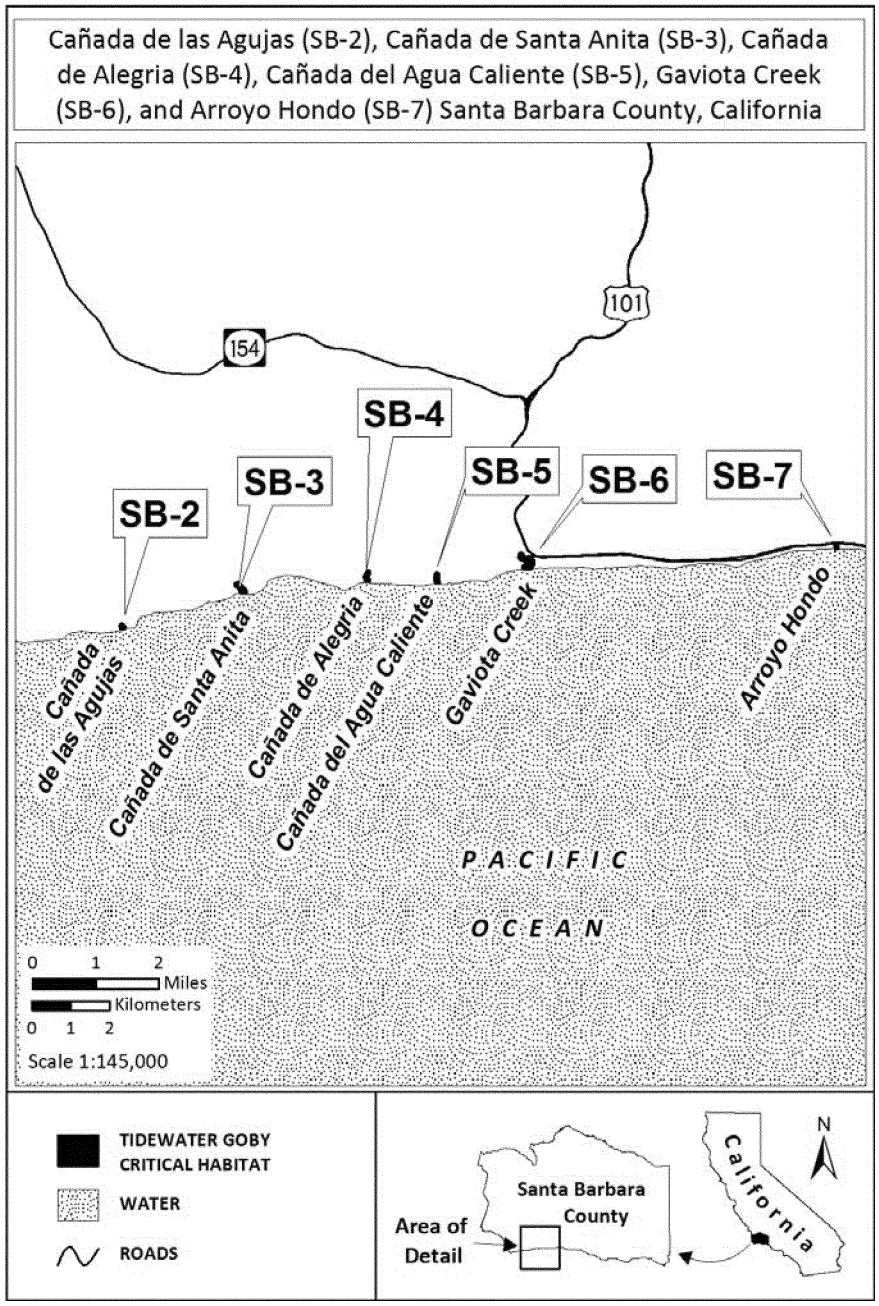


(49) Unit SLO 11: Pismo Creek, San Luis Obispo County, California. Map of Units SLO 10, SLO 11, SLO 12, and SB 1 is provided at paragraph (48) of this entry.

(50) Unit SLO 12: Oso Flaco Lake, San Luis Obispo County, California. Map of Units SLO 10, SLO 11, SLO 12, and SB 1 is provided at paragraph (48) of this entry.

(51) Unit SB 1: Santa Maria River, San Luis Obispo County, California. Map of Units SLO 10, SLO 11, SLO 12, and SB 1 is provided at paragraph (48) of this entry.

(52) Unit SB 2: Cañada de las Agujas, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 follows:



(53) Unit SB 3: Cañada de Santa Anita, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 is provided at paragraph (52) of this entry.

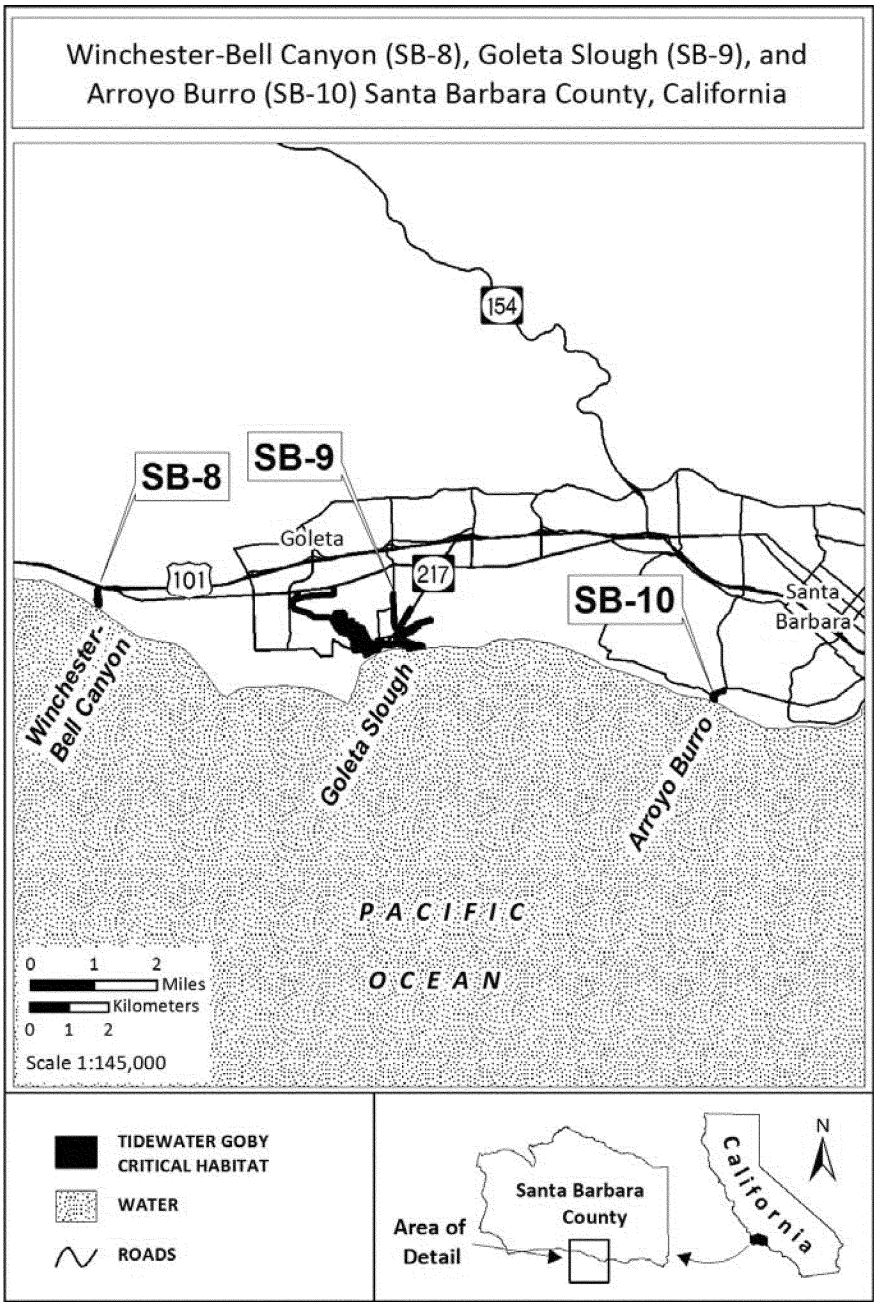
(54) Unit SB 4: Cañada de Alegria, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 is provided at paragraph (52) of this entry.

(55) Unit SB 5: Cañada del Agua Caliente, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 is provided at paragraph (52) of this entry.

(56) Unit SB 6: Gaviota Creek, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 is provided at paragraph (52) of this entry.

(57) Unit SB 7: Arroyo Hondo, Santa Barbara County, California. Map of Units SB 2, SB 3, SB 4, SB 5, SB 6, and SB 7 is provided at paragraph (52) of this entry.

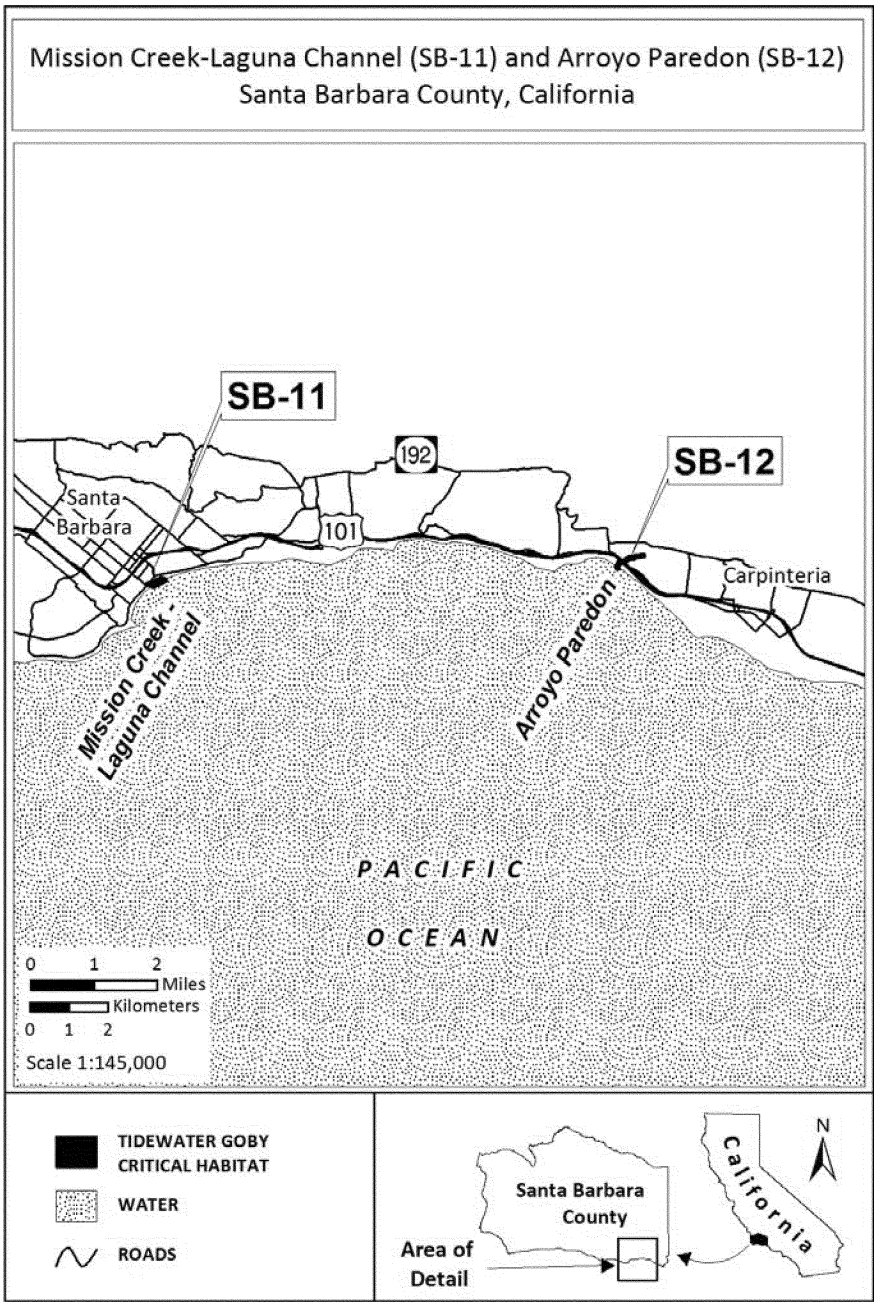
(58) Unit SB 8: Winchester-Bell Canyon, Santa Barbara County, California. Map of SB 8, SB 9, and SB 10 follows:



(59) Unit SB 9: Goleta Slough, Santa Barbara County, California. Map of Units SB 8, SB 9, and SB 10 is provided at paragraph (58) of this entry.

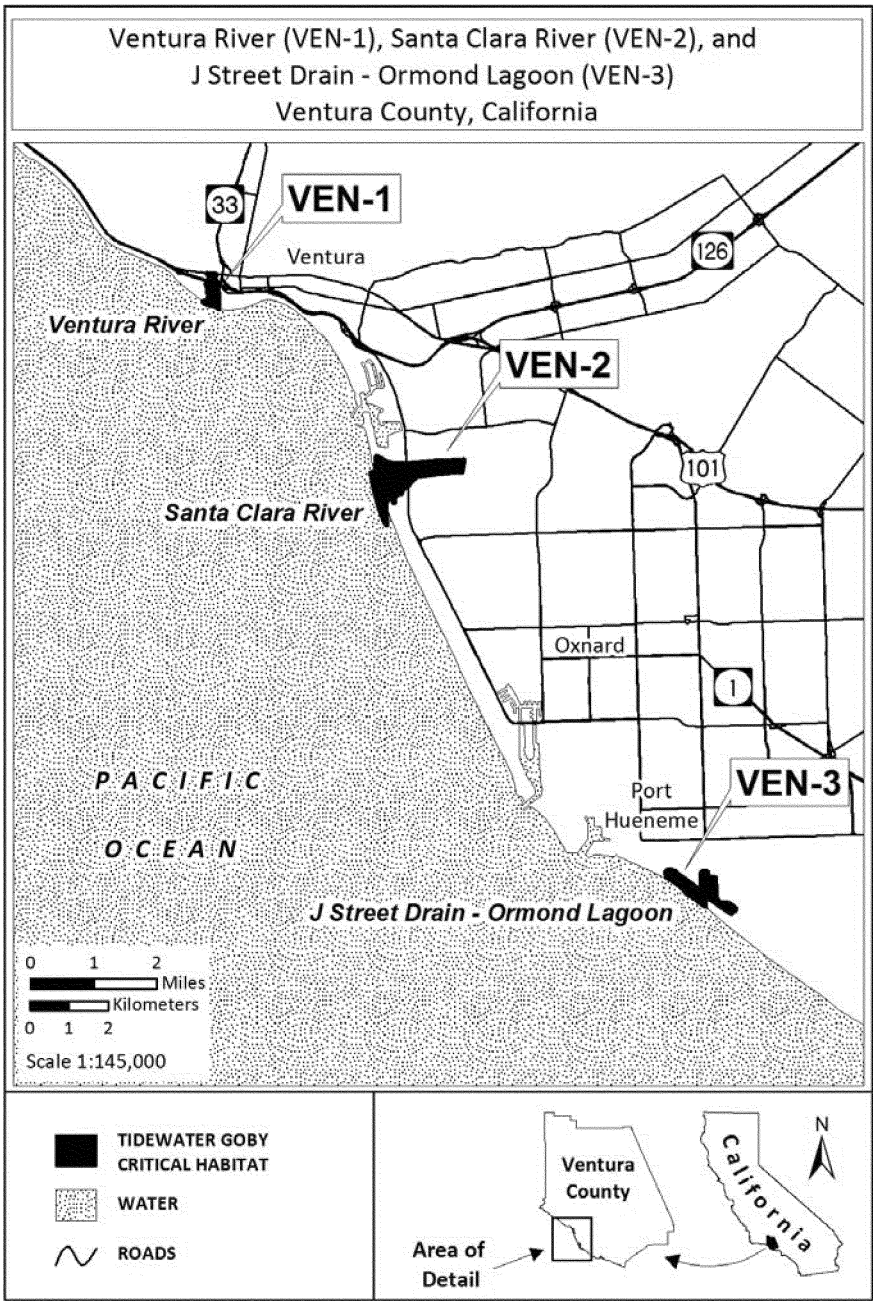
(60) Unit SB 10: Arroyo Burro, Santa Barbara County, California. Map of Units SB 8, SB 9, and SB 10 is provided at paragraph (58) of this entry.

(61) Unit SB 11: Mission Creek—Laguna Channel, Santa Barbara County, California. Map of Units SB 11 and SB 12 follows:



(62) Unit SB 12: Arroyo Paredon, Santa Barbara County, California. Map of Units SB 11 and SB 12 is provided at paragraph (61) of this entry.

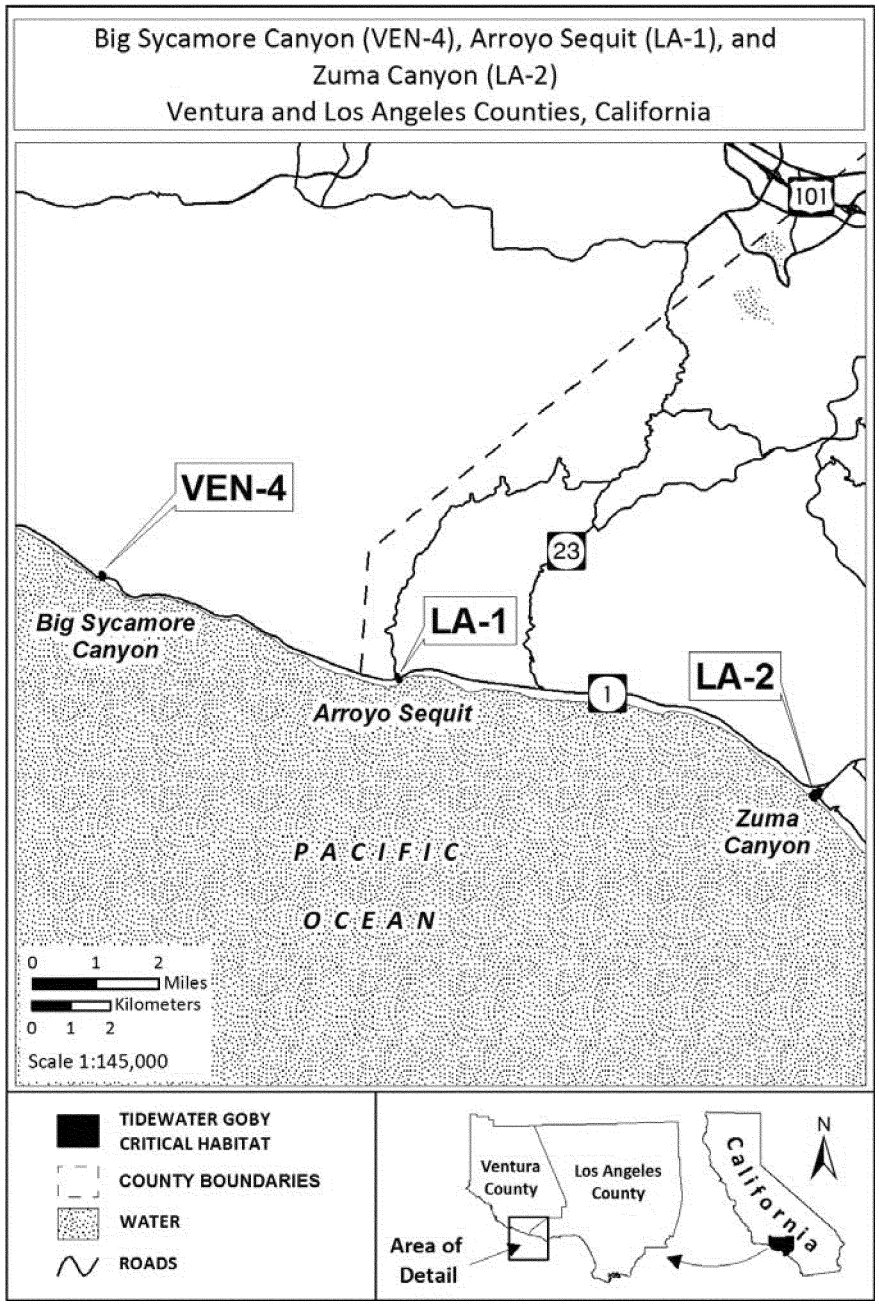
(63) Unit VEN 1: Ventura River, Ventura County, California. Map of VEN 1, VEN 2, and VEN 3 follows:



(64) Unit VEN 2: Santa Clara River, Ventura County, California. Map of Units VEN 1, VEN 2, and VEN 3 is provided at paragraph (63) of this entry.

(65) Unit VEN 3: J Street Drain—Ormond Lagoon, Ventura County, California. Map of Units VEN 1, VEN 2, and VEN 3 is provided at paragraph (63) of this entry.

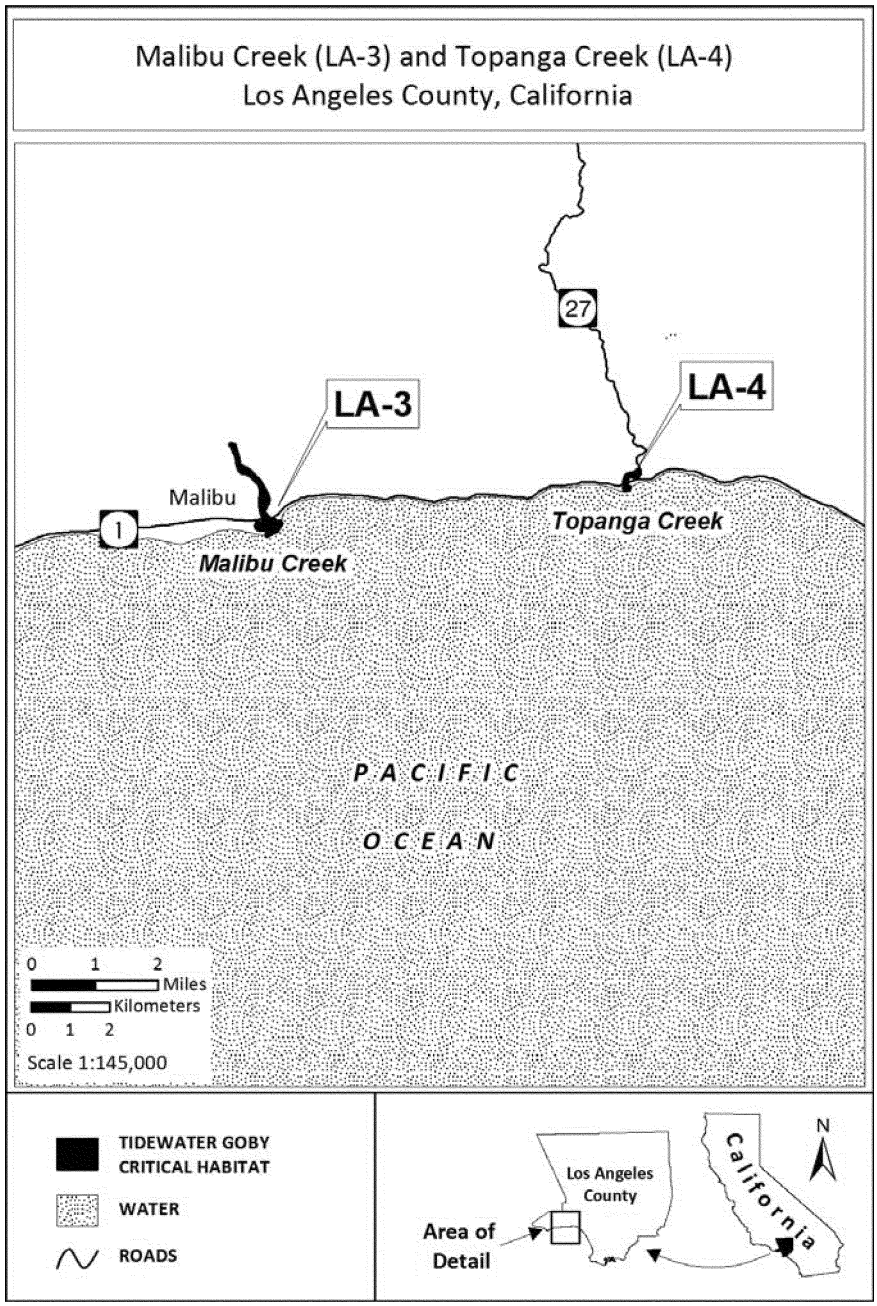
(66) Unit VEN 4: Big Sycamore Canyon, Ventura County, California. Map of Units VEN 1, LA 1, and LA 2 follows:



(67) Unit LA 1: Arroyo Sequit, Los Angeles County, California. Map of Units VEN 4, LA 1, and LA 2 is provided at paragraph (66) of this entry.

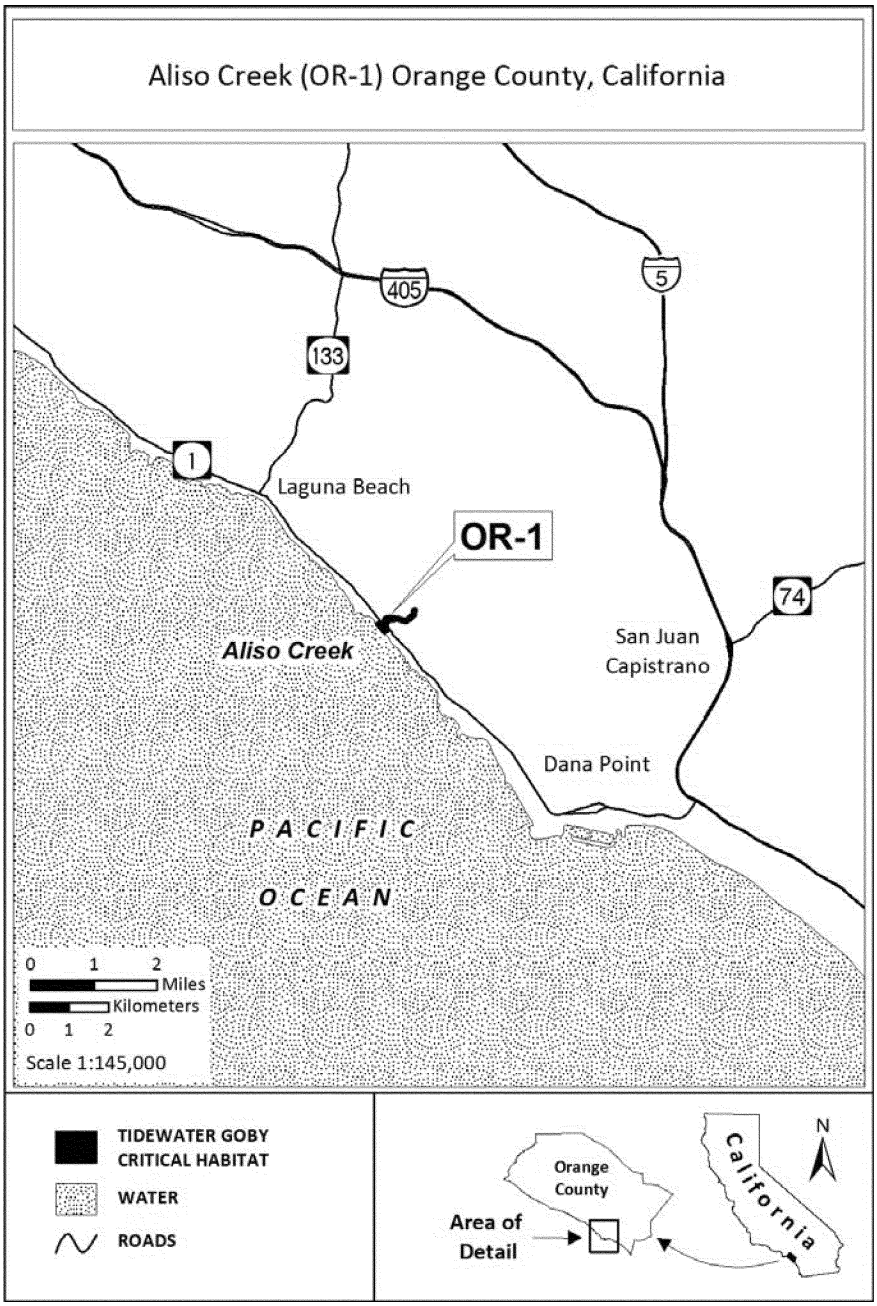
(68) Unit LA 2: Zuma Canyon, Los Angeles County, California. Map of Units VEN 4, LA 1, and LA 2 is provided at paragraph (66) of this entry.

(69) Unit LA 3: Malibu Creek, Los Angeles County, California. Map of Units LA 3, and LA 4 follows:

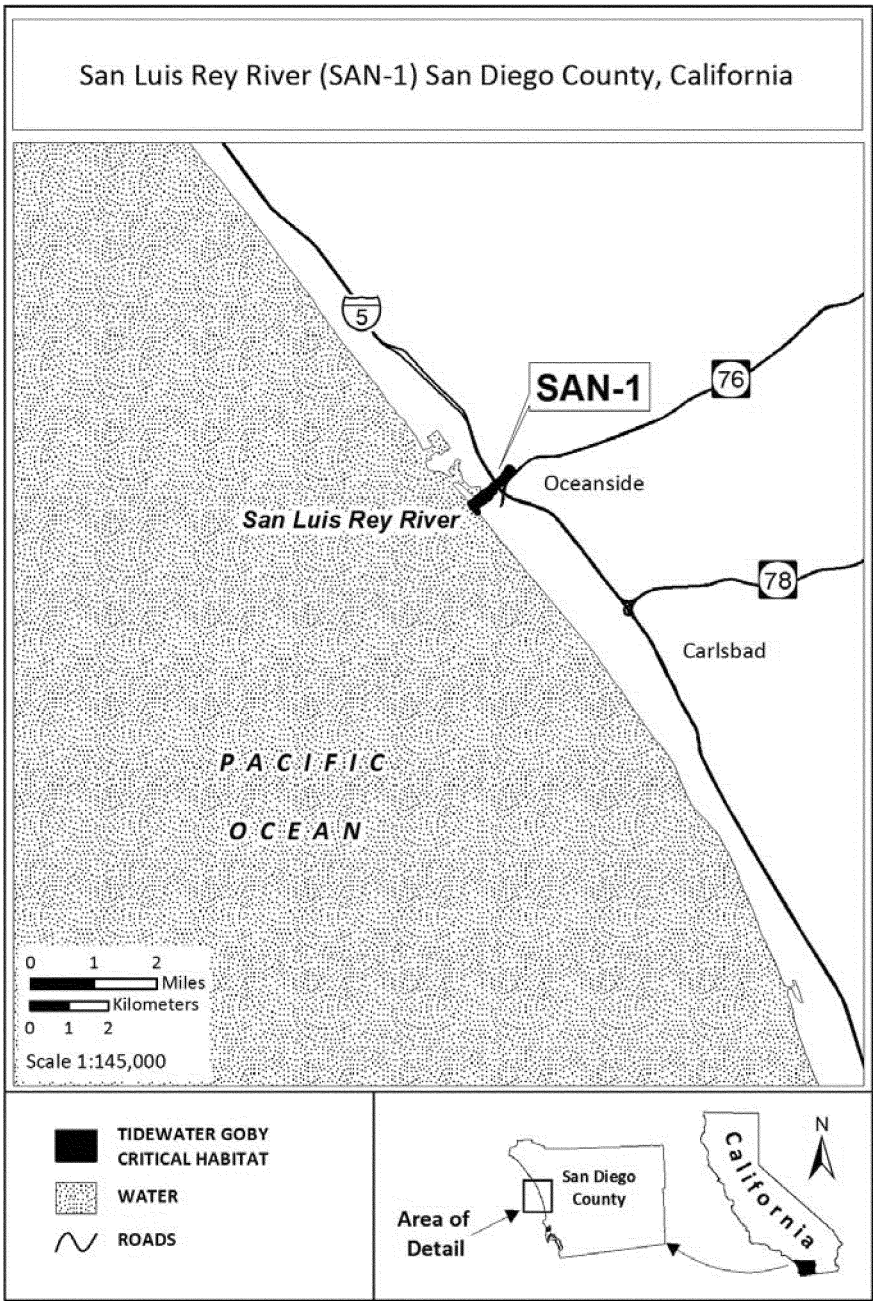


(70) Unit LA 4: Topanga Creek, Los Angeles County, California. Map of Units LA 3, and LA 4 is provided at paragraph (69) of this entry.

(71) Unit OR 1: Aliso Creek, Orange County, California. Map of Unit OR 1 follows:



(72) Unit SAN 1: San Luis Rey River, San Diego County, California. Map of Unit SAN 1 follows:



* * * * *

Dated: November 26, 2012.

Eileen Sobeck,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–02057 Filed 2–5–13; 8:45 am]

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Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 875, 879, et al.

Abandoned Mine Land Reclamation Program; Limited Liability for Noncoal Reclamation by Certified States and Indian Tribes; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 700, 875, 879, 884, and 885

[Docket ID: OSM–2012–0010]

RIN 1029–AC66

Abandoned Mine Land Reclamation Program; Limited Liability for Noncoal Reclamation by Certified States and Indian Tribes

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Office of Surface Mining Reclamation and Enforcement (OSM), are proposing changes to our abandoned mine land (AML) reclamation program regulations under title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). If finalized, the changes would allow states and Indian tribes that have certified correction of all known coal AML problems within their jurisdiction to receive limited liability protection for certain noncoal reclamation activities.

DATES: Electronic or written comments: We will accept written comments on the proposed rule on or before April 8, 2013.

Public hearings: If you wish to testify at a public hearing, you must submit a request before 4:30 p.m., Eastern Time, on March 8, 2013. We will hold a public hearing only if there is sufficient interest. Hearing arrangements, dates and times, if any, will be announced in a subsequent **Federal Register** notice. If you require reasonable accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

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

Federal eRulemaking Portal: http://www.regulations.gov. The proposed rule has been assigned Docket ID: OSM–2012–0010. Please follow the online instructions for submitting comments.

Mail/Hand-Delivery/Courier: Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 252 SIB, 1951 Constitution Avenue NW., Washington, DC 20240. Please include the Docket ID: OSM–2012–0010.

You may submit a request for a public hearing on the proposed rule to the person and address specified under **FOR FURTHER INFORMATION CONTACT**. If you require reasonable accommodation to attend a public hearing, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Alfred Whitehouse, Chief, Reclamation Support Division, 1951 Constitution Ave. NW., Washington, DC 20240; Telephone: 202–208–2788.

SUPPLEMENTARY INFORMATION:

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I. How does the AML reclamation program operate?

Congress established the AML reclamation program in title IV of SMCRA to remedy the extensive environmental damage caused by past coal mining activities. In general, the program is targeted toward reclaiming abandoned mine lands and waters adversely impacted by inadequately reclaimed surface coal mining operations on lands that were not subject to the reclamation requirements of SMCRA. Health, safety, and environmental problems associated with abandoned mine lands include surface and ground water pollution, entrances to open mines, water-filled pits, unreclaimed or inadequately reclaimed refuse piles and minesites (including some with dangerous highwalls), sediment-clogged streams, damage from landslides, and fumes and surface instability resulting from mine fires and burning coal refuse. Restoration activities under the abandoned mine reclamation program correct or mitigate these problems. While the central focus of the AML program has been to address coal-related health, safety and environmental problems, noncoal mining-related problems also are eligible to receive funding under certain conditions.

A core element of the national AML program is the reclamation plan developed by each qualifying state and tribe. Under section 405(b) of SMCRA, states (and, after amendment of the Act in 1987, the Navajo, Hopi, and Crow Indian tribes) that have coal lands and waters eligible for reclamation under title IV of SMCRA may submit a proposed plan to OSM for review. If the proposed plan demonstrates that the state or tribe has qualifying lands and waters along with the necessary legislative authority and administrative components to adequately administer the program, we will approve the plan under section 405(d) of SMCRA. Currently, 25 states and the 3 Indian tribes have approved AML reclamation plans, which allows them to submit applications for grant funding under section 405(f) of SMCRA.

During the first 30 years of the program, states and tribes with approved plans received grants and conducted reclamation activities to address AML-eligible problems. During this period, the states of Louisiana, Montana, Texas, and Wyoming and the Crow Tribe, the Hopi Tribe, and the Navajo Nation completed reclamation of all known coal-related AML problems within their jurisdiction and certified to that fact in accordance with section 411(a) of SMCRA. Once certified, these states and tribes were authorized to expend title IV grant funding on the reclamation of qualifying noncoal AML problems and on the construction of public facility projects under the provisions of paragraphs (b) through (g) of section 411 of SMCRA. In particular, section 411(b) provides a formal structure for addressing noncoal problems though identification and prioritization.

In contrast, uncertified states have generally focused on completing coal-related reclamation projects, although they also have the option to address noncoal problems in limited circumstances as provided under section 409 of SMCRA.

In 2006, the Tax Relief and Health Care Act of 2006, Public Law 109–432 (the ''2006 amendments'') substantially modified the AML reclamation program in title IV of SMCRA. The 2006 amendments altered AML fee collection rates on the industry, increased program funding, ended the appropriation process for AML grants to states and tribes, provided general Treasury revenues as a new source of funding, targeted funding in uncertified states more directly at addressing high priority coal-related AML problems, and made a number of procedural changes—such as requiring OSM approval for revisions to the national inventory of AML problems. Please refer to the final rule published November 14, 2008 (the ''2008 rule'') [1] for a more complete description of the program changes resulting from the 2006 amendments.

Prior to the 2006 amendments, section 402(g)(1) of SMCRA allocated 50 percent of the total reclamation fees paid by coal mine operations located

[1] 73 FR 67576–67647.

within each state or tribe to that state or tribe. These allocations within the AML Fund are referred to as ''State share'' or ''Tribal share'' funds. However, distribution of the State share and Tribal share funds was subject to annual appropriation, and the full amount allocated each year was not always appropriated.

Among other changes, the 2006 amendments barred certified states and tribes from receiving their State share and Tribal share moneys from the AML Fund.[2] Under the 2006 amendments, instead of receiving moneys from the AML Fund, they receive two new types of funding—prior balance replacement funds and certified in lieu funds—paid from the general funds of the United States Treasury and not subject to annual appropriations. Prior balance replacement funds are authorized by section 411(h)(1) of SMCRA; they either have been or will be distributed in seven equal annual installments beginning in fiscal year 2008.[3] The total of the seven payments equals the difference between the amount of the State share or Tribal share that was allocated to each state or tribe and the amount that was actually appropriated before the 2006 amendments. Certified in lieu funds are authorized by section 411(h)(2) of SMCRA and are annual payments from the general funds of the United States Treasury in an amount equal to 50 percent of the reclamation fees paid by coal mining operations within each certified state or tribe.[4]

Our 2008 rule revised our regulations to conform to the 2006 amendments. Of note, in accordance with the 2006 amendments, the 2008 rule gave certified states and tribes greater latitude in how they are allowed to use the new funding that they receive. In particular, while certified programs are still required to address known and newly discovered coal problems in a timely manner, funding not needed to address coal problems may be used for a wider range of purposes than previously allowed, including purposes not related to noncoal reclamation or public facility projects under paragraphs (b) through (g) of section 411 of SMCRA.

II. What is the limited liability provision of SMCRA?

On November 5, 1990, SMCRA was amended to extend fee collection authority and to revise both the way the AML Fund moneys are allocated and the purposes for which AML Fund moneys may be used. Among the many changes made to title IV at that time, a new section 405(l) was added, which specifies that no state or Indian tribe shall be liable under Federal law for any costs or damages as a result of any action or omitted action while carrying out an approved abandoned mine reclamation plan. The new paragraph applies to all Federal laws. It does not preclude liability for gross negligence or intentional misconduct by a state or Indian tribe. States and tribes value the protection provided by this provision because state and tribal program officials routinely make a broad range of decisions concerning site selection and abatement of serious health, safety, and environmental problems. The limited liability provision provides them a degree of protection as they make difficult choices with limited program funding.

On May 31, 1994, we adopted 30 CFR 874.15 and 875.19 to implement section 405(l) of SMCRA.[5] The language in the two sections is identical—30 CFR 874.15 applies to uncertified programs, while 30 CFR 875.19 applies to certified programs.

III. Why are we proposing rule changes related to the limited liability provision?

We propose to revise our rules in response to concerns that our 2008 rule may have created a disincentive for certified States and tribes to conduct noncoal reclamation activities. In the 2008 rule, we did not change the language of either 30 CFR 874.15 or 875.19. However, we did conclude that certified programs expending the two new sources of funding made available by the 2006 amendments under sections 411(h)(1) and (h)(2) of SMCRA (prior balance replacement funding and certified in lieu funding, respectively) cannot conduct a noncoal reclamation program under paragraphs (b) through (g) of section 411 of SMCRA.[6] As a consequence of this determination, any noncoal reclamation project would not be subject to the provisions of 30 CFR part 875, which includes the limited liability provision.

We received a number of comments on the application of the limited liability provision to certified programs during our 2008 rulemaking. The Interstate Mining Compact Commission (IMCC), the National Association of Abandoned Mine Land Programs (NAAMLP), and one state commented that ''certified AML programs should not be required to follow all of Part 875 to enjoy the protection of the limited liability provisions of § 875.19.'' Since we adopted the 2008 rule, program officials in certified states and tribes have continued to express concern over the loss of limited liability protection for noncoal reclamation projects.[7] This proposed rule is designed to address those concerns and restore limited liability protections for noncoal reclamation and public facility projects conducted pursuant to a SMCRA noncoal program and paragraphs (b) through (g) of section 411 of SMCRA.

IV. How do we propose to revise our rules?

We are proposing to revise our regulations to clarify that certified states and tribes, using prior balance replacement funds and certified in lieu funds, may voluntarily conduct noncoal reclamation programs under the provisions of 30 CFR subchapter R and receive limited liability protection for projects completed under those provisions. Our proposed revision would retain the ability of certified states or tribes to expend title IV moneys on projects that are not part of a SMCRA noncoal reclamation program, but they would not receive limited liability protection for work on those projects.

SMCRA section 405(l) protects the states or tribes from liability ''under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a[n approved] State abandoned mine reclamation plan * * *.'' 30 U.S.C. 1235(l). Under current regulations, certified states and tribes have very few SMCRA-related administrative duties when they conduct noncoal reclamation but they also do not receive limited liability protection for any of their work because that work is not considered to be part of a noncoal reclamation program conducted in accordance with an approved State abandoned mine reclamation plan. 30 CFR 875.19; see also 73 FR 67613–67614. To afford

[2] 30 U.S.C. 1231(f)(3)(B).

[3] 30 U.S.C. 1240a(h)(1).

[4] 30 U.S.C. 1240a(h)(2).

[5] 59 FR 28172.

[6] 73 FR 67611.

[7] *See, e.g.,* Statement of Madeline Roanhorse, Manager, AML Reclamation/UMTRA Department, Navajo Nation On Behalf of the National Association of Abandoned Mine Land Programs re Oversight Hearing on ''The Effect of the President's FY 2013 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction'' before the House Energy and Mineral Resources Subcommittee, March 6, 2012, p. 7 (''Without this limited liability protection, these states and tribes potentially subject themselves to liability under the Clean Water Act and CERCLA for their AML reclamation work. Nothing in the 2006 Amendments suggested that there was a desire or intent to remove these liability protections, and without them in place, certified states and tribes will need to potentially reconsider at least some of their more critical AML projects.'').

certified programs the protections of the limited liability provision at least in connection with some of their work, we propose to allow them the option of using their title IV moneys on SMCRA noncoal reclamation programs that will be part of an approved state abandoned mine reclamation plan; that is, on programs operating under paragraphs (b) through (g) of section 411 of SMCRA and that follow the requirements of 30 CFR subchapter R.

Under such a noncoal reclamation program, limited liability protections would extend not only to site reclamation activities but also to program administration, site development, environmental management, and other actions taken and not taken in support of SMCRA noncoal reclamation activities. Because the protections only extend to ''action taken or omitted in the course of carrying out'' an approved state or Indian tribe abandoned mine reclamation plan, there must be a clear nexus between the action or inaction and an approved state or abandoned mine reclamation plan for the protections to apply.

In the 2008 rule, we concluded that certified programs could not conduct noncoal reclamation programs under 30 CFR part 875 using prior balance replacement funds or certified in lieu funds.[8] The 2008 rule allowed certified states and tribes to use prior balance replacement funds for any purpose specified by the state legislature or tribal council under 30 CFR 872.31 and certified in lieu funds for any purpose under 30 CFR 872.34. However, we also determined that the 2006 amendments did not authorize certified states and Indian tribes to use their title IV funding for projects conducted under paragraphs (b) through (g) of section 411 because those paragraphs specifically refer to the use of State share and Tribal share funds, which certified states and tribes no longer receive.

Although we adopted this approach in the 2008 rule, we recognized at the time that SMCRA was not clear and we considered possible alternatives. First, in our proposed rule that preceded the 2008 rule, we proposed that certified states and tribes could choose to use their title IV moneys for noncoal reclamation and public facility projects under 30 CFR part 875.[9] Second, we presented an alternative that would have required certified states and tribes to spend their certified in lieu funds for noncoal reclamation and public facility projects under part 875.[10]

We now propose an approach to the use of prior balance replacement funds and certified in lieu funds that is similar to the one we proposed in 2008—*i.e.,* that certified states and tribes can choose to use their title IV moneys for noncoal reclamation and public facility projects under 30 CFR part 875. We do not believe that we need to amend the regulatory language in part 872 to effect this change—the current language is broad enough to allow certified states and tribes to expend their money on noncoal reclamation and public facility projects under 30 CFR subchapter R if they choose to do so. We invite comment as to whether we need to make any modifications to part 872, particularly §§ 872.31(a) and 872.34, to ensure that certified states and tribes receive limited liability protection for projects completed under a SMCRA noncoal program. Although we are not proposing changes to part 872, we are proposing revisions to other parts, as described further below.

A. How do we propose to revise 30 CFR Part 700: General?

1. Section 700.5: Definitions

We propose to revise § 700.5 to add a definition for the term ''SMCRA'' to improve the clarity of existing regulations. The term ''*SMCRA*'' means the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95–87).

B. How do we propose to revise 30 CFR Part 875: Certification and Noncoal Reclamation?

We propose to revise this part to clarify that certified states and tribes may voluntarily conduct noncoal reclamation programs under the provisions of 30 CFR subchapter R and receive limited liability protection for projects completed under those provisions. In general, our proposed revisions set forth the procedures that certified states and tribes would be required to follow if they voluntarily choose to use their title IV funding for a noncoal reclamation project or public facility project under SMCRA and 30 CFR subchapter R. These procedures relate to the eligibility of sites and restrictions related to land acquisition and management, lien determinations, and contractor eligibility. In addition, this part would make clear that certified states and Indian tribes would receive limited liability protection under 30 CFR 875.19 for authorized noncoal reclamation and supporting administrative and programmatic activities.

1. Section 875.11: Applicability

We propose to revise § 875.11(b)(2) to provide that under part 875 certified programs may use prior balance replacement funds and certified in lieu funds not only to engage in coal reclamation projects that are necessary to maintain certification but also to conduct noncoal reclamation programs.

During our previous rulemaking related to the 2006 amendments, we proposed similar language under § 875.11(b)(2) that would have given certified states and Indian tribes the choice to expend prior balance replacement funds or certified in lieu moneys on noncoal reclamation programs under SMCRA.[11] The majority of comments we received on this proposal were critical because certified states and tribes would have had to comply with the reclamation priorities for noncoal programs, which are set out in § 875.15. According to commenters, this would have placed ''unsupported and illegal restraints'' on their use of prior balance replacement funds and certified in lieu funds. The commenters recommended that the proposed language be revised to ensure that certified states and Indian tribes did not have to comply with all the provisions of part 875 and to clarify that certified states and tribe can elect to do noncoal reclamation outside the framework of that part.

Based on these comments and upon further analysis of our approach, the final rule implementing the 2006 amendments did not carry forward the option in proposed § 875.11(b)(2) that would have allowed certified states and Indian tribes the choice to expend prior balance replacement funds and certified in lieu funds on noncoal reclamation programs under SMCRA. Thus, the existing rule only requires certified states and tribes to follow part 875 when they expend prior balance replacement funds and certified in lieu funds on coal reclamation necessary to maintain their certification. In other words, certified states and tribes are no longer required to follow part 875 if they use their title IV funding for noncoal reclamation and public facility projects because we determined that those projects would not be completed under SMCRA and its regulations.

In this proposed rule, we are reexamining our 2008 decision on this topic. We are considering giving certified states and tribes the choice to

[8] 73 FR 67610.

[9] 73 FR 35236, June 20, 2008.

[10] 73 FR 35228, June 20, 2008.

[11] 73 FR 35259, June 20, 2008.

use their title IV moneys under a SMCRA noncoal program under part 875. We believe this proposed rule would be consistent with section 411(h)(1) of SMCRA, which grants the state legislatures and tribal councils discretion as to how prior balance replacement funds may be spent because the state legislature or tribal council could direct these funds to be expended pursuant to a SMCRA noncoal program. In addition, we believe that optional coverage would be consistent with section 411(h)(2) of SMCRA, which contains no specific instruction on the use of certified in lieu funds and does not place any restrictions upon them. Therefore, under the proposed rule, certified states and tribes would be able to direct, if they so choose, some or all of these funds to be used for a SMCRA noncoal reclamation program consistent with section 411 of SMCRA and 30 CFR part 875. This approach would also be consistent with our view that states and tribes may use these funds for coal reclamation to maintain certification, a use also not explicitly contained in either paragraph (h)(1) or paragraph (h)(2) of section 411 of SMCRA.

Finally, by allowing certified states and tribes the latitude to conduct activities under 30 CFR part 875, we would continue to promote the AML reclamation plan as a central component of noncoal reclamation. Under paragraphs (b) through (g) of section 405 of SMCRA, states and tribes may receive title IV grants only when they have received program approval based upon a complete reclamation plan. Certified states and tribes have approved reclamation plans, and they operate under and maintain these approved plans in order to receive title IV funding. Reclamation activities carried out pursuant to a SMCRA noncoal program would enjoy the limited liability protections of section 405(l) of SMCRA because the work would be conducted pursuant to an approved reclamation plan that conforms to paragraph (e) and (f) of section 405 of SMCRA.

2. Section 875.16: Exclusion of Certain Noncoal Reclamation Sites

We propose to revise this section to prohibit the reclamation of sites designated for remedial action under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) [12] or listed for remedial action under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) [13] by certified states or tribes using prior balance replacement funds or certified in lieu funds if they conduct the reclamation as a component of a voluntary noncoal reclamation program under Part 875. SMCRA clearly prohibits ''[s]ites and areas designated for remedial action pursuant to [UMTRCA] or which have been listed for remedial action pursuant to [CERCLA]'' from being ''eligible from expenditures from the Fund under'' section 411 of SMCRA.[14]

In the 2008 rule, one modification we made to this provision was to explicitly allow certified states and Indian tribes to expend their title IV moneys for UMTRCA and CERCLA sites so as to be consistent with our changes in 30 CFR part 872 that allowed these states and Indian tribes maximum flexibility to expend their prior balance replacement funds and certified in lieu funds.

Our proposed revision to 30 CFR 875.16(b) would continue to prohibit a certified state or Indian tribe from expending money left over from the pre-2008 distributions of funds from section 402(g)(1) on UMTRCA and CERCLA sites. The section would be revised to prohibit the expenditure of prior balance replacement funds and certified in lieu funds for UMTRCA and CERCLA sites if the state or tribe chooses to conduct a SMCRA noncoal program. However, our proposed revision would also retain the ability of a certified state or tribe to expend title IV moneys on UMTRCA and CERCLA sites if those projects are completed outside the scope of a SMCRA noncoal reclamation program. In such an instance, the certified state or tribe would not receive limited liability coverage under SMCRA.

3. Section 875.17: Land Acquisition Authority—Noncoal

Consistent with our proposal to allow certified programs to voluntarily use prior balance replacement funds and certified in lieu funds to conduct a noncoal reclamation program under part 875, we propose to revise this section to confirm that the requirements specified in parts 877 (Rights of Entry) and 879 (Acquisition, Management and Disposition of Lands and Water) also apply to a state's or tribe's SMCRA noncoal program conducted voluntarily under part 875.

4. Section 875.19: Limited Liability

We propose to revise this section to clarify that no certified state or Indian tribe conducting noncoal reclamation activities under the provisions of part 875 is liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved state or Indian tribe abandoned mine reclamation plan.

In our 2008 rule, we did not revise this section, but we did note that under the proposed rule, the only scenario in which a certified state or Indian tribe could avail itself of the limited liability provision of § 875.19 would be if it decided to maintain a noncoal reclamation program under section 411 of SMCRA. As previously discussed, we did not select our proposed approach at that time. Under the approach we adopted in the 2008 rule, we concluded that because prior balance replacement funds and certified in lieu funds could not be used to fund a noncoal reclamation program under SMCRA, section 405(l) of the Act did not support an interpretation that limited liability protection extends to noncoal reclamation programs that are not conducted under title IV of SMCRA.

Our current proposal is consistent with the approach we proposed, but did not adopt, in 2008. It is also consistent with section 405(l) of SMCRA, as this section would not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the state or Indian tribe that is carrying out a SMCRA noncoal program in accordance with its approved reclamation plan.

5. Section 875.20: Contractor Eligibility

We propose to revise this section to clarify that certified states and tribes that voluntarily conduct noncoal reclamation activities under part 875 must comply with the contractor eligibility requirements. This section also applies to certified states and tribes that conduct coal reclamation to maintain certification.

C. How do we propose to revise 30 CFR Part 879: Acquisition, Management, and Disposition of Lands and Water?

Because this proposed rule modifies part 875 to allow certified states and tribes to voluntarily conduct noncoal reclamation activities under SMCRA, we are proposing changes to part 879 so that our procedures related to acquisition, management, and disposition of land and water are consistent with this option. In general, with this proposed rule, certified states and Indian tribes that voluntarily conduct noncoal reclamation activities under part 875 would be required to follow the provisions of part 879. To ensure that any moneys received from

[12] 42 U.S.C. 7901 *et seq.*

[13] 42 U.S.C. 9601 *et seq.*

[14] 30 U.S.C. 1240a(d).

the disposition of lands and waters are returned to the reclamation program, we also propose to revise § 879.15 to specify that all moneys received by a certified state or tribe in the context of the noncoal reclamation program must be handled in accordance with § 885.19.

1. Section 879.1: Scope

We propose to revise this section to clarify its applicability to certified states and tribes that choose to conduct noncoal reclamation activities under part 875.

2. Section 879.11: Land Eligible for Acquisition

We propose to revise § 879.11(a) and 879.11(b) to clarify that these sections apply to a certified state or Indian tribe that chooses to conduct noncoal reclamation activities under part 875. In addition, as we reviewed our regulations to implement this proposed rule, we determined that existing § 879.11 was not as clear as we intended, and we propose to restructure § 875.11(a) to confirm that OSM must execute a written approval and make the findings required by § 875.11(a)(1) and 875.11(a)(2) when we acquire land.

3. Section 879.15: Disposition of Reclaimed Land

We propose to revise § 879.15(h) to specify that moneys received from disposal of land by certified states and tribes conducting a SMCRA noncoal reclamation program under part 875 must be handled as unused funds in accordance with § 885.19.

D. How do we propose to revise 30 CFR part 884: State Reclamation Plans?

We propose to revise part 884 to specify the contents of a proposed reclamation plan for certified states and Indian tribes. In our 2008 rule, we revised § 884.13 to reflect the view that the contents of a reclamation plan for a certified program should be very limited because certified programs would largely be expending the two new sources of funding outside of the parameters of the part 875 noncoal reclamation requirements. Specifically, our 2008 rule established that a reclamation plan for a certified program was only required to contain two components; the Governor's designation under § 884.13(a) and a commitment to address coal problems in accordance with §§ 875.13(a)(3) and 875.14(b).

In this proposed rule, we are revisiting our decision in the 2008 rule and proposing to revise § 884.13 to require that, if certified programs maintain reclamation plans, those plans must contain all of the components of § 884.13(a) through (f)—instead of just the two aforementioned components. This change would be consistent with our position that to acquire the limited liability protections under section 405(l) of SMCRA, certified states and Indian tribes must conduct reclamation activities pursuant to an approved reclamation plan that conforms to paragraphs (e) and (f) of section 405. We believe that maintenance of a reclamation plan that fully conforms to paragraphs (e) and (f) of section 405 would ensure that a certified program has all of the necessary legal, administrative, and procedural components to conduct coal reclamation under part 874, to conduct noncoal reclamation under part 875, and to gain the limited liability protections under section 405(l) of SMCRA.

1. Section 884.13: Content of Proposed State Reclamation Plan

As discussed above, we propose to revise this section to clarify that the reclamation plan for a certified program must contain all of the information identified in the section as well as a commitment to address eligible coal problems found or occurring after certification as required in §§ 875.13(a)(3) and 875.14(b). The revision would ensure that reclamation plans for certified programs will contain all of the necessary legal, administrative, and procedural components to conduct coal reclamation to maintain certification and to conduct voluntary noncoal reclamation activities under part 875.

E. How do we propose to revise 30 CFR part 885: Grants to Certified States and Indian Tribes?

We are proposing changes in this part consistent with our proposal that certified states and tribes may voluntarily use prior balance replacement funds and certified in lieu funds for noncoal reclamation under part 875.

To implement our proposal, we would need to revise several regulations in this part to ensure that certain grants management and programmatic activities are conducted properly. In particular, we propose to revise § 885.12 to expand the list of activities eligible for certified program funding, and we are proposing revisions to § 885.16 in order to ensure that the appropriate project authorization and environmental reviews are conducted for voluntary noncoal reclamation under part 875. Finally, we propose to revise § 885.20 to ensure that we receive the necessary grant information and project reporting for voluntary noncoal reclamation under part 875.

1. Section 885.12: What can I use grant funds for?

We propose to revise § 885.12(b) to clarify that certified programs may use prior balance replacement funds and certified in lieu funds for noncoal reclamation under section 411 of SMCRA and part 875.

2. Section 885.16: After OSM approves my grant, what responsibilities do I have?

We propose to revise § 885.16(e) to ensure that certified programs that use prior balance replacement funds and certified in lieu funds for noncoal reclamation under part 875 receive a written authorization to proceed with reclamation on individual projects. Our authorization to proceed denotes that both the certified program and OSM have taken all actions necessary to ensure compliance with the National Environmental Policy Act of 1969 (NEPA),[15] and any other applicable laws, clearances, permits, or requirements.

To receive an authorization to proceed from us, a certified state or tribe would be required to follow its approved reclamation plan and conduct administrative and noncoal site development reclamation activities within the regulatory structure provided by 30 CFR subchapter R. Requesting an authorization to proceed from us would be a voluntary action on the part of the certified state or tribe. If we issue an authorization to proceed, the certified state or tribe would qualify for the limited liability protections for that project, including the administrative and programmatic activities directly related to that project. Because certified states and Indian tribes would not be required under this proposed rule to expend their title IV moneys under a SMCRA noncoal program, it would be possible for a certified state or Indian tribe to complete noncoal reclamation or public facility projects outside the parameters of a SMCRA noncoal reclamation program, including projects at CERCLA or UNTRCA sites as provided by other laws. If a certified state or tribe conducts noncoal reclamation activities outside SMCRA, it would not need to request an authorization to proceed from us, and it would not receive limited liability protection for that project.

Requests for authorizations to proceed would be required to contain the information needed for us to complete

[15] 42 U.S.C. 4321 *et seq.*

our review requirements and meet applicable deadlines. Any noncoal reclamation project proposal submitted to us would be required to be consistent with 30 CFR subchapter R and the approved state reclamation plan, and it would be required to be submitted well in advance of any planned construction so as to allow adequate time for review, including a NEPA review in order to fully consider reasonable alternatives.

Certified states and tribes have many years of experience developing noncoal projects with moneys from the AML Fund. As with those projects, submissions for sites to be reclaimed as noncoal reclamation projects with prior balance replacement funding and certified in lieu funding would be required to comply with the requirements of program-related environmental reviews and satisfy AML grant and administrative components. These review elements would include, but would not be limited to, information sufficient for the conduct of assessments under NEPA, the Endangered Species Act, National Historic Preservation Act, and the Clean Water Act. In addition, we would review proposals and conduct oversight activities as needed to ensure that our program requirements related to site eligibility, grants management, and AML Inventory management are met. Proposals that receive our approval as noncoal reclamation projects would be required to be implemented consistent with the scope of work we approve, and we would be required to review changes in project scope or activities that would materially alter the environmental consequences of the reclamation. Generally, noncoal reclamation projects conducted with prior balance replacement funds or certified in lieu funds would be required to adhere to the development, review, and approval components we currently rely on for AML coal sites being addressed to maintain certification.

3. Section 885.20: What must I report?

We propose to revise § 885.20 to clarify that certified programs using prior balance replacement funds and certified in lieu funds for noncoal reclamation under part 875 would be required to update the AML inventory for each noncoal reclamation project as it is funded.

V. How do I submit comments on the proposed rule?

General Guidance

We will review and consider all comments submitted to the addresses listed above (see **ADDRESSES**) by the close of the comment period (see **DATES**). The most helpful comments and the ones most likely to influence the final rule are those that include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent federal laws or regulations, technical literature, or other relevant publications and those that involve personal experience. Your comments should reference a specific portion of the proposed rule or preamble, be confined to issues pertinent to the proposed rule, explain the reason for any recommended change or objection, and include supporting data when appropriate.

Please include the Docket ID ''OSM–2012–0010'' at the beginning of all written comments. We cannot ensure that comments received after the close of the comment period (see **DATES**) or at locations other than those listed above (see **ADDRESSES**) will be included in the docket for this rulemaking or considered in the development of a final rule.

Public Availability of Comments

Before including your address, phone number, 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.

Public Hearings

We will hold a public hearing on the proposed rule only if there is sufficient interest to do so. We will announce the time, date, and address for any hearings in the **Federal Register** at least 7 days before the hearing.

If you wish to testify at a hearing, please contact the person listed in **FOR FURTHER INFORMATION CONTACT**, either orally or in writing, by 4:30 p.m., Eastern Time, on March 8, 2013. If no one expresses an interest in testifying at a hearing by that date, we will not hold a hearing. If only a limited number of people express an interest, we will hold a public meeting or teleconference rather than a hearing. We will place a summary of the public hearing in the docket for this rulemaking.

If a public hearing is held, it will continue on the specified date until all persons scheduled to speak have been heard. If you are in the audience and have not been scheduled to speak but wish to do so, you will be allowed to testify after the scheduled speakers. We will end the hearing after all persons scheduled to speak and persons present in the audience who wish to speak have been heard. To assist the transcriber and ensure an accurate record, we request, if possible, that each person who testifies at a public hearing provide us with a written copy of his or her testimony.

Public Meeting or Teleconference

We may hold a public meeting, in person or by teleconference, in place of a public hearing if there is only limited interest in a hearing. If you wish to meet with us to discuss the proposed rule, you may request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All meetings will be open to the public, and, if appropriate, we will post a notice of the meetings. We will include a written summary of the meeting in the docket for this rulemaking.

VI. Procedural Matters and Required Determinations.

A. Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. OIRA has determined that this proposed rule is not significant.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

At the time of this rulemaking, there are a total of seven certified states and tribes who would be affected by this proposed change. As previously discussed, the rulemaking would remove a disincentive for certified states and tribes to undertake noncoal reclamation. We estimate that, if the proposed rule is adopted, approximately 30 to 60 additional noncoal reclamation projects would be covered by SMCRA's limited liability provision each year. We do not anticipate any additional costs to

the certified states and tribes because this proposed rule creates a voluntary opportunity to redirect existing grant funds to noncoal reclamation under 30 CFR part 875 to obtain the limited liability protections of § 875.19. By offering the incentive of limited liability coverage, the rule should result in more noncoal reclamation projects being undertaken. Increased reclamation would improve the quality of the human environment and eliminate hazardous conditions while improving water quality, air quality, wildlife habitat, community aesthetics, and the visual landscape.

B. Regulatory Flexibility Act

The Department of the Interior certifies that this proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA).[16] The proposed revisions would not be expected to have an significant adverse economic impact on the regulated community, including small entities. As previously stated that rule would affect the states of Louisiana, Montana, Texas, and Wyoming and the Crow Tribe, the Hopi Tribe, and the Navajo Nation.

C. Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act.[17] For the reasons previously discussed, the proposed rule would not—

a. Have an annual effect on the economy of $100 million or more.

b. Cause a major increase in costs or prices for consumers, individual industries; federal, state, or local government agencies; or geographic regions.

c. Have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. Unfunded Mandates

This proposed rule would not impose an unfunded mandate on state, local, or tribal governments or the private sector of more than $100 million per year. The rule would not have a significant or unique effect on state, tribal, or local governments or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act[18] is not required.

E. Executive Order 12630—Takings

The proposed rule would not have significant takings implications because it is not a governmental action capable of interference with constitutionally protected property rights. A takings implication assessment is not required.

F. Executive Order 13132—Federalism

This proposed rule would not alter or affect the relationship between states and the Federal Government. Therefore, the proposed rule would not have significant Federalism implications. Consequently, there is no need to prepare a Federalism assessment.

G. Executive Order 12988—Civil Justice Reform

The Office of the Solicitor for the Department of the Interior has determined that this proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

H. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, we have evaluated the potential effects of this rule on Federally-recognized Indian Tribes and have determined that the proposed revisions would not have substantial direct effects 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. Indian Tribe representatives were invited to consult with OSM on our intention to propose a rule extending section 405(l) limited liability protections. In response to a request for consultation, we met with Indian tribe program representatives from the Hopi and Navajo nations on July 10, 2012, at Kykotsmovi, Arizona. The Crow Tribe did not request consultation.

During the consultation with the Hopi and the Navajo Nations, the Tribes stated that they would like the proposed rule to allow a Tribe with an approved AML program to be able to request limited liability protection for some projects but to decline it for others. Our proposed rule reflects this optional approach. As proposed, the rule would allow a certified State or Indian Tribe to request OSM approval for specific noncoal and public facility projects that conform to the reclamation provisions of section 411(b) through (g) of SMCRA and 30 CFR part 875.

The Tribes also indicated that they would prefer that the limited liability protections apply to all projects, including public facility projects, and that OSM should be involved in the NEPA process because OSM understands the projects and can move quickly through the approval process. Our proposed rule would allow public facility projects to receive limited liability if the Tribe chooses to conform to the reclamation provisions of section 411(b) through (g) of SMCRA and 30 CFR part 875 and to receive the protections of section 405(l).

Similarly, the Tribes requested that the limited liability protection apply to non-coal reclamation projects, as they were concerned that they could face liability if they chose to remediate sites, such as abandoned uranium mines. As proposed, our rule would provide the option for certified States and Tribes to receive limited liability protection for such project; however, we can make no predictions on how other federal agencies might approach the provision when implementing other federal laws.

The Tribes questioned how the proposed rule might affect a Tribe's AML Reclamation Plan. Unfortunately, we are unable to completely answer this question at this time because until the rule is finalized, the effects of any final rule on an approved AML reclamation plan are speculative. If and when the rule is finalized, OSM together with the Tribes would need to conduct a detailed review of the existing approved AML reclamation plans to determine if changes need to be made. Because noncoal reclamation was routinely conducted by certified States and Tribes prior to our rulemaking that implemented the 2006 amendments to SMCRA, it is possible that some or all of the approved AML reclamation plans may already contain sufficient language to implement the rule with only minimal changes.

The Tribes also voiced concern about the extent of limited liability protection provided to public facility projects. The limited liability provision extends protections to public facility projects if they are conducted under section 411(b) through (g) of SMCRA and 30 CFR part 875. The limited liability provision specifies that no State or Indian tribe shall be liable under Federal law for any costs or damages as a result of any action taken or omitted while carrying out an approved abandoned mine reclamation plan. The provision does not preclude liability for gross negligence or intentional misconduct by a state or Indian tribe.

In addition, the Tribes commented on the relationship between SMCRA's limited liability provision and the Department of the Interior's trust responsibilities. More specifically, the

[16] 5 U.S.C. 601 *et seq.*

[17] 5 U.S.C. 804(2).

[18] 2 U.S.C. 1534.

Tribes asked if OSM provides funding to a Tribe, does OSM assume liability? We believe that the limited liability provision of SMCRA and the Department's trust responsibilities are two essentially unrelated matters. The Department's trust responsibilities are a special Federal responsibility, involving the legal responsibilities and obligations of the United States towards Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. In contrast, SMCRA section 405(l) relates to the potential liability of a State or Indian tribe under federal law for costs or damages when carrying out an approved reclamation plan. Indian tribe grant recipients provide commitments to OSM that expenditures of AML funding will comply with federal laws (as well as State, Tribe, and local laws). By providing funding, OSM assumes no liabilities for actions taken by the Tribe or Tribe officials. As proposed, this rule does not affect the Department's trust responsibilities.

I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not considered a significant energy action under Executive Order 13211 because it is not classified as a significant rule under Executive Order 12866 and because the proposed revisions would not have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a statement of energy effects is not required.

J. Paperwork Reduction Act

This proposed rule contains no new information collection requirements that are not already covered by the Office of Management and Budget (OMB) control numbers: 1029–0059 for 30 CFR Parts 735, 885 and 886 and OSM's grant forms OSM–47, OSM–49 and OSM–51; and 1029–0087 for the OSM–76—Problem Area Description Form used for OSM's Abandoned Mined Land Inventory System (AMLIS). We anticipate that there will not be an increase in the number of respondents who prepare OSM's grant forms, nor an increase in burden per respondent based on this proposed rulemaking.

K. National Environmental Policy Act

We have determined that the revisions in this proposed rule are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act,[19] as provided in 43 CFR 46.205(b). The specific categorical exclusion that applies is the exclusion in 43 CFR 46.210(i) for policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature. In this case, extension of the limited liability provision of section 405(l) to noncoal reclamation conducted by certified states is a legal matter. In addition, none of the extraordinary circumstances listed in 43 CFR 46.215 applies.

L. Information Quality Act

In developing this proposed rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554, section 15).

M. Clarity of This Regulation

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following:

(1) Are the requirements in the proposed rule clearly stated?

(2) Does the proposed rule contain technical language or jargon that interferes with its clarity?

(3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity?

(4) Would the rule be easier to understand if it were divided into more but shorter sections (a ''section'' appears in bold type and is preceded by the symbol ''§ '' and a numbered heading; for example, ''§ 700.5 Definitions.'')?

(5) Is the description of the proposed rule in the **SUPPLEMENTARY INFORMATION** part of this preamble helpful in understanding the proposed rule?

(6) What else could we do to make the proposed rule easier to understand?

Send a copy of any comments that concern how we could make this proposed rule easier to understand to: Office of Information and Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street NW., Washington, DC 20240. You also may email the comments to this address: *Exsec@ios.doi.gov.*

List of Subjects

30 CFR Part 700

Administrative practice and procedure, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 875

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 879

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 884

Grant programs-natural resources, Reporting and recordkeeping requirements, Surface mining, Underground mining.

30 CFR Part 885

Abandoned Mine Reclamation Fund, Indian lands, Reclamation fees, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: January 27, 2013.

Tommy P. Beaudreau,

Principal Deputy Assistant Secretary—Land and Minerals Management.

For the reasons set forth in the preamble, the Department proposes to amend 30 CFR parts 700, 875, 879, 884, and 885 as set forth below.

PART 700—GENERAL

■ 1. The authority citation for part 700 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 2. Amend § 700.5 by adding a definition for the term ''SMCRA'' in alphabetical order to read as follows:

§ 700.5 Definitions.

* * * * *

SMCRA means the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95–87), as amended.

* * * * *

PART 875—CERTIFICATION AND NONCOAL RECLAMATION

■ 3. The authority citation for part 875 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 4. In § 875.11, revise paragraph (b) to read as follows:

§ 875.11 Applicability.

* * * * *

(b) If you are a State or Indian tribe that has certified under section 411(a) of the Act—

(1) You must use State share or Tribal share funds distributed to you under section 402(g)(1) of the Act before

[19] 42 U.S.C. 4332(2)(c).

October 1, 2007, in accordance with this part; and

(2) You may use prior balance replacement funds distributed to you under section 411(h)(1) of the Act, certified in lieu funds distributed to you under section 411(h)(2) of the Act, or both to—

(i) Maintain certification as required by §§ 875.13 and 875.14 of this part; or

(ii) Conduct a noncoal reclamation program in accordance with the requirements of this part.

■ 5. In § 875.16, revise paragraph (b) to read as follows:

§ 875.16 Exclusion of certain noncoal reclamation sites.

* * * * *

(b) You, the certified state or Indian tribe, may not reclaim sites and areas designated for remedial action under the Uranium Mill Tailings Radiation Control Act of 1978 (42 U.S.C. 7901 *et seq.*) or that have been listed for remedial action under the Comprehensive Environmental Response Compensation and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*) using—

(1) Moneys distributed from the Fund under section 402(g)(1) of the Act.

(2) Prior balance replacement funds distributed to you under section 411(h)(1) of the Act where you are conducting reclamation under the provisions of this part.

(3) Certified in lieu funds distributed to you under section 411(h)(2) of the Act where you are conducting reclamation under the provisions of this part.

■ 6. Revise § 875.17 to read as follows:

§ 875.17 Land acquisition authority—noncoal.

The requirements of parts 877 (Rights of Entry) and 879 (Acquisition, Management and Disposition of Lands and Water) of this chapter apply to a state's or Indian tribe's noncoal reclamation program conducted under this part except that, for purposes of this section, the term ''noncoal'' replaces all references to ''coal'' in parts 877 and 879 of this chapter.

■ 7. Revise § 875.19 to read as follows:

§ 875.19 Limited liability.

No certified State or Indian tribe conducting noncoal reclamation activities under the provisions of this part is liable under any provision of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out an approved State or Indian tribe abandoned mine reclamation plan. This section does not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or Indian tribe. For purposes of the preceding sentence, reckless, willful, or wanton misconduct will constitute gross negligence or intentional misconduct.

■ 8. Revise § 875.20 to read as follows:

§ 875.20 Contractor eligibility.

Every successful bidder for any contract by an uncertified State or Indian tribe under this part, or for any contract by a certified State or Indian tribe to undertake noncoal reclamation under this part, must be eligible under §§ 773.12, 773.13, and 773.14 of this chapter at the time of contract award to receive a permit or be provisionally issued a permit to conduct surface coal mining operations. This section does not apply to any contract by a certified State or Indian tribe that is not for coal reclamation or that is not for noncoal reclamation under this part.

PART 879—ACQUISITION, MANAGEMENT, AND DISPOSITION OF LANDS AND WATERS

■ 9. The authority citation for part 879 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 10. Revise § 879.1 to read as follows:

§ 879.1 Scope.

This part establishes procedures for acquisition of eligible land and water resources for emergency abatement activities and reclamation purposes by you, a State or Indian tribe with an approved reclamation program that has not certified completion of coal reclamation or a certified State or tribe conducting noncoal reclamation activities under part 875 of this chapter, or by us. It also provides for the management and disposition of lands acquired by the State, the Indian tribe, or us.

■ 11. In § 879.11, revise paragraphs (a) and (b) to read as follows:

§ 879.11 Land eligible for acquisition.

(a)(1) We may acquire land adversely affected by past coal mining practices with moneys from the Fund.

(2) You, an uncertified State or Indian tribe or a certified State or Indian tribe conducting noncoal reclamation under part 875 of this chapter, may acquire land adversely affected by past coal mining practices with moneys from the Fund or with prior balance replacement funds and certified in lieu funds provided under §§ 872.29 and 872.32 of this chapter, provided that we first approve the acquisition in writing.

(3) Before acquiring land under paragraph (a)(1) of this section or approving land acquisition under paragraph (a)(2) of this section, we must make a finding that the land acquisition is necessary for successful reclamation and that—

(i) The acquired land will serve recreation, historic, conservation, and reclamation purposes or provide open space benefits after restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices; and

(ii) Permanent facilities will be constructed on the land for the restoration, reclamation, abatement, control, or prevention of the adverse effects of past coal mining practices. For the purposes of this paragraph, ''permanent facility'' means any structure that is built, installed, or established to serve a particular purpose or any manipulation or modification of the site that is designed to remain after the reclamation activity is completed, such as a relocated stream channel or diversion ditch.

(b) You, an uncertified State or Indian tribe or a certified State or Indian tribe conducting noncoal reclamation under part 875 of this chapter, if approved in advance by us, may acquire coal refuse disposal sites, including the coal refuse, with moneys from the Fund and with prior balance replacement funds and certified in lieu funds provided under §§ 872.29 and 872.32 of this chapter. We, OSM, also may use moneys from the Fund to acquire coal refuse disposal sites, including the coal refuse.

(1) Before the approval of the acquisition, the reclamation program seeking to acquire the site will make a finding in writing that the acquisition is necessary for successful reclamation and will serve the purposes of the reclamation program.

(2) Where an emergency situation exists and a written finding as set forth in § 877.14 of this chapter has been made, we may acquire lands where public ownership is necessary and will prevent recurrence of the adverse effects of past coal mining practices.

* * * * *

12. In § 879.15, revise paragraph (h) to read as follows:

§ 879.15 Disposition of reclaimed land.

* * * * *

(h) You must return all moneys received from disposal of land under this part to us. We will handle all moneys received under this paragraph as unused funds in accordance with §§ 885.19 and 886.20 of this chapter.

PART 884—STATE RECLAMATION PLANS

■ 13. The authority citation for part 884 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 14. In § 884.13, revise the introductory text to read as follows:

§ 884.13 Content of proposed State reclamation plan.

You must submit each proposed State reclamation plan to the Director in writing. A proposed plan must include the information set forth in all of the following paragraphs of this section. In addition, a proposed plan for a certified State or Indian tribe must also include a commitment to address eligible coal problems found or occurring after certification as required in §§ 875.13(a)(3) and 875.14(b) of this chapter.

* * * * *

PART 885—GRANTS FOR CERTIFIED STATES AND INDIAN TRIBES

■ 15. The authority citation for part 879 continues to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*

■ 16. In § 885.12, revise paragraph (b) to read as follows:

§ 885.12 What can I use grant funds for?

* * * * *

(b) You may use grant funds as established for each type of funds you receive. You may use prior balance replacement funds as provided under § 872.31 of this chapter. You may use certified in lieu funds as provided under § 872.34 of this chapter. You may use the following moneys for noncoal reclamation under section 411 of the Act and part 875 of this chapter:

(1) Moneys that may be available to you from the Fund.

(2) Prior balance replacement funds made available under § 872.31 of this chapter.

(3) Certified in lieu funds as provided under § 872.34 of this chapter.

* * * * *

■ 17. In § 885.16, revise the section heading and paragraph (e) to read as follows:

§ 885.16 After OSM approves my grant, what responsibilities do I have?

* * * * *

(e) If you conduct a coal reclamation project under part 874 of this chapter or noncoal reclamation under part 875 of this chapter, you must not expend any construction funds until you receive a written authorization to proceed with reclamation on an individual project. Our authorization to proceed ensures that both you and we have taken all actions necessary to ensure compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and any other applicable laws, clearances, permits, or requirements.

* * * * *

■ 18. In § 885.20, revise paragraph (c) to read as follows:

§ 885.20 What must I report?

* * * * *

(c) You must use the AML inventory to maintain a current list of AML problems and to report annual reclamation accomplishments with grant funds.

(1) If you conduct coal reclamation projects or noncoal reclamation projects under part 875 of this chapter, you must update the AML inventory for each reclamation project as you fund it.

(2) You must update the AML inventory for each reclamation project you complete as you complete it.

(3) We must approve any amendments to the AML inventory after December 20, 2006. We define ''amendment'' as any coal problems added to the AML inventory in a new or existing problem area.

[FR Doc. 2013–02589 Filed 2–5–13; 8:45 am]

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Part V

Department of Labor

Wage and Hour Division

29 CFR Part 825

The Family and Medical Leave Act; Final Rule

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB76, RIN 1235–AA03

The Family and Medical Leave Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: This Final Rule amends certain regulations of the Family and Medical Leave Act of 1993 (the FMLA or the Act) to implement amendments to the military leave provisions of the Act made by the National Defense Authorization Act for Fiscal Year 2010, which extends the availability of FMLA leave to family members of members of the Regular Armed Forces for qualifying exigencies arising out of the servicemember's deployment; defines those deployments covered under these provisions; extends FMLA military caregiver leave for family members of current servicemembers to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty; and extends FMLA military caregiver leave to family members of certain veterans with serious injuries or illnesses. This Final Rule also amends the regulations to implement the Airline Flight Crew Technical Corrections Act, which establishes eligibility requirements specifically for airline flight crewmembers and flight attendants for FMLA leave and authorizes the Department to issue regulations regarding the calculation of leave for such employees as well as special recordkeeping requirements for their employers. In addition, the Final Rule includes clarifying changes concerning the calculation of intermittent or reduced schedule FMLA leave; reorganization of certain sections to enhance clarity; the removal of the forms from the regulations; and technical corrections to the current regulations.

DATES: This Final Rule is effective March 8, 2013.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director of the Division of Regulation, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693–0675 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's regulations may be directed to the nearest Wage and Hour Division (WHD) district office. Locate the nearest office by calling the WHD's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of WHD district and area offices at *http://www.dol.gov/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Purpose of the Regulatory Action

This Final Rule amends certain regulations of the FMLA to implement amendments to the military leave provisions of the Act made by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), to implement amendments to the hours of service requirements made by the Airline Flight Crew Technical Corrections Act (AFCTCA) and add new leave calculation regulations for flight crew employees, and to clarify existing regulatory provisions related to intermittent leave and make other clarifying changes.

On November 17, 2008, the Department issued a Final Rule (2008 Final Rule) implementing amendments to the FMLA made by the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA). 73 FR 67934. The FY 2008 NDAA created two new categories of leave: qualifying exigency leave and military caregiver leave. Under the FY 2008 NDAA's qualifying exigency leave provision, eligible family members of members of the National Guard and Reserves are entitled to take FMLA leave for qualifying exigencies, as defined by the Secretary of Labor, arising out of the military member's deployment in support of a contingency operation. In the 2008 Final Rule, the Secretary defined qualifying exigency using eight categories: *short notice deployment, military events and related activities, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities,* and *additional activities* to which both the employer and employee agree. Under the FY 2008 NDAA's military caregiver leave provision, eligible family members of current servicemembers are entitled to take up to 26 workweeks of military caregiver leave in a single 12-month period to care for a current servicemember who incurred a serious injury or illness in the line of duty on active duty that renders the servicemember unable to perform the duties of his or her office, grade, rank, or rating. The Secretary implemented the FY 2008 amendments in the 2008 Final Rule.

The FY 2010 NDAA further amends the FMLA by expanding the qualifying exigency leave provision to include leave for eligible family members of members of the Regular Armed Forces and by adding a foreign deployment requirement for both members of the Regular Armed Forces and the National Guard and Reserves. The FY 2010 NDAA amendments also expands military caregiver leave to cover injuries or illnesses that existed prior to the servicemember's active duty and were aggravated in the line of duty on active duty in the Armed Forces. 29 U.S.C. 2611(18)(A). It further expands the military caregiver leave provision to provide leave to eligible family members of certain veterans with a serious injury or illness who are receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. 2611(15)(B). The amendments define a serious injury or illness for a veteran as a ''qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested before or after the member becomes a veteran.'' 29 U.S.C. 2611(18)(B).

The AFCTCA establishes special hours of service eligibility requirements for airline flight crewmembers and flight attendants (collectively referred to as airline flight crew employees) for FMLA leave. The amendments provide that an airline flight crew employee meets the hours of service requirement if during the previous 12-month period, he or she (1) has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or the equivalent) and (2) has worked or been paid for not less than 504 hours, not including personal commute time or time spent on vacation, medical, or sick leave. Congress authorized the Department to issue regulations providing a method of calculating leave for airline flight crew employees as well as regulations regarding employers' maintenance of

certain information specific to airline flight crew employees.

Finally, in this rulemaking, the Department also took the opportunity to make organizational improvements and clarifying edits to enhance the regulated community's understanding of the regulations.

Summary of the Major Provisions of the Final Rule

To implement the amendments made to the FMLA by the FY 2010 NDAA, this Final Rule revises the FMLA regulations to reflect the expansion of qualifying exigency leave to include eligible employees with family members serving in the Regular Armed Forces and the addition of the foreign deployment requirement. It also increases the length of time an eligible family member may take for the qualifying exigency leave reason of Rest and Recuperation from five days to up to a maximum of 15 days and creates a new qualifying exigency leave category for *parental care.*

In military caregiver leave, the Final Rule expands the definition of *serious injury or illness* to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty, and expands military caregiver leave to care for covered veterans. It defines a *covered veteran* as an individual who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness and who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. The Final Rule interprets the five-year period of eligibility for a covered veteran to exclude the period between the enactment of the FY 2010 NDAA on October 28, 2009, and the effective date of this Final Rule to protect the military caregiver leave entitlement of family members of veterans whose five-year period has either expired or has been diminished during that time. The Final Rule defines a *serious injury or illness of a covered veteran* as: (i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

In addition to revising the regulations to reflect the statutory amendments, the Final Rule also increases the length of time an eligible family member make take for the qualifying exigency leave reason of *Rest and Recuperation* from five days to up to a maximum of 15 days to match the military member's Rest and Recuperation leave orders, and creates a new qualifying exigency leave category for *parental care.* The Final Rule also expands the list of authorized health care providers from whom an employee may obtain a certification of the servicemember's serious injury or illness to include authorized health care providers as defined by the regulations in § 825.125. The Final Rule permits an employer to request a second and third opinion for medical certifications obtained from a health care provider who is not affiliated with the Department of Defense (DOD), the Department of Veterans Affairs (VA), or the TRICARE network.

This Final Rule also implements the amendments made to the FMLA by the AFCTCA. The Final Rule relocates the special rules applicable only to airline flight crew employees and their employers to revised Subpart H—Special Rules Applicable to Airline Flight Crew Employees to provide clarity to employees and employers and to emphasize the distinction between the eligibility requirements and calculation of FMLA leave for airline flight crew employees and all other employees. Additionally, the Final Rule adopts a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5) and 156 days of military caregiver leave under § 825.112(a)(6). The Final Rule further provides that employers must account for an airline flight crew employee's FMLA leave usage utilizing an increment no greater than one day. As revised, Subpart H also includes special recordkeeping requirements applicable to the employers of airline flight crew employees.

The Final Rule also revises various regulatory sections the Department revisited in the course of implementing the statutory amendments described previously. For instance, the Department moves the definitions section from current § 825.800 to currently reserved § 825.102. These revisions also include clarifications to the rules for calculation of intermittent or reduced schedule FMLA leave, including clarifying regulatory language regarding increments of leave and providing additional explanation of the physical impossibility rule. The Department also made modifications to ensure consistency with other statutes, such as amending references to the Uniformed Services Employment and Reemployment Rights Act (USERRA) to more closely mirror the USERRA regulations, and setting forth an employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA).

Finally, the Final Rule updates the FMLA optional use forms (WH–380, WH–381, WH–382, WH–384, and WH–385) to reflect the statutory changes, creates a new optional use form for the certification of a serious injury or illness for a veteran (WH–385–V), and removes the forms from the regulations.

This Final Rule revises only some provisions of the existing regulations and creates certain new provisions, but the Department is republishing the entirety of the FMLA regulations (Part 825). The Department is republishing the unchanged provisions along with the revised provisions as a convenience to readers and to ensure readers are provided the context for the changes made in the Final Rule.

Costs and Benefits

The Department estimates that 381,000 covered firms and government agencies owning 1.2 million establishments and employing 91.1 million workers will potentially be affected by the Final Rule changes. These employers have an annual payroll of $5.0 trillion, estimated annual revenues of $23.7 trillion, and estimated net income of $1.03 trillion. *See* Table 3 in the Summary of Impacts.

Under the AFCTCA, the Department estimates that nearly 6,000 flight attendants, pilots, co-pilots, and flight engineers will take new FMLA leaves. The Department estimates that each individual will take 1.5 leaves, for a total of 8,930 leaves. Under the FY 2010 NDAA amendments, the Department estimates that approximately 30,900 eligible employees will take 926,000 days (7.4 million hours) of FMLA leave annually to address qualifying exigencies; and, that nearly 7,000

eligible employees will take 385,000 days (3.1 million hours) of FMLA leave annually to act as a caregiver for a veteran who is undergoing treatment for a serious illness or injury. *See* Table ES–1.

TABLE ES–1—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE RULE

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Flight Crew [a]	.....	90,560	5,950	8.9	8.9	.....
Pilots	.....	41,470	2,070	3.1	3.1	.....
Flight Attendants	.....	49,090	3,880	5.8	5.8	.....
NDAA 2010 [b]	218,130	219,908	37,896	758	1,311	10.5
Qualifying Exigency	197,000	193,000	30,900	401	926	7.4
Military Caregiver	21,130	26,908	6,966	357	385	3.1

[a] Number eligible for leave represents only those flight crew employees not currently covered by an FMLA-type provision under a CBA; thus, the number of leaves equals new leaves as a result of this rule. The Department did not estimate the number of hours of leave for flight crew employees because the rule establishes a bank of days of leave, to be used in full day increments.
[b] Number of days and hours of leave estimated based on leave profiles, see discussion for more detail.

The Department projects that the annualized cost of the rule will average somewhat less than $43 million per year over 10 years. The rule is expected to cost $53.9 million in the first year, and $41.3 million per year in subsequent years. The amendment to extend FMLA provisions to flight crew employees accounts for 0.7 percent of first year costs and 0.9 percent in subsequent years, while military exigency and caregiver leave account for 75.9 percent of first year costs and 99.1 percent of costs in subsequent years. Regulatory familiarization costs account for 23.4 percent of first year costs. The costs related to the provision of health benefits account for the largest share of costs, about 44.0 percent of costs in the first year of the rule, and 57.5 percent of costs each in each of the following years. *See* Table ES–2.

TABLE ES–2—SUMMARY OF IMPACT OF CHANGES TO FMLA [A]

Component	Year 1 ($ mil)	Year 2 ($ mil)	Annualized ($ mil) [b]	
			Real discount rate 3%	Real discount rate 7%
Total	$53.9	$41.3	$42.8	$43.0
Cost of Each Amendment:				
Any FMLA regulatory revision	12.6	0.0	1.4	1.7
Flight Crew Technical Amendment	0.4	0.4	0.4	0.4
NDAA 2010	41.0	41.0	41.0	41.0
NDAA Subtotal: Qualifying Exigency	25.8	25.8	25.8	25.8
NDAA Subtotal: Military Caregiver	15.1	15.1	15.1	15.1
Cost of Each Requirement:				
Regulatory Familiarization	12.6	0.0	1.4	1.7
Employer Notices	17.1	17.1	17.1	17.1
Certifications	0.4	0.4	0.4	0.4
Health Benefits	23.8	23.8	23.8	23.8

[a] Columns may not sum due to rounding.
[b] Costs are annualized over 10 years.

The Department anticipates significant benefits resulting from the Final Rule. For example, providing job-protected leave for caregivers of covered veterans under the military caregiver provision is expected to increase family involvement in the veteran's recovery, improve self-reliance and access to resources for caregivers, and reduce negative outcomes for covered veterans and their families. Also, the extension of FMLA leave entitlement to flight crew employees will allow them to enjoy all the benefits of FMLA coverage, and may also reduce employer costs due to presenteeism (the loss of productivity due to employees working while injured or ill) and a resulting increase in overall productivity, workplace safety and employee wellness. The Department is not able to quantify these benefits at this time due to lack of suitable data.

II. Background

This regulatory action first appeared on the Department's Fall 2009 Regulatory Agenda where the Department stated its intent to review the impact of the 2008 Final Rule on the regulated community. 77 FR 67934. Subsequently, the FMLA was amended by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), Public Law 111–84, and the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111–119. This rulemaking, therefore, makes regulatory changes to implement these statutory amendments. It also makes various clarifying revisions to existing regulations. The Department continues to review the impact of regulatory revisions made in the FMLA 2008 Final Rule.

A. What the FMLA provides

The FMLA was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. As originally enacted, the FMLA entitled eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 workweeks in a 12-month period for the birth of the employee's son or daughter and to care for the newborn

child; for the placement of a son or daughter with the employee for adoption or foster care; to care for the employee's spouse, parent, son, or daughter with a serious health condition; or when the employee is incapacitated due to the employee's own serious health condition.

The FMLA was amended in January 2008 with the enactment of the FY 2008 NDAA. Public Law 110–181. Section 585(a) of FY 2008 NDAA expanded the FMLA to allow eligible employees of covered employers to take FMLA leave because of any qualifying exigency (as determined by the Secretary of Labor) when that employee's spouse, son, daughter, or parent is a member of the National Guard or Reserves who is on, or has been notified of an impending call or order to, active duty in the Armed Forces in support of a contingency operation (referred to as qualifying exigency leave). Additionally, the FY 2008 NDAA amendments provided up to 26 workweeks of leave in a single 12-month period for an eligible employee to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember (referred to as military caregiver leave). These two leave entitlements are collectively referred to as military family leave.

The FMLA was again amended in 2009 with the enactment of the FY 2010 NDAA on October 28, 2009, and the AFCTCA on December 21, 2009. Section 565(a) of the FY 2010 NDAA amended the military family leave provisions of the FMLA by extending qualifying exigency leave to eligible family members of members of the Regular Armed Forces, and military caregiver leave to include care provided to certain veterans. The AFCTCA amended the FMLA to provide special hours of service eligibility requirements for airline flight crew employees. Each of these amendments is discussed in detail in the section-by-section analysis that follows.

FMLA leave may be taken in a block, or under certain circumstances, intermittently or on a reduced leave schedule. In addition to providing job-protected family and medical leave, employers must also maintain any pre-existing group health plan coverage for an employee on FMLA-protected leave under the same conditions that would apply if the employee had not taken leave. 29 U.S.C. 2614. Once the leave period is concluded, the employer is required to restore the employee to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. *Id.* If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department or file a private lawsuit in Federal or state court. If the employer has violated the employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. 29 U.S.C. 2617.

Title I of the FMLA is administered by the Department and applies to private sector employers with 50 or more employees, public agencies, and certain Federal employers and entities, such as the U.S. Postal Service and Postal Regulatory Commission. Title II is administered by the U.S. Office of Personnel Management and applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63 and certain employees covered by other Federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains provisions governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Finally, Title V originally extended the leave provisions to certain employees of the U.S. Senate and House of Representatives; however, such coverage was repealed and replaced by the Congressional Accountability Act of 1995. 2 U.S.C. 1301.

B. Who the Law Covers

The FMLA generally covers employers with 50 or more employees. To be eligible to take FMLA leave, an employee must meet specified criteria, including employment with a covered employer for at least 12 months, performance of a specified number of hours of service in the 12 months prior to the start of leave, and work at a location where there are at least 50 employees within 75 miles.

C. Regulatory History

The FMLA required the Department to issue initial regulations to implement Title I and Title IV of the FMLA within 120 days of the law's enactment (by June 5, 1993) with an effective date of August 5, 1993. The Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on March 10, 1993. 58 FR 13394. The Department received comments from a wide variety of stakeholders, and after considering these comments the Department issued an Interim Final Rule on June 4, 1993, effective August 5, 1993. 58 FR 31794.

After publication, the Department invited further public comment on the interim regulations. 58 FR 45433. During this comment period, the Department received a significant number of substantive and editorial comments on the interim regulations from a wide variety of stakeholders. Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995. 60 FR 2180. The regulations were amended February 3, 1995 (60 FR 6658) and March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** requesting public comment on its experiences with and observations of the Department's administration of the FMLA and the effectiveness of the regulations. 71 FR 69504. Comments were received from workers, family members, employers, academics, and other interested parties, ranging from personal accounts, surveys, and legal reviews to academic studies and recommendations for regulatory and statutory changes to the FMLA. The Department published its Report on the comments in the **Federal Register** on June 28, 2007. 72 FR 35550.

The Department published an NPRM in the **Federal Register** on February 11, 2008 proposing changes to the FMLA's regulations based on the Department's experience administering the law, two Department of Labor studies and reports on the FMLA issued in 1996 and 2001, several U.S. Supreme Court and lower court rulings on the FMLA, and a review of the comments received in response to the RFI. 73 FR 7876. Comments were also sought on the FY 2008 NDAA military family leave statutory provisions. In response to the NPRM, the Department received thousands of comments from a wide variety of stakeholders. The Department issued a Final Rule on November 17, 2008, which became effective on January 16, 2009. 73 FR 67934.

The Department commenced the current rulemaking by publishing an NPRM in the **Federal Register** on February 15, 2012 (77 FR 8960), inviting public comment for 60 days. On April 16, 2012, in response to requests to extend the comment period, the Department published a notice extending the original 60-day comment

period by 14 days. 77 FR 22519. The comment period closed on April 30, 2012; approximately 870 comments were received and are available for review at the Federal eRulemaking Portal, *www.regulations.gov,* Docket ID WHD–2012–0001. Comments were received from worker advocacy organizations, military members, employers, employer associations, human resource specialists, labor organizations, and private individuals. Approximately 90 percent of the comments received were identical or nearly identical form letters sent in response to a comment campaign by members of the Society for Human Resource Management (SHRM). The Department received one comment ''late''—after the close of the comment period—from SHRM. Although SHRM accessed the Federal eRulemaking Portal prior to the midnight deadline, it was unable to submit its comment in a timely manner due to technical difficulties. Since technical difficulties prevented SHRM from complying with the deadline, the Department accepted SHRM's comment in this rulemaking. Several of the comments received addressed issues that are beyond the scope or authority of the proposed regulations including expanding the coverage or benefits of the Act. However, many of the comments centered on either the military amendments or the AFCTCA amendments, with several offering comments on both amendments. Comments on specific provisions are discussed in detail in the Summary of Comments below.

D. Updates to the Military Family Leave Provisions

Section 565(a) of the FY 2010 NDAA, enacted on October 28, 2009, amends the military family leave provisions of the FMLA. Public Law 111–84. The FY 2010 NDAA expands the availability of qualifying exigency leave and military caregiver leave. Qualifying exigency leave, which was made available to family members of the National Guard and Reserve components under the FY 2008 NDAA, is expanded to include family members of members of the Regular Armed Forces. The entitlement to qualifying exigency leave is expanded by substituting the term covered active duty for active duty and defining covered active duty for a member of the Regular Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country'', and for a member of the Reserve components of the Armed Forces as ''duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.'' 29 U.S.C. 2611(14).[1] Prior to the FY 2010 NDAA amendments, there was no requirement that members of the National Guard and Reserves be deployed to a foreign country.

The FY 2010 NDAA amendments expand the definition of a serious injury or illness for military caregiver leave for current members of the Armed Forces to include an injury or illness that existed prior to service and was aggravated in the line of duty on active duty and that renders the member medically unfit. 29 U.S.C. 2611(18)(A). These amendments also expand the military caregiver leave provisions of the FMLA to allow family members to take military caregiver leave to care for certain veterans. The definition of a covered servicemember, which is the term the Act uses to indicate the group of military members for whom military caregiver leave may be taken, is broadened to include a veteran with a serious injury or illness who is receiving medical treatment, recuperation, or therapy, if the veteran was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. 29 U.S.C. 2611(15)(B). The amendments define a serious injury or illness for a veteran as a ''qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.'' 29 U.S.C. 2611(18)(B).

As was the case with the FY 2008 NDAA, the FY 2010 NDAA is silent as to the effective date of the FMLA amendments. In the NPRM, the Department stated its position that the qualifying exigency provision of the FY 2010 NDAA was effective upon the law's enactment on October 28, 2009. 77 FR 8962. However, because the FY 2010 NDAA requires the Secretary to define a serious injury or illness of a veteran, the Department concluded that the military caregiver leave provision for family members of certain veterans would not be effective until the Department defined this term. 77 FR 8962. The Department stated that employers were not required to provide employees with leave to care for a covered veteran until the Department defined the term. *Id.* The Department noted, however, that employers were not prohibited from providing employees with leave to care for a veteran if employers chose to do so before the Department defined this term through regulation, but such leave, assuming it did not otherwise qualify as FMLA leave to care for a family member with a serious health condition, would not be FMLA-protected and would not count against employees' FMLA entitlement. *Id.*

Although the Department did not request comments on its interpretation of the effective date of the FY 2010 NDAA amendments, a few commenters addressed the effective date of the military caregiver leave provision providing care to certain veterans. SHRM and Senators Harkin and Murray concurred with the Department's position that military caregiver leave is not available to veterans' families until the Department defines serious injury or illness of a veteran through regulation. The Legal Aid Society—Employment Law Center (Legal Aid) asserted that the Department's positions on the effective date of the military caregiver leave provision in the FY 2008 NDAA and the FY 2010 NDAA were inconsistent. It urged the Department to treat the provision providing military caregiver leave to care for veterans as effective on the signing date of the FY 2010 NDAA in light of the critical needs of veterans. It also urged the Department to state that if an employer permitted an employee to take leave to care for a veteran before the Department defined this term through regulation, such leave is protected under the FMLA. The National Employment Lawyers Association (NELA) commented that, from the date the law was enacted in 2009 until the adoption of final regulations, employers could have permitted employees to take leave to care for a veteran pursuant to 29 U.S.C. 2652(a), which authorizes employers to voluntarily provide leave rights broader than those provided for under the FMLA, and asserted that such leave would be FMLA protected. At the same time, however, NELA supported the Department's position that any such leave taken before final regulations are adopted should not count against an employee's FMLA entitlement, and recommended that the regulations expressly incorporate this requirement.

[1] As with the FY 2008 NDAA, the FY 2010 NDAA references 10 U.S.C. 101(a)(13)(B), which covers call ups of the National Guard and Reserves and certain retired members of the Regular Armed Forces and Reserves in support of contingency operations. 73 FR 67954–55. For simplicity, the terms ''National Guard and Reserve'' and ''Reserve components'' are used interchangeably throughout this document and refer to these categories of military members.

The Department disagrees with Legal Aid's suggestion that the Department is being inconsistent in its position on the effective date of the 2008 and 2010 amendments. In both the 2008 Final Rule and this rulemaking, the Department determined that where the statute requires the Secretary to define a term, that portion of the statute is not effective until the Department defines the term through regulation; where the statute does not require the Secretary to define any terms, that portion of the statute is effective upon the statute's enactment. In the FY 2008 NDAA, Congress directed the Secretary to define the term qualifying exigency, and, therefore, the Department concluded that qualifying exigency leave was not effective until the Department defined this term in the 2008 Final Rule. 73 FR 7925. In the FY 2010 NDAA, Congress directed the Secretary to define what qualifies as a serious injury or illness of a veteran, and, therefore, the Department has taken the position that employers are not required to provide military caregiver leave to care for a veteran until the Department defines a serious injury or illness of a veteran through regulation. Similarly, in the FY 2008 NDAA, Congress did not require the Secretary to define any terms related to military caregiver leave, and therefore the Department took the position that the military caregiver leave provision was effective upon enactment. 73 FR 7925. In the FY 2010 NDAA, Congress did not require the Secretary to define any terms related to the expansion of qualifying exigency leave, and therefore Department has taken the position that the qualifying exigency leave provision was effective upon enactment. As to the comments regarding the treatment of leave to care for a veteran that is voluntarily provided by an employer before the effective date of this Final Rule, the Department disagrees with the commenters' assertions that such leave is FMLA-protected. Because this provision of the FY 2010 NDAA is not effective until the Department defines a qualifying serious injury or illness of a veteran through regulation, there is no basis to treat such leave, if voluntarily provided by an employer, as FMLA-protected. There is likewise no basis to interpret 29 U.S.C. 2652(a) as requiring that leave to care for a veteran voluntarily provided by an employer prior to the effective date of this Final Rule be treated as protected FMLA leave. Section 2652(a) states that the FMLA does not diminish an employer's obligations to comply with the terms of any employment benefit program or plan providing greater rights than the FMLA that the employer has agreed to provide through a collective bargaining agreement or otherwise voluntarily agreed to provide. This section does not say that any benefit provided under such program or plan that exceeds the rights provided under the FMLA is protected under the FMLA. Nor does it say that the FMLA provides a mechanism for enforcement of such benefits. Thus, the Department's position in this Final Rule is the same as set out in the NPRM: the qualifying exigency leave provision of the FY 2010 NDAA was effective on October 28, 2009; the military caregiver leave provision to care for a covered veteran will be effective on the effective date of this Final Rule; and any leave to care for a veteran voluntarily provided by an employer before the effective date of this Final Rule that does not otherwise qualify as FMLA leave to care for a family member with a serious health condition is not FMLA-protected and does not count against employees' FMLA entitlement.

E. Amendments to Eligibility Criteria for Airline Flight Crewmembers and Flight Attendants

On December 21, 2009, the AFCTCA was enacted, establishing a special hours of service eligibility requirement for airline flight crew employees. The AFCTCA provides that an airline flight crew employee will meet the hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent) and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements. The AFCTCA also authorized the Department to issue regulations regarding the calculation of FMLA leave for airline flight crew employees as well as special recordkeeping requirements for the employers of such employees.

The AFCTCA is silent as to its effective date. The Department concluded in the NPRM that the amendment became effective on the date of enactment, December 21, 2009, because the AFCTCA is explicit about how to calculate the hours of service requirement for airline flight crew employees. 77 FR 8962. Although the AFCTCA authorizes the Department to promulgate regulations regarding how to calculate the FMLA leave entitlement for airline flight crew employees, and special recordkeeping requirements, these authorizations are permissive and do not require the Department to engage in rulemaking. The Department did not request comments concerning the effective date of the AFCTCA and no comments were received on the issue. The Department's position in this Final Rule is the same as set out in the NPRM.

III. Summary of Comments

The Department received approximately 870 comments on the NRPM; of those, almost 90 percent were identical or nearly identical form letters from SHRM members which addressed concerns about the Department's proposed elimination of the employer's ability to utilize different increments of FMLA leave at different times of the day or shift and the Department's consideration of whether the physical impossibility provision should be removed from the regulations. The Department also received comments that were general statements, and comments addressing issues that are beyond the scope authority of the proposed regulations. The remaining comments reflect a wide variety of views primarily concerning proposals to implement the FY 2010 NDAA or the AFCTCA. Many include substantive analyses of the proposed revisions. Some commenters addressed both amendments and some addressed other proposed changes as well. The Department has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. A number of other minor editorial changes have been made for consistency in the regulatory text.

IV. Section-by-Section Analysis of Proposed Changes to the FMLA Regulations

The following is a section-by-section analysis of the final revisions to the FMLA regulations. As explained, this Final Rule revises only certain provisions of the existing regulations and creates certain new provisions, which are discussed below. The Department is republishing, however, the entirety of the FMLA regulations, including the unchanged regulatory provisions not discussed here.

The primary sections of the regulations with revisions to implement the FY 2010 NDAA amendments are: § 825.126 (Leave because of a qualifying

exigency); § 825.127 (Leave to care for a covered servicemember with a serious injury or illness); § 825.309 (Certification for leave taken because of a qualifying exigency); and § 825.310 (Certification for leave taken to care for a covered servicemember (military caregiver leave)). Less substantive changes are made to § 825.122 (Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember) and § 825.102 (Definitions) to reflect new definitions related to military family leave (moved from § 825.800 in the current regulations).

The sections of the regulations with final revisions to implement the AFCTCA are located in revised Subpart H newly titled, Special Rules Applicable to Airline Flight Crew Employees. This reorganization is intended to enhance clarity and utility of the regulations, and to prevent confusion about the applicability of the special rules for airline flight crew employees to any other types of employees. Subpart H includes the following sections: § 825.800 (Special rules for airline flight crew employees, general), § 825.801 (Special rules for airline flight crew employees, hours of service requirement); § 825.802 (Special rules for airline flight crew employees, calculation of leave); and § 825.803 (Special rules for airline flight crew employees, recordkeeping requirements). Additional changes to implement the AFCTCA are made in § 825.102 (Definitions).

In addition to changes to incorporate the statutory amendments, the Department also made changes to clarify existing regulatory text and for consistency with other statutes and regulations. Specifically, the Department moved the definitions section of the regulations from § 825.800 to § 825.102, which is reserved in the current regulations, and made certain substantive revisions to the definitions as discussed later in this preamble. Other modified sections include § 825.110 (Eligible employee), § 825.205 (Increment of FMLA leave for intermittent and reduced schedule leave), § 825.500 (Recordkeeping requirements), and § 825.702 (Interaction with Federal and State anti-discrimination laws).

The Department also removes the following optional-use forms and notices from the regulations' Appendices: Forms WH–380–E (Certification of Health Care Provider—Employee), WH–380–F (Certification of Health Care Provider—Family Member), WH–384 (Certification of Qualifying Exigency for Military Family Leave), and WH–385 (Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave) related to certification; and Forms WH–381 (Notice of Eligibility and Rights & Responsibilities), WH–382 (Designation Notice to Employee of FMLA Leave), and Notice to Employees of Rights under FMLA (WH Publication 1420) related to notification. The Department noted in the NPRM that the forms would continue to be available to the public on the WHD Web site, and that the forms are separately subject to the requirements of the Paperwork Reduction Act of 1995 (PRA), which provides an opportunity for the public to comment on the forms and their information collection requirements every three years. The Department also advised that future substantive changes to the forms would continue to require separate and additional rulemaking. 77 FR 8963.

The Department received several comments on this proposal. Aon Hewitt and a self-described labor-employment attorney both supported the Department's proposal to remove the forms from the regulations. Legal Aid, the National Coalition to Protect Family Leave (Coalition), and SHRM opposed the proposal. Legal Aid stated that removing the forms from the regulations would eliminate an important source of information for employers and employees. This commenter also stated that many people lack access to the Internet, and even for those who do have access, navigating the Internet and being certain that the most recent form is being accessed is difficult. The Coalition expressed concern that the PRA procedures would not produce the same amount of public participation and awareness of future proposed changes to the forms. This commenter further asserted that even the slightest changes to the forms can result in a significant economic impact on an employer as systems must be updated to accommodate the changes. The commenter also stated that the forms are a critical part of the FMLA approval process, and even the smallest proposed changes should receive careful consideration. SHRM commented that the notice and comment process has contributed to the improvement of these forms over time and that it would be a mistake to remove the forms from this regulatory process. It also commented that removal of the forms from the rulemaking process would be contrary to the Administration's commitment to transparency and open government, notwithstanding the Department's assertion that the PRA review process would facilitate these goals.

The Department has carefully considered the concerns raised by the commenters, and has decided to implement the provision as proposed. The Department understands that, for many employers and employees, compliance with the FMLA begins with notification and certification of the employee's need for leave. The Department recognizes that its optional-use FMLA forms, as well as employer forms requiring the same information, play a key role in employers' compliance with the FMLA and employees' ability to take FMLA-protected leave when needed. Therefore, the Department believes it would be helpful to discuss the authority for these information collections, briefly describe the PRA process, and explain how the removal of the forms from the regulations will and will not impact the regulated community.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. The authority for an employer requiring medical certification in support of an employee's request for FMLA leave due to a serious health condition and for the content of the certification are found in 29 U.S.C. 2613(a), 2614(c)(3) and 29 CFR 825.100(d), 825.305–.308, 825.312. These provisions are the basis for Forms WH–380–E and WH–380–F. The authority for requiring certification in support of an employee's need for leave due to a qualifying exigency arising from the deployment of the employee's family member and the content of the information included in Form WH–384 are found in 29 U.S.C. 2613(f) and § 825.309. The authority for requiring certification of a covered servicemember's serious injury or illness and the content of Form WH–385 and new Form WH–385–V are found in 29 U.S.C. 2613(a) and § 825.310. The regulations, § 825.300(b)–(c), set forth the authority and information requirements for Form WH–381, Notice to Employee of FMLA Eligibility and Rights and Responsibility. The authority for and content of Form WH–382, Notice to Employees of FMLA Leave Designation is found in §§ 825.300(c)–.301(a). In order to make any changes to the information included in these forms, the Department must engage in

rulemaking because the content of the forms is determined by the regulations.

Under the PRA process, the WHD publishes a notice in the **Federal Register** notifying the public that the agency is seeking an extension of approval from the Office of Management and Budget (OMB) for the subject information collection, and that the Department is accepting comments for 60-days on the extension of OMB approval of the information collection. In this notice, WHD describes the information collection, the estimated time needed to complete the information collection, the cost of complying with the information collection, and describes the changes, if any, to the information collection from the previous clearance. Often they are programmatic to the information collection requirements or format changes to the instruments. In such cases the Agency merely updates number of responses or respondents, or updating the cost of responding to account for items such as wage increases as reported by the Department's Bureau of Labor Statistics or increases in postage rates. The **Federal Register** notice provides the public an opportunity to comment on those estimates and make recommendations on how the agency might improve the information collection in a way that would not necessarily require rulemaking. After the 60 day comment period, the Department publishes a notice informing the public of its intention to submit the information collection to the OMB for an extension of approval. This notice informs the public that they have 30 days to submit comments to OMB on the extension of approval, a brief description of the information collection, the estimated time needed to complete the information collection, the cost of complying with the information collections, and describes the changes, if any, to the information collection from the previous clearance. The Department also provides OMB with a summary of any comments received in response to the first notice and of the agency's response to those comments. The public may seek additional information about the forms from the WHD Web site at any time. Information about specific information collections is also available at *www.reginfo.gov.*

Removal of the forms from the regulations will allow the Department to make non-regulatory changes to the forms in a more effective manner while still offering the public an opportunity to comment on the proposed changes. For example, the Department regularly receives completed medical certification forms (Forms WH–380–E and WH–380–F) from health care providers even though respondents are instructed not to send the form to the Department of Labor. This results in the employee's FMLA leave being delayed because the employer has not received the medical certification supporting the employee's need for leave. Through the PRA notice and review process, the Department could modify the instructions for health care providers in Section III of the form to include an instruction not to send the forms to the Department. This type of change would not require a regulatory change but would enhance the usability of the form and employers' compliance efforts.

As discussed, even with removal of the forms from the regulations, the information collection requirements underlying the FMLA forms continue to be subject to both the rulemaking process and the PRA process. The FMLA regulations determine what substantive information is collected on the forms and the PRA process requires that any Federal government information collection be approved by OMB and re-authorized every three years. Removing the forms from the regulations gives the Department the ability to maintain one version of the FMLA forms, thereby lessening the confusion among employees and employers currently resulting from the existence of multiple versions of the forms. The forms will continue to be available on the WHD Web site, and for those individuals who lack Internet access, forms may be obtained from their local WHD district office and, in some cases, from their employer. Removal of the forms from the regulations does not alter the Department's belief that the forms facilitate employer and employee compliance with their respective obligations under the FMLA. Employers are permitted to use forms other than those issued by the Department so long as they do not require information beyond that specified in the regulations. *See* 29 CFR 825.306, 825.309, 825.310. However, if an employee provides sufficient certification regardless of format, no additional information may be requested.

In response to SHRM's comment regarding transparency and open government and the Coalition's concern that the Department does not publicize the PRA process in the same manner that it publicizes proposed changes to the regulations, the Department believes that the PRA process is open, transparent, and well-publicized; however the Department will take into consideration additional steps to alert the regulated community that the FMLA forms are undergoing the PRA process. Additionally, as stated previously, any changes to the information collection requirements underlying the forms would still require full notice and comment through the rulemaking process. Changes to the forms would still require full notice and comment under the PRA process.

In the Final Rule, as proposed, the Department makes various minor changes or corrections to the forms and regulations. Specifically, the Department makes small modifications to the FMLA forms, and creates a new form for certification of a serious injury or illness of a covered veteran, to reflect the FY 2010 NDAA amendments and the AFCTCA, which are discussed in the section-by-section analysis. In addition, minor edits to more accurately reflect the new military family leave and airline flight crew employee eligibility provisions or to delete references to Appendices for prototype forms or notices are made at: §§ 825.100, 825.101, 825.107, 825.112, 825.200, 825.213, 825.300, 825.302, 825.303, and 825.306. Cross-references to the special rules applicable only to airline flight crew employees and their employers in revised Subpart H are included in §§ 825.102, 825.110, 825.120, 825.121, 825.200, 825.205, 825.300, and 825.702. Cross-references to the definitions section, which the Department moves, as proposed, to § 825.102, are updated throughout the regulations. The Department also corrects inadvertent drafting errors that were made in the 2008 Final Rule, including correcting the cross-references in § 825.200(f) and (g) and inserting the word ''spouse'' in the first lines of § 825.202(b) and (b)(1). Furthermore, the Department includes the word ''the'' in the statutory phrase ''in line of duty'' where used in the regulations and updates the URL for the WHD Web site in §§ 825.300, 825.306, and 825.309 to link viewers directly to the WHD site. These minor editorial changes are not addressed in the section-by-section analysis.

A. Revisions To Implement the FY 2010 NDAA Amendments

1. Section 825.122 Definitions of Covered Servicemember Spouse, Parent, Son or Daughter, Next of Kin of a Covered Servicemember, Adoption, Foster Care, Son or Daughter on Covered Active Duty or Call or Order to Covered Active Duty Status, son or Daughter of a Covered Servicemember, and Parent of a Covered Servicemember

The Department proposed to add a definition of covered servicemember as

a new paragraph (a) in this section and to modify the definition in the current regulations to reflect the addition of covered veterans as covered servicemembers under the FY 2010 NDAA, and to redesignate the paragraphs that follow. The Department also proposed to change the term active duty to covered active duty in each place it appears in both the title of this section and in current paragraph (g), and to update the reference in this paragraph to proposed § 825.126(a)(5).

The Department received several comments on the proposed definition of *covered servicemember,* all of which are discussed below in conjunction with § 825.127(b)(2). For the reasons stated in the discussion of § 825.127(b)(2), the Final Rule modifies the definition of *covered servicemember* in § 825.122 in the same manner that it modifies § 825.127(b)(2), and makes additional minor word changes to mirror the language used in § 825.127(b)(2).

No comments were received on the other proposed changes to this section. The Final Rule adopts these proposals without modification, and updates cross-references throughout the regulations to the definitions in this section that have been redesignated.

2. Section 825.126 Leave Because of a Qualifying Exigency

Section § 825.126 sets forth the regulation allowing an eligible employee whose spouse, parent, son, or daughter is on active duty or has been notified of an impending call or order to active duty to take FMLA leave for a qualifying exigency arising out of that active duty or call to active duty. The FY 2008 NDAA defined active duty as a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). Public Law 110–181; § 585(a). The provisions referred to in 10 U.S.C. 101(a)(13)(B) are limited to duty by members of the Reserve components, the National Guard, and certain retired members of the Regular Armed Forces and retired Reserve. The FY 2008 NDAA thus limited the availability of qualifying exigency leave to family members of members of the National Guard and Reserve components. 73 FR 67954–55.

The FY 2010 NDAA further amended the FMLA to permit an eligible employee to take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty, or has been notified of an impending call or order to covered active duty in the Armed Forces. Public Law 111–84, § 565(a)(1); *see* 29 U.S.C. 2611(14)(A), 2612(a)(1)(E). The FY 2010 NDAA defined covered active duty to include duty by members of the Regular Armed Forces during deployment to a foreign country, and duty by members of the Reserve components during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code. 29 U.S.C. 2611(14). Thus, the FY 2010 NDAA expanded the availability of qualifying exigency leave to include family members of the Regular Armed Forces during a foreign deployment, and added a foreign deployment requirement to the type of call or order to active duty required for the Reserve components of the Armed Forces.

The Department proposed to reverse the order in which the two parts of this section appear, so that proposed paragraph (a) addressed an employee's entitlement to qualifying exigency leave and proposed paragraph (b) identified the specific circumstances under which qualifying exigency leave may be taken. The Department also proposed to substitute covered active duty for active duty in paragraph (a) (as well as throughout the regulations wherever the term appeared) to incorporate the FY 2010 NDAA statutory language. Additionally, because the term covered military member was associated with the restrictive nature of qualifying exigency leave under the FY 2008 NDAA, *i.e.,* the limitation of such leave to family members of Reserve component members only, the Department proposed to delete references to a covered military member and instead use the term member or military member to refer to all military members on covered active duty as defined by the statute.

In accordance with the FY 2010 NDAA, the Department proposed to delete the statement in current § 825.126(b)(i) that family members of members of the Regular Armed Forces are not entitled to qualifying exigency leave. The Department proposed in paragraph (a) to state than an eligible employee may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status. The Department proposed in § 825.126(a)(1) to define *covered active duty or call to covered active duty status* for a member of the Regular Armed Forces as ''duty under a call or order to active duty (or notification of an impending call or order to covered active duty) during the deployment of the member with the Armed Forces to a foreign country,'' and to state that the active duty orders will generally specify if the member's deployment is to a foreign country. The Department proposed in § 825.126(a)(2) to define *covered active duty or call to covered active duty status* for a member of the Reserve components as ''duty under a call or order to active duty (or notification of an impending call or order to active duty) during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation'' pursuant to the provisions of law referred to in 10 U.S.C. 101(a)(13)(B). The Department also proposed to use the word Federal in proposed § 825.126(a)(2) in describing the covered calls or orders to active duty in order to make clear that only Federal calls to duty will meet the definition of covered active duty. The Department proposed to move to § 825.126(a)(2)(i) the list of the specific Reserve components in current § 825.126(b)(2)(i). The Department proposed to move to § 825.126(a)(2)(ii) the statement in current § 825.126(b)(3) that the active duty orders of a member of the Reserve components will generally specify if the covered active duty military member is serving in support of a contingency operation by citing the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation, and to state also in § 825.126(a)(2)(ii) that the active duty orders will generally specify that the deployment is to a foreign country. The Department proposed in § 825.126(a)(3) to define *deployment* of the member with the Armed Forces to a foreign country as deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including deployment in international waters. As discussed in the NPRM, this definition was consistent with the Department's understanding of the term deployment based on consultations with the DOD. 77 FR 8965. The Department also sought comment on the types of duty assignments for members of the Navy and Coast Guard that would satisfy the definition of *deployment.* The Department proposed to move to § 825.126(a)(4) the provision specifying that covered deployments are limited to Federal calls to active duty, which is in current § 825.126(b)(2)(ii). Finally, the Department proposed to move the definition of *son or daughter on active duty or call to active duty status* to § 825.126(a)(5) from current § 825.126(b)(1).

No comments were received on the proposed changes regarding the

reorganization of the section, or the changes in proposed paragraph (a) regarding the use of the term covered active duty rather than active duty or the use of the term military member or member rather than covered military member. Therefore, the Final Rule adopts these changes as proposed.

Several commenters suggested additional language changes for paragraph (a) of this section. Two commenters, the National Partnership for Women and Families (Partnership) and the North Carolina Justice Center, suggested that the term qualifying exigency may be confusing to military families and that the Department should provide a general explanation of what is meant by this term. NELA commented that the definition of covered active duty or call to covered active duty status is confusing because it seems to indicate that an impending call or order to active duty must occur during deployment to a foreign country. NELA suggested that the Department remove the phrase call or order to active duty from proposed § 825.126(a)(1) defining the term for members of the Regular Armed Forces, noting that 29 U.S.C. 2611(14)(A) does not use the phrase. NELA further suggested that the Department include a definition of the Armed Forces in this subparagraph rather than using the term Regular Armed Forces. NELA also commented that the use of the term contingency operation in the proposed regulation at § 825.126(a)(2), discussing covered active duty, is confusing and unnecessary in light of the fact that Congress deleted this term in the FY 2010 NDAA. This commenter suggested that, because each of the listed military duties in 10 U.S.C. 101(a)(13) is a type of contingency operation, there is no reason to include the phrase in the final regulations. In contrast, SHRM commented that the inclusion of the language that the call or order to active duty must be in support of a contingency operation will help clarify this entitlement. The Coalition commented that the inclusion of the word Federal in § 825.126(a)(2) adds clarity and the reference to Title 10 of the United States Code in subparagraph (2) is appropriate, but that this subparagraph should provide explicit definitions or descriptions of the different types of active duty under the various statutes listed in Title 10 because most employers are not familiar with these statutory references.

The Partnership and the North Carolina Justice Center supported the Department's proposed definition of deployment to a foreign country in proposed § 825.126(a)(3) to include international waters as consistent with congressional intent. The Military Officers Association of America also supported the inclusion of international waters in this definition, but suggested that the Department ''encourage expansion of the law'' to include family members of servicemembers assigned overseas to remote areas and to servicemembers of all the uniformed services, including the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Public Health Service Commissioned Corps.

The Department has carefully considered all of the comments regarding the proposed changes to § 825.126 and has adopted paragraph (a) as proposed with a slight modification. The Department removes from the proposed definition of *covered active duty or call to covered active duty status* in the Final Rule the phrase ''under a call or order to active duty (or notification of an impending call or order to active duty)'' and inserts into the regulatory text preceding the definition the phrase ''(or has been notified of an impending call or order to covered active duty)''. The revised text is not intended to change the meaning of § 825.126(a), under which an eligible employee may take qualifying exigency leave if that employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status or has been notified of an impending call or order to covered active duty, but instead to provide clarity and more closely track the statutory language of the FY 2010 NDAA. With regard to commenters' request that the Department provide a definition for the term qualifying exigency, the Department notes that the 2008 Final Rule defined qualifying exigency by providing clearly defined reasons for which an eligible employee can take leave because of a qualifying exigency. 73 FR 67957. Thus, the proposed rule provided, just as the 2008 Final Rule did, eight distinct categories that the Department has determined to be qualifying exigencies that entitle eligible family members to FMLA leave. The Department does not believe that any additional explanation of the term qualifying exigency is necessary. In response to the comment concerning whether the phrase covered active duty or call to covered active duty limits qualifying exigency leave to the period during the military member's deployment, the Department notes that eligible employees who are family members of military members of the Armed Forces are entitled to qualifying exigency leave after notification of an impending deployment, during the deployment, and post-deployment. As explained in the NPRM, the Department does not believe that the FY 2010 NDAA altered the applicability of qualifying exigency leave to the limited category of post-deployment activities, the need for which immediately and foreseeably arise from the military member's covered active duty. In response to the request to define Armed Forces, the Department believes that the public has a common understanding of the Armed Forces, and that further definition is not necessary.

In response to the comments regarding the continued use of the term contingency operation in the definition of covered active duty for military members of the Reserve components, the Department declines to modify the language in § 825.126(a)(2) as suggested in light of the complexity of the different designations for types of duties and deployments within the military. The Department maintains its view, as explained in the NPRM, that because Congress retained the reference to 29 U.S.C. 101(a)(13)(B) in the FY 2010 NDAA, and 29 U.S.C. 101(a)(13)(B) defines contingency operations, this reference continues to require that members of the Reserve components be called to duty in support of a contingency operation in order for their family members to be entitled to qualifying exigency leave. 77 FR 8965. In response to the request to provide descriptions of the different types of active duty under the statutes listed in Title 10, the Department notes that proposed § 825.126(a)(2) provided, just as current § 825.126(b)(2) does, brief descriptions of the types of active duty to which each of the referenced statutes refers in addition to citing the statutes referenced in 10 U.S.C. 101(a)(13)(B). The Department believes that these descriptions are sufficient for employers and employees to ascertain the types of deployments for which members of the National Guard and Reserve components may be deployed which would entitle an eligible family member to take qualifying exigency leave.

In response to the Military Officers Association of America's comment suggesting expansion of the law to servicemembers assigned overseas, the Department notes that military members of the Regular Armed Forces who are assigned overseas to remote areas may be considered on covered active duty if they are called or ordered to active duty under a deployment and the remote area to which they are deployed is an area outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. The

same is true of military members of the National Guard and Reserve components as long as their foreign deployment is in support of a contingency operation referenced in § 825.126(a)(2). As to the inclusion of servicemembers of all the uniformed services referenced by the Military Officers Association of America, the Department notes that the definition of covered active duty in the FY 2010 NDAA specifically refers to the Armed Forces for members of both the Regular Armed Forces and the National Guard and Reserve components. *See* 29 U.S.C. 2611 (14). ''[A]rmed [F]orces'' is defined in 10 U.S.C. 101(a)(4) as the ''Army, Navy, Air Force, Marine Corps, and Coast Guard.'' While the NOAA Commissioned Corps and the U.S. Public Health Service Commissioned Corps are, part of the uniformed services as defined in 10 U.S.C. 101(a)(5), they are explicitly not part of the Armed Forces as defined in 10 U.S.C. 101(a)(4) and the Department lacks the authority to expand coverage for qualifying exigency leave as requested. Therefore, the Department adopts paragraph (a) as proposed in the Final Rule without modification.

Current § 825.126(a) sets forth the list of reasons for which an eligible employee may take qualifying exigency leave. The current qualifying exigency leave categories are: (1) *Short-notice deployment,* (2) *military events and related activities,* (3) *childcare and school activities,* (4) *financial and legal arrangements,* (5) *counseling,* (6) *rest and recuperation,* (7) *post-deployment activities,* and (8) *additional activities.* The Department proposed to move this list to § 825.126(b) without changing the subparagraph numbers that correspond to categories of qualifying exigencies.

Proposed § 825.126(b)(1) tracked current § 825.126(a)(1), which sets forth the requirements for *short-notice deployment* qualifying exigency leave. In addition to redesignating this subparagraph from (a)(1) to (b)(1), the proposal inserted the term ''covered active duty'' and deleted the reference to contingency operations from this section. However, the Department requested comment on whether the current seven-calendar-day period for *short-notice deployment* qualifying exigency leave remained appropriate. The Department received a few comments on this issue. The Coalition commented that, based on feedback from its members, the current seven-day period remains appropriate, and, along with SHRM, urged the Department not to make any changes to this section. World at Work conducted a survey (to which it received 94 responses) on issues raised in the NPRM, and found that the majority of requests for *short–notice deployment* qualifying exigency leave have not been for amounts of time beyond the current allotment. In contrast, the National Association of Letter Carriers (the Letter Carriers) suggested the period be expanded to 15 days, stating its members have found that seven days is often inadequate for dealing with all of the arrangements and adjustments that family members must make when faced with short-notice deployment. Twiga, an organization that advocates for workplace flexibility, also suggested an expansion to 15 days, asserting that some military members face difficulties in securing alternative childcare arrangements within a seven-day period.

The Department acknowledges the concern that seven days may be inadequate to address all issues arising from the short-notice deployment of a military member. After this seven-day-period, however, the employee remains entitled to qualifying exigency leave for any of the other enumerated exigencies set forth in this section. For example, an eligible employee would be able to take leave pursuant to § 825.126(b)(3) to address childcare arrangement issues arising from the military member's deployment subsequent to the seven-day short-notice period. Likewise, the employee is entitled, pursuant to current § 825.126(a)(8), to job-protected leave to address events arising out of the military member's deployment that are not included in the list of qualifying exigencies provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave. Accordingly, the Final Rule adopts the redesignation of § 825.126(a)(1) to § 825.126(b)(1) as proposed and retains the seven-day period for *short-notice deployment* qualifying exigency leave.

Proposed § 825.126(b)(3), *childcare and school activities,* tracked current § 825.126(a)(3), which allows eligible employees to take qualifying exigency leave to arrange childcare or attend certain school activities for a military member's son or daughter. In addition to redesignating this paragraph from (a)(3) to (b)(3), the Department proposed to delete repetitive text throughout this paragraph identifying the relationship between the child and the military member. Proposed § 825.126(b)(3) stated that, for purposes of the childcare and school activities leave listed in § 825.126(b)(3)(i) through (iv), the child must be ''the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence'', and also added language to clarify that, as with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting leave. As stated in the NPRM, the Department believes this clarifying language is necessary because of this section's unique relationship requirements. 77 FR 8966. While the military member must be the spouse, parent, or son or daughter of the eligible employee, the child for whom childcare leave is sought need not be a child of the employee requesting leave.

Several commenters addressed the clarifying language in proposed § 825.126(b)(3) with respect to *childcare and school activities* qualifying exigency leave. Legal Aid commended the Department for including such language. In contrast, an individual commenter did not support granting leave to military members' families to take leave for school activities when non-military working parents do not receive this benefit. Several commenters, including the Family Equality Council, North Carolina Justice Center, the Partnership, and Twiga, urged the Department to explicitly note that all FMLA regulations are interpreted to include the children of persons standing in loco parentis to those children. Twiga recommended the Department strike the requirement that the military member must be the spouse, son, daughter, or parent of the employee taking qualifying exigency leave and instead simply require that the employee be the parent of, or stand in loco parentis to, the military member's child for this category of qualifying exigency leave. The Partnership, Twiga, and the Family Equality Council noted that the Wage and Hour Administrator's Interpretation No. 2010–3, issued on June 22, 2010, stated that in loco parentis under the FMLA includes all persons with day-to-day responsibility to care for or financially support a child. For these reasons, Twiga suggested that the definition of who may take qualifying exigency leave should be flexible enough to account for relationships beyond the nuclear family.

A number of commenters, including Senators Harkin and Murray, and the Partnership, suggested adding a new qualifying exigency leave category to address issues regarding educational and related services for a child with a disability under the Individuals with

Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973, including attending meetings about eligibility, placement, and services, or to develop, update, or revise the child's Individual Education Plan under the IDEA. The North Carolina Justice Center also suggested the Department indicate that other childcare needs, such as the need to arrange for summer care and to attend medical appointments for children, would be included.

In response to the comments regarding in loco parentis, the Department reiterates its interpretation in Administrator's Interpretation No. 2010–3 that either day-to-day care or financial support may establish an in loco parentis relationship under the FMLA where the adult intends to assume the responsibilities of a parent with regard to a child. However, the statutory provisions of the FMLA with respect to qualifying exigency leave are very specific that the military member on covered active duty or call to covered active duty status must be the spouse, parent, or son or daughter of the eligible employee in order for the FMLA protections to apply. 29 U.S.C. 2612(a)(1)(E). Therefore, the fact that an employee may stand in loco parentis to a child of a military member is not sufficient to satisfy the statutorily-required relationship with the military member for qualifying exigency leave. The statute requires that the employee, whether or not he or she stands in loco parentis to the military member's child, have the requisite relationship with the military member. For example, the mother of a military member may be entitled to childcare and school activities qualifying exigency leave for the military member's child, but the military member's mother-in-law would not be regardless of her relationship to the military member's child. The Department notes, however, that any eligible employee who stands in loco parentis to the child of a military member (or any other child) is entitled to take FMLA leave if the child needs care due to a serious health condition. In light of the confusion indicated in the comments regarding the relationship requirements for qualifying exigency leave for childcare and school activities, the Department believes that the proposed clarification is beneficial.

In response to comments seeking the addition of a specific qualifying exigency category for educational and related services for disabled children, the Department notes that § 825.126(b)(3) allows qualifying exigency leave for a broad array of childcare and school activities, which could include leave to enroll a child in summer day camp or similar kind of summer day care at the end of the school year if the need to do so arises out of the military member's covered active duty or call to covered active duty. 73 FR 67959. Likewise, § 825.126(b)(3)(iv) provides for qualifying exigency leave to attend meetings with staff at a school or daycare facility, such as meetings with school counselors, parent-teacher conferences, or meetings with school officials regarding disciplinary matters, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty of a military member. The Department believes the current regulation is sufficient to include attending meetings about eligibility, placement, and services, or to develop, update or revise a child's Individual Education Plan when those meetings are necessary due to the covered active duty or call to covered active duty of a military member. The Department does not intend for this leave to be used to meet with staff at a school or daycare facility for routine academic concerns, nor to be used for routine educational and related services for a child with a disability under the Individuals with Disabilities Education Act that are unrelated to the military member's deployment. Therefore, no additional clarification or additional categories of childcare and school activities are added to the Final Rule. The Final Rule adopts the re-designation of § 825.126(a)(3) to § 825.126(b)(3) and the other proposed changes in § 825.126(b)(3) without modification.

Proposed § 825.126(b)(6), *Rest and Recuperation,* followed current § 825.126(a)(6), which allows an eligible employee to take up to five days of leave to spend time with a military member on Rest and Recuperation leave during a period of deployment. In addition to re-designating this paragraph from (a)(6) to (b)(6) and capitalizing Rest and Recuperation to correspond directly to the DOD's Rest and Recuperation leave programs, the Department also proposed to expand the maximum duration of *Rest and Recuperation* qualifying exigency leave from five days to the duration of the military member's Rest and Recuperation leave, up to a maximum of 15 days. As stated in the NPRM, the DOD has advised the Department that the actual number of days of Rest and Recuperation leave provided by the military varies, with some military members receiving as many as 15 days, depending upon the length of their deployment. 77 FR 8966. The Department proposed to allow the amount of leave an employee may take for *Rest and Recuperation* qualifying exigency leave to equal that provided to the military member, up to a maximum of 15 days. The Department sought comment on the expansion of *Rest and Recuperation* qualifying exigency leave, and whether the proposed 15-day period would be sufficient in all instances.

Several commenters, including World at Work, North Carolina Justice Center, the Partnership, and the Military Officers Association of America, supported the Department's proposal to expand *Rest and Recuperation* leave up to a maximum of 15 days. The Military Officers Association of America and the Partnership stated that it is appropriate to grant employees time with their military family members when the military member is home for a limited time from a foreign deployment, as allowing for such leave positively impacts family members at home and improves the morale of those serving abroad. SHRM supported the expansion, but suggested that the leave be limited only to the actual Rest and Recuperation time at home or some other destination where the military member will take the Rest and Recuperation leave. The Coalition agreed that an extension is appropriate, but commented that 15 days is excessive and suggested a 10-day period instead. The Coalition commented that as written, the proposal would allow an employee to take 15 days off of work, potentially equating to three full five-day workweeks of leave, while the military's leave programs allow up to 15 calendar days of leave, which is meant to allow the military member two weeks at home. The Letter Carriers commented that because the need for recuperation can vary tremendously depending on the nature of the deployment, the leave granted for this exigency should be equal to the amount of leave the military has determined to be necessary and has granted for the military member, up to a maximum of at least 30 days.

As stated in the NPRM, the Department believes it is appropriate to make the availability of this type of qualifying exigency leave consistent with the leave actually provided by the military to the member on covered active duty. 77 FR 8966. Therefore, the Department has decided to implement the regulation as proposed in the Final Rule, providing for up to a maximum of 15 days for *Rest and Recuperation* qualifying exigency leave, but has modified the language for clarity. The Department has modified the language to delete the reference to eligible

employees because the paragraph (b) makes it clear that all of the subparagraphs under (b), including this one, apply only to eligible employees. Further, in response to the comments, the Department has modified the language to state that leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave. This language is consistent with the Department's position for *short-notice deployment* leave found in § 825.126(b)(1). The Department reiterates that, as noted in the NPRM, this allows an employee to take *Rest and Recuperation* qualifying exigency leave for the same amount of time as is provided to the military member for the member's Rest and Recuperation leave, up to a maximum of 15 days. 77 FR 8966. The Department further clarifies that the employee may choose to take the leave in a continuous block of time or intermittently over the duration of the military member's Rest and Recuperation leave, up to 15 calendar days. Thus, the employee's leave does not need to be taken as a single block of time. However, it must be taken during the period of time indicated on the Rest and Recuperation orders.

Proposed § 825.126(b)(7), *Post-deployment activities* tracked current § 825.126(a)(7). In addition to the redesignation of paragraph from (a)(7) to (b)(7), the Department proposed to add attending funeral services to redesignated paragraph (b)(7)(ii), which permits an employee to take qualifying exigency leave to address issues that arise from the death of a military member while on covered active duty status, as an additional example of the activities that are covered by such leave. Legal Aid supported this addition. SHRM endorsed the Department's clarification, stating that according to SHRM survey data, over 90 percent of all employers currently provide some form of paid bereavement leave, and the availability of qualifying exigency leave for this purpose ensures coverage for those who take such leave. Accordingly, the Department implements the redesignation and § 825.126(b)(7)(ii) as proposed.

The Department did not propose any new qualifying exigencies for which FMLA leave may be taken, but invited comment on whether additional qualifying exigencies should be added in light of the extension of this leave entitlement to family members of members of the Regular Armed Forces. The Department received one comment in response. The Letter Carriers suggested adding an eldercare provision as an additional qualifying exigency, stating that several of its members have indicated that providing and making arrangements for eldercare is as pressing a need for them as childcare is when they face military deployment.

The Department agrees that the need to provide care to a military member's parent is analogous to the need to provide care for a military member's child and that such a need may arise when a military member is called to covered active duty. Consistent with the purpose and intent of the qualifying exigency leave provision in the FMLA, the Department modifies the Final Rule to create a new provision for parental care qualifying exigency leave. An eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood in loco parentis to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status. In the 2008 Final Rule establishing qualifying exigency leave for *childcare and school activities,* the Department stated that certain childcare and school activities require attention because the military member is on active duty or has been called to active duty status and that qualifying exigency leave would be appropriate in such situations, but that routine events that occur regularly for all children would not warrant qualifying exigency leave. 73 FR 67959. This same standard applies to qualifying exigency leave to care for a military member's parent when the parent is incapable of self-care. Therefore, the parental care qualifying exigency provision in the Final Rule tracks the childcare provision in setting out the types of situations when qualifying exigency leave is available. Thus, parental care qualifying exigency leave may be used for: (i) Arranging for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangements; (ii) providing care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member; (iii) admitting or transferring a parent of the military member to a care facility when the admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and (iv) attending meetings with staff at a care facility for the parent of the military member, such as meeting with hospice or social service providers, when such meetings are necessitated by the covered active duty or call to covered active duty status of the military member (but not for routine or regular meetings). For purposes of parental care qualifying exigency leave, incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' or ''instrumental activities of daily living.'' Activities of daily living include, but are not limited to, adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include, but are not limited to, cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. This definition of incapable of self-care is adopted from § 825.122(d)(1), where it is used as part of the determination of whether a child 18 years of age or older is a son or daughter under the FMLA. Thus, for example, if a military member's parent is incapable of self-care and the parent was cared for by the military member, an eligible employee may take parental care qualifying exigency leave to arrange for the alternative care of the military member's parent, such as hiring a home health care aide, or to provide, on an urgent, immediate need basis, care that a home health care aide would normally provide. In either event, however, the employee may not take parental care qualifying exigency leave to provide such care to the parent on a regular or routine basis, even if the military member previously provided such regular or routine care. The Department reiterates that as with all instances of qualifying exigency leave, the military member must be the spouse, parent, son, or daughter of the employee requesting qualifying exigency parental care leave. In the case of parental care leave, the parent in need of care must be the military member's parent or a person who stood in loco parentis to the military member when the member was less than 18 years old. Accordingly, the Department creates a new provision for *parental care* leave at § 825.126(b)(8), and redesignates *additional activities* from current § 825.126(a)(8) to § 825.126(b)(9).

3. Section 825.127 Leave To Care for a Covered Servicemember With a Serious Injury or Illness (Military Caregiver Leave)

Section 825.127 sets forth the regulation allowing an eligible employee who is a covered servicemember's spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave during a single 12-month period to care for a servicemember with a serious injury or illness (military caregiver leave). Section 825.127 implemented Section 585(a) of the FY 2008 NDAA, which entitled an eligible employee who is a spouse, parent, son, daughter, or next of kin of a current servicemember with a serious injury or illness, to take FMLA leave to provide care to that covered servicemember. Section 565(a) of the FY 2010 NDAA further expands military caregiver leave to eligible employees caring for certain veterans with a qualifying (as defined by the Secretary of Labor) injury or illness incurred in line of duty on active duty or that existed before the member's active duty and was aggravated in the line of duty on active duty. 29 U.S.C. 2611(15)(B). Section 565(a) also amends the FMLA by revising the definition of a serious injury or illness for current servicemembers of the Armed Forces to include conditions that existed before the current servicemember's active duty and were aggravated by service in the line of duty on active duty. 29 U.S.C. 2611(18)(A).

The Department proposed to reorganize § 825.127 to incorporate the substantive changes to the military caregiver leave provisions pursuant to the FY 2010 NDAA amendments. The Department proposed to add the term military caregiver leave to the title of this section for clarity. The Department also proposed to move current § 825.127(b), which defines the family members qualified to take caregiver leave, to proposed § 825.127(d), current § 825.127(c), which explains the single 12-month period, to proposed § 825.127(e), and current § 825.127(d), which addresses circumstances when a husband and wife who are both eligible for FMLA leave work for the same employer, to proposed § 825.127(f), as well as to update the internal cross-references in the provision accordingly. The Department did not receive any comments on the proposal to redesignate these three paragraphs or to modify the title of this section. The Department adopts these proposed changes in the Final Rule.

Consistent with the FY 2008 NDAA, under current § 825.127(a), an eligible employee may take FMLA leave to care for a current member of the Armed Forces, including National Guard and Reserves members, with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list. This paragraph specifically excludes former members of the Regular Armed Forces, former members of the National Guard and Reserves, and members on the permanent disability list from the current definition of a covered servicemember. In accordance with the FY 2010 NDAA, the Department proposed to remove the statement that military caregiver leave does not apply to former members of the military from proposed paragraph (a), and to move the definitions in current paragraph (a)(1) to proposed paragraph (c) and current paragraph (a)(2) into proposed paragraph (b). The Department proposed in paragraph (a) to state simply that eligible employees are entitled to take FMLA leave to care for a covered servicemember with a serious injury or illness. The Department did not receive any comments on proposed paragraph (a), and therefore, adopts this paragraph without modification in the Final Rule.

The Department proposed in § 825.127(b) to define a covered servicemember for current members of the Armed Forces and for covered veterans. Proposed § 825.127(b)(1) defined *covered servicemember* for current members of the Armed Forces, including members of the Reserve components. The proposed definition mirrored the statutory definition. 29 U.S.C. 2611(15)(A). The proposed definition also incorporated the definition of outpatient status from current § 825.127(a)(2), which applies only to current servicemembers. No comments were received on this proposal. It is adopted without modification in the Final Rule.

Proposed § 825.127(b)(2) defined *covered servicemember* for veterans as a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. It further defined a *covered veteran* as an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* 29 U.S.C. 2611(15)(B) (defining a covered servicemember as a veteran ''who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness'' and who was a member of the Armed Forces ''at any time during the period of 5 years preceding the date of which the veteran undergoes that medical treatment, recuperation, or therapy''); 29 U.S.C. 2611(19) (defining veteran as the term is defined in 38 U.S.C. 101). As discussed in the NPRM, the Department noted that Congress extended FMLA leave to care for a particular subset of veterans. 77 FR 8967. The Department noted that this interpretation may exclude veterans of previous conflicts such as Gulf War veterans, as well as certain veterans of the War in Afghanistan and Operation Iraqi Freedom. *Id.* The proposal also indicated that an eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but noted the single 12-month period described in proposed paragraph (e)(1) may extend beyond the five-year period. As explained in the NPRM, the Department proposed to measure the five-year period from the date the employee first takes leave to care for the veteran, and to permit an employee to continue leave begun within the five-year period until the end of the applicable single 12-month period. *Id.* Thus, if the leave commences within the five-year period, the employee may continue leave for the applicable single 12-month period even if it extends beyond the five-year period.

The Department received several comments on this definition. SHRM commented that the definition failed to include the requirement that the veteran was a member of the Armed Forces (including a member of the National Guard or Reserves) that is part of the statutory definition at 29 U.S.C. 2611(15)(B). The Department had not included this phrase in the proposed definition because the Department's understanding was that all veterans were, by definition, members of the Armed Forces, and therefore the Department believed that the inclusion of such language was unnecessary. While this is still the Department's understanding, in the interest of clarity, the Department modifies § 825.127(b)(2), as well as the corresponding definitions in §§ 825.102 and 825.122, in the Final Rule to incorporate this statutory language.

The majority of the comments on this section were directed at the Department's interpretation of the five-year period. The Partnership and Twiga supported the Department's interpretation that an employee who begins taking military caregiver leave during the five-year period will be permitted to continue taking such leave after the five-year period has expired.

Similarly, the North Carolina Justice Center approved of the interpretation of the five-year period for veterans. Both the Partnership and the North Carolina Justice Center noted, however, that some veterans who would have been covered veterans under this interpretation of the five-year period when the FY 2010 NDAA was enacted on October 28, 2009 will have been discharged for more than five years when these regulations become effective and, therefore, will no longer be covered veterans for whom an employee may take military caregiver leave. They urged the Department to provide for a special exception for the calculation of the five-year period for such veterans who have qualifying injuries or illnesses so that their family members will be able to take caregiver leave to care for them. The Consortium for Citizens with Disabilities (CCD) recognized that the five-year time period is statutorily determined, but asked that the Department adopt as broad a definition as possible. Senators Harkin and Murray suggested that the time period between the date the law was enacted (October 28, 2009) and the effective date of these regulations should not count in the five-year window. They provided an example of a scenario in which a servicemember became a veteran on July 1, 2010 and the Department's final regulations become effective on July 1, 2012—they asserted that this servicemember's family should be eligible to take military caregiver leave until June 30, 2017 rather than until June 30, 2015.

While the Department has taken and continues to take the position that the military caregiver leave provision to care for veterans is not effective until the effective date of this Final Rule, the Department acknowledges that the time in which family members of veterans can take military caregiver leave to care for veterans who were discharged or released between October 28, 2009 and the effective date of this Final Rule has been diminished. The comments highlighted that there are veterans whose five-year period will have expired between October 28, 2009 and the effective date of this Final Rule but who will still have serious injuries or illnesses and will still need caregiving from family members when this Final Rule becomes effective. The comments likewise highlighted that there are servicemembers who will have become veterans between October 28, 2009 and the effective date of this Final Rule and who will have a shortened period remaining in their five-year window during which they may receive needed caregiving from family members for a serious injury or illness when this Final Rule becomes effective. Similarly, there may be servicemembers who became or will become veterans between October 28, 2009 and the effective date of this Final Rule and who will manifest a serious injury or illness that was incurred or aggravated in the line of duty and will need caregiving from family members for longer than the shortened period remaining in their five-year window when this Final Rule becomes effective. Therefore, after further consideration, the Department believes that it would not be consistent with congressional intent to deprive the family members of such veterans the complete amount of time that the family members would have had to take military caregiver leave to care for those servicemembers who became veterans between October 28, 2009 (the date the FY 2010 NDAA was enacted) and the effective date of this Final Rule. Therefore, the Department has modified § 825.127(b)(2) in the Final Rule to provide for a special method of calculating the five-year period for this subset of veterans: for an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status. This will protect the military caregiver leave entitlement for the family members of veterans whose five-year period either expired or was diminished between October 28, 2009 and the effective date of this Final Rule. Thus, for a veteran whose five-year period expired between October 28, 2009 and the effective date of this Final Rule, the five-year period will be extended by the amount of time that the veteran would have had if the provision had been effective on October 28, 2009. For example, if, on October 28, 2009, a veteran had one year remaining before the expiration of the five-year period (*i.e.,* the veteran was honorably discharged from the military on October 28, 2005), the veteran's family member would have one year from the effective date of this Final Rule during which he or she could, if all other conditions were met, commence taking military caregiver leave. Similarly, as suggested by Senators Harkin and Murray, for a servicemember who became a veteran between October 28, 2009 and the effective date of this Final Rule, the five-year period will be extended by the amount of time between the veteran's date of discharge and the effective date of this Final Rule. For example, if a servicemember became a veteran two years before the date this Final Rule becomes effective, the two years that elapsed between that date of discharge and the effective date of this Final Rule would be excluded from the calculation of the period in which the veteran's family members could begin taking FMLA military caregiver leave. In such a situation, two years would be added to the amount of time that the veteran has remaining in his or her five-year window as of the date that this Final Rule becomes effective. In all instances of military caregiver leave, regardless of how the five-year period is calculated, the veteran must have a qualifying serious injury or illness on the date the family member seeks to take military caregiver leave. In addition, this special provision for the subset of veterans described above does not change the character of any leave to care for a veteran that was voluntarily provided by an employer before the effective date of this Final Rule and that was not otherwise qualified as FMLA-protected leave. As discussed earlier in this preamble, if such leave was provided before the effective date of this Final Rule, the leave is not FMLA-protected leave and does not count against an employee's FMLA entitlement.

The Department proposed in § 825.127(c) to define a serious injury or illness for both current members of the Armed Forces and covered veterans. Proposed § 825.127(c)(1) incorporated the definition of a *serious injury or illness for a current servicemember* from current § 825.127(a)(1), and expanded the definition pursuant to the FY 2010 NDAA amendments to include an illness or injury that existed prior to the member's active duty and was aggravated by service in the line of duty on active duty.

As the Department explained in the NPRM, for both current members of the Armed Forces and covered veterans, a serious injury or illness that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty includes both conditions that were noted at the time of entrance into active service and conditions that the military was unaware of at the time of entrance into active service but that are later determined to have existed at that time. 77 FR 8967. A preexisting injury or illness would generally be considered to have been aggravated by service in the line of duty on active duty where there is an increase in the

severity of such injury or illness during service, unless there is a specific finding that the increase in severity is due to the natural progression of the injury or illness. As stated in the NPRM, it was the Department's understanding that individuals will not be accepted for military service in the Regular or Reserve components unless they are: (1) Free of contagious diseases that probably will endanger the health of other personnel; (2) free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation for medical unfitness; (3) medically capable of satisfactorily completing required training; (4) medically adaptable to the military environment without the necessity of geographical area limitations; and (5) medically capable of performing duties without aggravation of existing physical defects or medical conditions. 77 FR 8967. In light of these standards, the Department sought comments, particularly from military members and their families, concerning types of injuries or illnesses that may exist prior to service and be aggravated in the line of duty on active duty to such an extent as to render the servicemember unable to perform the duties of the member's office, grade, rank, or rating. The Department did not receive any comments in response.

The Department received two comments that addressed proposed § 825.127(c)(1) more generally. Senators Harkin and Murray and the CCD suggested that the Department consider participation in or meeting the eligibility requirements of the Department of Defense Special Compensation for Assistance with Activities of Daily Living (SCAADL) caregiver program as a method to establish the current servicemember's serious injury or illness. The SCAADL program was authorized by the FY 2010 NDAA and implemented by the Department of Defense in August 2011. *See* Public Law 111–84 and Department of Defense Instruction 1341.12. The SCAADL program provides compensation to an eligible member of the active or Reserve components of the military who has a permanent catastrophic injury or illness that was incurred or aggravated in the line of duty. The compensation is intended to offset the economic burden borne by the servicemember's primary caregiver in providing such caregiving. The criteria for participation in the SCAADL program includes, in relevant part, certification by a licensed DOD or VA physician that the servicemember has a permanent catastrophic injury or illness and is in need of assistance from another person to perform the personal functions required in everyday living and that, in the absence of the provision of such assistance, the servicemember would require hospitalization, nursing home care, or other residential institutional care. 37 U.S.C. 439. The Department notes that the definition of *serious injury or illness for a current servicemember* in § 825.127(c)(1) reflects the statutory definition of the term. While the Department does not believe that it would be appropriate to add participation in the SCAADL program as a second definition for serious injury or illness of a current servicemember, it does believe that a current servicemember enrolled in the program may meet the requirement of suffering a serious injury or illness that renders the servicemember unable to perform the duties of his or her office, grade, rank, or rating. As discussed in more detail in the discussion of § 825.310 below, private health care providers may consider documentation produced by the DOD, such as DD Form 2948, in assessing whether the current servicemember has a serious injury or illness that may render him or her medically unfit to perform the duties of his or her office, grade, rank, or rating.

The FY 2010 NDAA requires the Department to define a qualifying serious injury or illness for a veteran. Proposed § 825.127(c)(2) defined serious injury or illness for a covered veteran as an injury or illness that was incurred in the line of duty on active duty or existed before the beginning of active duty and was aggravated by service in the line of duty on active duty and manifested before or after the member became a veteran and satisfied one of three alternate definitions set out in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii). With these three proposed definitions, the Department intended for there to be parity between the definition of a serious injury or illness of a covered veteran and the statutory definition of a serious injury or illness of a current servicemember. Because a veteran no longer has a military office, grade, rank, or rating and may participate in the civilian workforce, the standard for a serious injury or illness for current members of the Armed Forces cannot be directly applied to veterans. The three alternative definitions set out in the proposal at (c)(2)(i), (ii), and (iii) were intended to achieve this parity. As discussed later, the Department also requested comment on adding enrollment in the Department of Veterans Affairs (VA) Program of Comprehensive Assistance for Family Caregivers as a possible fourth definition for establishing a qualifying serious injury or illness of a covered veteran, and sought comment from veterans and caregivers on whether inclusion of this program would be helpful. 77 FR 8969.

Proposed § 825.127(c)(2)(i) defined a *serious injury or illness of a covered veteran* as a serious injury or illness of a current servicemember, as defined in proposed § 825.127(c)(1), that continues after the servicemember becomes a veteran. Thus, if a veteran suffered a serious injury or illness when he or she was a current member of the Armed Forces and that same injury or illness continues after the member leaves the Armed Forces and becomes a veteran, the injury or illness will continue to qualify as a serious injury or illness warranting military caregiver leave. As stated in the NPRM, the Department believes that allowing qualifying family members to take leave to care for covered veterans who continue to suffer from these serious injuries or illnesses is consistent with congressional intent, as evidenced by the extension of military caregiver leave provisions for veterans for a defined five-year period. 77 FR 8967. Senators Harkin and Murray submitted the only comment on this definition, and stated that the definition is clear and understandable. The Final Rule incorporates this definition as proposed.

Proposed § 825.127(c)(2)(ii) defined a *serious injury or illness for a covered veteran* as a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater, and the VASRD rating is based, in whole or part, on the condition for which the caregiver leave is needed. As discussed in the NPRM, the Department considered proposing a VASRD rating of 60 percent, which is equal to the level at which the veteran is considered ''totally disabled'', meaning that the veteran is unable to secure or follow a substantially gainful occupation by reason of a service-connected disability under the VA regulations. 77 FR 8968; *see* 38 CFR 4.16. The Department was concerned, however, that veterans may suffer from injuries and illnesses that do not result in a total disability under the VASRD rating system, but which should qualify as a serious injury or illness for military caregiver leave. The Department also considered proposing a VASRD rating at a level less than 50 percent, but determined that a lower threshold might capture injuries and illnesses that Congress did not intend to qualify as

serious injuries or illnesses for which employees would be entitled to 26 workweeks of FMLA leave. In addition, the Department believed that a single threshold of an overall VASRD rating of 50 percent (based on a single or multiple disabilities) was more appropriate to establish a serious injury or illness for a covered veteran than the two-tiered test used under VASRD determining total disability based on multiple conditions. The Department sought comments on all aspects of this proposed definition.

Several comments were received with respect to the second proposed definition of a qualifying serious injury or illness for a veteran set out in § 825.127(c)(2)(ii). Senators Harkin and Murray stated that the proposed 50 percent VASRD rating threshold is sufficient so long as there are other avenues for the veteran to qualify as having a serious injury or illness. The Partnership expressed concern that the 50 percent VASRD rating may not capture certain serious injuries and illnesses. The Partnership pointed to traumatic brain injuries and post traumatic stress disorder and suggested that these conditions may not be captured by the 50 percent threshold. An individual commenter expressed a similar concern regarding post traumatic stress disorder. The CCD noted that while a 50 percent VASRD rating is likely to capture the most significantly disabled veterans, a number of arguably serious conditions may not be rated at a level of 50 percent or greater, and cited a number of conditions that it asserted should be covered but that might not be rated at a level of 50 percent or greater. Legal Aid commented that the Department's decision to pick a certain VASRD rating rather than allowing for the more fact-specific inquiry allowed for under the definition of serious health condition seemed unnecessarily rigid.

The Department has considered the comments, and continues to believe that a VASRD rating of 50 percent or greater is most reflective of congressional intent and is the rating at which injuries or illnesses are on par with a serious injury or illness of a current servicemember. In proposing a threshold of 50 percent, the Department was attempting to ensure that disabilities or conditions that may render the veteran substantially unable to work were captured, so as to achieve parity with the definition of serious injury or illness for a current servicemember. At the same time, the Department was attempting to ensure that the threshold was great enough to preclude injuries or illnesses that Congress did not intend to include in the definition of a serious injury or illness. The Department's review indicates that a VASRD disability rating of 50 percent or greater encompasses disabilities or conditions such as amputations, severe burns, post traumatic stress disorder, and severe traumatic brain injuries. While these and other injuries and illnesses may not result in a total disability under the VASRD rating system, the Department believes that such conditions should qualify as a serious injury or illness for military caregiver leave. Similarly, as noted in the NPRM, the Department believes that a VASRD rating below 50 percent would fail to reach the level of severity intended by Congress. 77 FR 8968. The commenters who addressed this proposed definition did not suggest an alternative VASRD rating that would better capture conditions that should be considered a serious injury or illness. Therefore, in order to achieve parity with the standard of a serious injury or illness for a current member of the Armed Forces, the Department concludes that a VASRD rating of 50 percent or greater is appropriate and most closely approximates a condition that substantially impairs a veteran's ability to work.

The Department is cognizant of the commenters' concern that many veterans who will have a need for care arising out of an injury or illness related to military service may not have received a VASRD rating. The Department reiterates its intent that the VASRD rating be only one alternative for establishing a qualifying serious injury or illness of a covered veteran. In instances where the servicemember has not yet received a VASRD rating, family members will still be able to take leave if the veteran's condition is such that it constitutes a serious illness or injury in accordance with any one of the other definitions set forth in § 825.127(c)(2). Therefore, the Department adopts proposed § 825.127(c)(2)(ii) without modification in the Final Rule.

The Department proposed a third definition of *serious injury or illness for a covered veteran* in § 827.127(c)(2)(iii) as a physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability or would do so absent treatment. 77 FR 8968. This definition was intended to cover injuries and illnesses that are similar in severity to the injuries and illnesses qualifying under the proposed definitions in (c)(2)(i) and (ii), but for which the veteran did not obtain certification as a serious injury or illness when he or she was a current member of the military or had not received a VASRD rating. In addition, the Department intended by this definition to cover veterans who may need a family member to provide care for injuries or illnesses that, *absent treatment,* would substantially impair the veteran's ability to secure or follow a substantially gainful occupation. 77 FR 8968. The Department explained that it expected that, when making determinations of a serious injury or illness under this proposed definition, health care providers would do so in the same way they make similar determinations for Social Security Disability and Workers' Compensation claims. *Id.* at 8969.

The Department sought comment specifically on whether this proposed definition would be effective at capturing the serious injuries or illnesses that covered veterans suffer for which caregiving is needed by qualifying family members and which would not be covered under the first two proposed definitions in paragraphs (c)(2)(i) and (c)(2)(ii). The Department also sought comment on the ability of health care providers to certify a serious injury or illness for a covered veteran and the ability of employers to administer leave associated with a serious injury or illness for a covered veteran under this proposed definition. Finally, the Department sought comment on the types of injuries and illnesses that typically manifest after the servicemember becomes a veteran, whether a family member is needed to care for the veteran for such injuries or illnesses, and, if so, whether the proposed definition would cover such situations.

The Department received numerous comments on this proposed third definition. The CCD generally supported this proposal (with specific exceptions discussed below) given the length of time it may take to receive a VASRD rating. Several commenters addressed the part of the definition that requires the injury or illness to substantially impair the veteran's ability to work or would do so absent treatment. SHRM asked that the Department provide further guidance on the terms in the definition. Legal Aid, Senators Harkin and Murray, and the Partnership similarly expressed concern that this definition contained undefined terms, which could cause confusion among military families or medical professionals unfamiliar with this language. Twiga and an individual commenter expressed support for the Department's recognition that a veteran may be able to work while also needing assistance performing other daily

activities. However, Aon Hewitt inquired why a family member would still need FMLA leave if the veteran is able to work. This commenter believed that this provision would lead to increased abuse of FMLA leave. Senators Harkin and Murray expressed concern that the focus on a veteran's ability to work might provide a disincentive for the veteran to pursue employment. The Senators further asserted, along with the Partnership, that making a family member's ability to take military caregiver leave dependant on the veteran's inability to work imposes a more stringent standard for leave to care for veterans with a serious injury or illness than for non-veterans with a serious health condition. These commenters recommended that the Department permit military caregiver leave for family members of covered veterans who have a serious health condition that was caused or aggravated in the line of duty on active duty. In contrast, the CCD stated that while the Department does not use a substantially gainful work standard for others to qualify for leave related to a serious health condition, it understood that the Department was attempting to set a higher standard for the enhanced leave provision for family members of veterans. In keeping with this standard, the CCD suggested that using the standard for Social Security Disability Insurance (SSDI) for a healthcare provider to determine if the injury or illness renders the veteran substantially limited in the ability to work because many veterans with significant service-connected disabilities receive an official determination of SSDI before obtaining a VASRD rating. The commenter suggested that an SSDI determination should qualify a covered veteran under this section along with a medical opinion that the injury or illness is at least related to military service. At the same time, the commenter expressed concern that reliance on an SSDI or Workers' Compensation standard could be unnecessarily restrictive. The CCD suggested that the Department include as an alternative definition the veteran's inability to perform a number of activities of daily living. Senators Harkin and Murray similarly suggested as another option a definition based on a veteran's inability to perform a number of activities of daily living and instrumental activities of daily living. Legal Aid asserted that the Department's statement that private health care providers can make determinations of serious injuries or illnesses in the same way they make similar determinations for Social Security Disability and Workers' Compensation claims is unnecessarily complicated as not all private healthcare providers make these types of determinations and Workers' Compensation standards vary by state. This commenter requested that this standard be removed, or if it is retained, that the Department provide more guidance. Lastly, the CCD and Senators Harkin and Murray suggested that the Department remove the term service-connected disability and replace it with a disability that is related to military service or a disability or disabilities eligible for service connection because only the VA can officially determine whether a disability is service-connected.

After carefully considering these comments, the Department has decided to retain the proposed definition in § 825.127(c)(2)(iii) with one modification. In response to comments that only the VA can determine if a disability is connected to the individual's military service, the Department has removed the term service-connected disability or disabilities and replaced it with the term a disability or disabilities related to military service in the Final Rule. This change is made to avoid any confusion as to whether a determination of service connection from the VA is required for this definition; the Department does not view this as a substantive change as the FY 2010 NDAA clearly requires that a covered veteran's serious injury or illness have been incurred or aggravated in the line of duty on active duty. As the Department stated in the NPRM, a certification of serious injury or illness under this definition serves only to establish that the veteran has a condition that entitles his or her family member to military caregiver leave under the FMLA. 77 FR 8969. Such a determination provides no basis for a determination of status, rights, or benefits for the VA or other agencies. The VA is the sole agency qualified to make any service-connected rating determination for purposes of VA-related rights or benefits. The Department believes that the modified phrasing in the Final Rule will prevent possible confusion on this issue.

In response to the comments by the Partnership and Senators Harkin and Murray that this definition links the ability of an employee to take military caregiver leave to the veteran's inability to work, the Department emphasizes that the definition includes a physical or mental condition that would substantially impair a veteran's ability to work absent treatment, and therefore does not preclude coverage of veterans who are employed. The comments illustrate that further clarification of this standard is needed. This definition would cover, for example, a covered veteran with post traumatic stress disorder who is receiving medical treatment and is able to work, but would not be able to do so without treatment, and who needs care from an employee-family member because of this treatment. Thus, this definition recognizes that while a veteran may be able to work, he or she may have a continuing need for treatment for his or her military related injury or illness that, if not treated, would substantially impair his or her ability to secure or follow a gainful occupation. It is the Department's position that in such scenarios, the veteran's family member would be entitled to FMLA caregiver leave to provide care for the veteran, such as driving the veteran to medical appointments or assisting the veteran with basic medical needs. *See* § 825.124(a). The Department fully supports the goal of returning veterans to the workforce, and does not believe that this definition will undermine that goal.

In addition, in response to the comments urging the Department to adopt the serious health condition standard as the definition of a serious injury or illness of a veteran, the Department notes that an eligible family member is entitled to take 26 workweeks of leave in a single 12-month period under the FMLA military caregiver leave provision. *See* 29 U.S.C. 2612(a)(3). As the CCD correctly noted, this is an enhanced leave entitlement, as traditional FMLA only allows 12 workweeks of leave for an eligible employee. When Congress passed the FY 2008 NDAA first creating this enhanced leave provision, it defined a serious injury or illness of a current servicemember as an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. Public Law 110–181. Congress did not use the existing statutory standard of serious health condition as defined in 29 U.S.C. 2611(11) as the basis for the military caregiver leave entitlement. When Congress passed the FY 2010 NDAA, it required the Secretary to define a serious injury or illness of a covered veteran. Public Law 111–84. Again, Congress did not use the statutory standard of serious health condition as the basis of the entitlement. Because Congress expressly added a new standard for military caregiver

leave for both current servicemembers and covered veterans instead of referencing the existing serious health condition standard, the Department's intent in defining serious injury or illness of a covered veteran was to achieve parity between the definitions of a serious injury or illness for current servicemembers and for covered veterans for this enhanced leave entitlement. As the definition of a serious injury or illness for a current servicemember is linked to the servicemember's inability to perform the duties of his or her office, grade, rank, or rating, and in light of the fact that veterans no longer have an office, grade, rank, or rating to perform, the Department proposed a definition that would link the veteran's injury or illness to a condition that substantially impairs the veteran's ability to secure or maintain a gainful occupation or would do so absent treatment. For these reasons, the Department does not believe it would be appropriate to define a serious injury or illness of a covered veteran as a serious health condition. The Department notes that where a veteran's injury or illness is not a serious injury or illness as defined in this Final Rule, the veteran's family members would still be able to take FMLA leave to care for the veteran if the condition is a serious health condition and the other requirements for FMLA leave are met.

While the Department acknowledges the comments that some of the terms used in this definition are new to the FMLA, the Department believes that health care providers will be able to make the determination of whether an injury or illness substantially impairs the veteran's ability to secure or follow a substantially gainful occupation or would do so absent treatment. The Department declines to further define these terms at this time, as it believes that such determinations will be a fact-specific inquiry that the health care provider will make based on his or her skills, expertise, and experience. As the Department noted in the NPRM, health care providers are currently called upon to make determinations about an individual's ability to work for Social Security and Workers' Compensation claims, and the Department believes that a health care provider can make similar determinations for FMLA requests for military caregiver leave as well. 77 FR 8969. In response to Legal Aid's comment regarding Social Security Disability and Worker's Compensation, the Department clarifies that it did not propose that private health care providers use the established standards for Social Security Disability or Worker's Compensation evaluations for making serious injury or illness determinations under the proposed definition at § 825.127(c)(2)(iii). Rather, the Department was attempting to illustrate that health care providers already make similar types of determinations regarding an individual's ability to work, and therefore, the Department expects that they have the experience and expertise permitting them to do so for military caregiver leave certifications.[2]

Lastly, the Department has decided not to adopt the CCD's recommendation to use SSDI determinations as another means of establishing a serious injury or illness. It is the Department's understanding that the criteria upon which SSDI determinations are based are distinct from the criteria upon which VASRD ratings are based. In light of the fact that the definition in proposed § 825.127(c)(2)(iii) was intended to mirror a 50 percent or greater VASRD rating, relying on a SSDI determination would not necessarily be an equivalent standard. The Department is concerned that if it were to use SSDI determinations to establish a qualifying serious injury or illness of a covered veteran, parity may not be achieved due to the different criteria on which SSDI determinations are based. Moreover, the SSDI determination does not address whether the veteran's injury or illness was incurred or aggravated in the line of duty on active duty. However, the Department believes that if a servicemember has an SSDI determination, a private health care provider may consider the determination in assessing whether a veteran has a qualifying serious injury or illness.

In addition to the three definitions that the Department proposed in the NPRM, the Department also discussed the VA's Program of Comprehensive Assistance for Family Caregivers (*see Caregivers and Veterans Omnibus Health Services Act of 2010,* Public Law 111–163; 38 CFR Part 71) as another possible means through which the severity of a veteran's injury or illness may be assessed. 77 FR 8969. This program is designed to provide health care, travel, training, and financial benefits to certain eligible caregivers of veterans who are eligible for the program. In general, a veteran or servicemember undergoing medical discharge from the Armed Forces is eligible for VA's Program of Comprehensive Assistance for Family Caregivers if the individual has incurred or aggravated a serious injury (including traumatic brain injuries, psychological trauma, or other mental disorders) in the line of duty on or after September 11, 2001; the serious injury renders the individual in need of a minimum of six continuous months of personal care services based on a variety of clinical criteria listed under 38 CFR 71.20 (c)(1)–(4); and it is in the best interest of the individual to participate in the program. *See* 38 CFR 71.20. According to the VA, there are approximately 4,600 participants enrolled in the program, and 80 percent of these participants have a VASRD rating of 50 percent or greater. Based on the eligibility requirements for VA's Program of Comprehensive Assistance for Family Caregivers, the Department believed that most veterans who qualify for the program meet the requirement of having a serious injury or illness as defined in this proposal. The Department invited comment on whether adding enrollment in the VA's program as a fourth alternative to the definition of a serious injury or illness of a covered veteran would be appropriate and would reduce the burden placed on military and veterans' families in seeking FMLA leave.

In response to the Department's inquiry, the CCD, Senators Harkin and Murray, and the Coalition submitted comments in support of making enrollment in the VA's Program of Comprehensive Assistance for Family Caregivers part of the definition of serious injury or illness of a veteran. Additionally, the CCD and Senators Harkin and Murray wrote that the Department should also consider a veteran's eligibility for the program as part of the definition for a serious injury or illness even if the veteran is not enrolled. The Department did not receive any responses that expressed opposition to this possible fourth definition. Therefore, in the Final Rule at § 825.127(c)(2)(iv), the Department adopts a fourth definition of a *serious injury or illness* for a veteran: an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers will be a qualifying serious injury or illness for military caregiver

[2] As discussed in § 825.310, when an employee obtains a certification for military caregiver leave from a private health care provider that is not affiliated with DOD, VA, or TRICARE, if the employer has reason to doubt the validity of the certification, he or she may require the employee to obtain a second (or third opinion) at the employer's expense. *See* §§ 825.310(d); 825.307(b), (c).

leave for a covered veteran. Only actual enrollment by covered veterans in this program will be considered as establishing a qualifying serious injury or illness under this definition. The employee seeking military caregiver leave under this definition does not, however, have to be the designated caregiver for the veteran under the VA's Program of Comprehensive Assistance for Family Caregivers. As with the three other definitions in paragraphs (c)(2)(i) to (iii), enrollment in VA's Program of Comprehensive Assistance for Family Caregivers establishes only that the veteran has a serious injury or illness, and does not mean that the employee is automatically entitled to take FMLA leave. The employee seeking to take FMLA military caregiver leave must qualify as a family member and meet the other eligibility criteria under the FMLA, and the veteran must meet the definition of a *covered veteran* in § 825.127(b)(2). The Department notes that the VA's Program of Comprehensive Assistance for Family Caregivers is open to veterans who were injured on or after September 11, 2001, while FMLA military caregiver leave requires that a veteran have been discharged within five years of the employee's requested leave.

The Department proposed to move the paragraph defining the family members qualified to take military caregiver leave currently in paragraph (b) to paragraph (d) (the numbering of the subparagraphs did not change). No substantive changes were proposed for this paragraph. The Department received several comments, including those submitted by Legal Aid and the North Carolina Justice Center on the definition of next of kin of a covered servicemember that appears in proposed § 825.127(d)(3) urging the Department to expand the definition beyond blood relatives. Two commenters, the Family Equality Council and the Partnership, noted that the repeal of the military's ''Don't Ask, Don't Tell'' policy means that gay and lesbian servicemembers may now serve openly in the military and that these servicemembers would undoubtedly prefer to be cared for by their same-sex partners or spouses. These commenters suggested that, because the Defense of Marriage Act prevents same-sex couples from being considered spouses for purposes of the FMLA, the Department should expand the definition of next of kin of a covered servicemember to include domestic partners. On a similar note, Twiga stated that Congress intended to provide greater flexibility for military caregiver leave to account for servicemembers relying on care from people other than spouses, parents, or children. According to Twiga, the requirement of consanguinity is outdated because kinship is predicated on broader relationships, including partners and in-laws. This commenter also asserted that the definition would leave adopted servicemembers, who have no literal blood relatives, with no next of kin. It urged the Department to interpret the statute's blood relative requirement to include caretakers with legal relationships or other family members. Additionally, Twiga suggested that, in the special circumstance of a servicemember who is at risk of suicide, fellow servicemembers of that servicemember should be included in the definition of next of kin of a covered servicemember. Lastly, this commenter suggested that the definition take into account the availability of a particular caregiver and, where the next of kin is not available to provide caregiving, the next of kin of a covered servicemember definition should default to a relative who is close in terms of personal relationship and is available.

The Department cannot modify the definition as requested because the Department is constrained by the statutory definition of next of kin in the FMLA. The statute defines next of kin as ''the nearest blood relative.'' 29 U.S.C. 2611(17). Based on this statutory definition, the Department defined *next of kin of a covered servicemember* in the 2008 Final Rule as the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter and then provided the order of priority of blood relatives: those who have been granted legal custody; brothers and sisters; grandparents; aunts and uncles; and first cousins. 73 FR 67967–68. In addition, as an alternative to this hierarchy of consanguinity, the 2008 Final Rule provided for the servicemember to designate in writing another blood relative as the nearest blood relative. *Id.* Thus, the 2008 Final Rule adhered to the consanguinity (*i.e.,* blood relationship) element of the statutory definition even in interpreting ''nearest'' broadly to be based on closeness of personal relationship as an alternative to closest in consanguinity. 73 FR 67968. While a spouse is not a blood relative, the inclusion of spouse among the relatives excluded from the definition of next of kin of a covered servicemember was intended to make clear that the next of kin was an additional family member beyond the covered servicemember's spouse, parents, and children; it was not intended to suggest that the next of kin could be someone unrelated by blood. Given the specific language used in the statutory definition of next of kin (*i.e.,* ''blood relative''), there is no basis to include same-sex partners or spouses, or fellow servicemembers, in the definition of next of kin of a covered servicemember. In response to Twiga's concern regarding adopted servicemembers, the Department notes that adoption creates a parent-child relationship between the adopted child and the adoptive parents with all the rights, privileges and responsibilities that attach to that relationship. *See Black's Law Dictionary* (9th ed. 2009). Therefore, for purposes of military caregiver leave and the definition of next of kin of a covered servicemember, adoption has the legal effect of establishing the same consanguineous relationships with family members that a non-adopted child has to that child's family members. Lastly, the Department notes that in the 2008 Final Rule, it considered but rejected the notion of incorporating a ''willing and able'' concept into the definition because of the anticipated difficulty in proving and verifying the relative's willingness and ability to provide care. 73 FR 67967.

The Department also received two comments, from Senators Harkin and Murray and the CCD, requesting that the Department clarify that each caregiver who takes care of a covered servicemember is able to take the full 26 weeks of leave individually, including situations when multiple employees need leave simultaneously to care for a single covered servicemember. In response to these comments, the Department notes that the military caregiver leave entitlement belongs to the employee-family member of the covered servicemember. Therefore, other than situations when spouses are employed by the same employer, each employee family member who is entitled to take up to 26 workweeks of military caregiver leave in a single 12-month period can do so independently of whether other caregivers are also taking leave to care for that same covered servicemember. As stated in § 825.124(b), ''[t]he employee may need not be the only individual or family member available to care for the family member or the covered servicemember.'' The Department does not believe that further clarification is necessary. Therefore, the Department adopts paragraph (d) in the Final Rule without modification.

The Department proposed to move the paragraph explaining the single 12-month period currently in paragraph (c) to paragraph (e) (the numbering of the subparagraphs did not change). No substantive changes were proposed for

this paragraph. The Department explained in the NPRM that, because the FY 2010 NDAA establishes two distinct categories of covered servicemembers (*i.e.,* a current member of the Armed Forces and a covered veteran) and because military caregiver leave is applied on a per-covered servicemember per-injury basis, an eligible employee could potentially take military caregiver leave to care for a covered servicemember who is a current member of the Armed Forces and then, at a later point when the same servicemember becomes a covered veteran, could take a subsequent period of military caregiver leave based on the same injury or illness. 77 FR 8969. The Department noted, however, that all of the normal eligibility requirements, such as the hours of service requirement, would apply in such a situation, and that an employee may not take more than a combined total of 26 workweeks of FMLA leave during a single 12-month period. *Id.* The Department sought comment on this interpretation of the single 12-month period limitation.

Two commenters addressed the Department's interpretation of the single 12-month period. Legal Aid approved of the Department's interpretation that employees may take leave for the same servicemember when he or she is a current member of the Armed Forces and again when he or she is a veteran. An individual expressed concern about this interpretation of the single 12-month period, however. She stated that, as she understood the proposed interpretation, it would permit an employee to use two consecutive periods of 26 workweeks of leave (one 26 workweek period to care for a current servicemember, another 26 workweek period to care for a veteran), resulting in 52 consecutive workweeks of leave for an employee. In response to this comment, the Department reiterates that all of the normal eligibility requirements apply. The employee in this commenter's scenario would likely not meet the hours of service requirement in the preceding 12 months if that employee had just taken 26 workweeks of leave to care for a current servicemember. Additionally, an employee may not take more than a combined 26 workweeks of FMLA leave during a single 12-month period. The Department adopts paragraph (e) in the Final Rule without modification.

4. Section 825.309 Certification Requirements for Leave Taken Because of a Qualifying Exigency

Section 825.309 sets forth the certification process and the elements of a complete certification for qualifying exigency leave. Consistent with the proposed changes in § 825.126, the Department proposed in § 825.309 to substitute covered active duty for active duty and military member or member for covered military member wherever it appears in this section. The Department proposed to delete the phrase in support of a contingency operation from current § 825.309(a) to reflect the expansion of qualifying exigency leave to family of members of the Regular Armed Forces and the fact that this requirement does not apply to members of the Regular Armed Forces. The proposal revised the regulatory language at § 825.309(a) to make it clear that new active duty orders or documentation do not automatically need to be provided if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status of the same or a different military member; rather, in such situations, new active duty orders or documentation need only be provided upon request by the employer. As noted in the NPRM, the proposed change is consistent with the general certification process, which provides that an employer may require certification upon receiving an employee request for qualifying exigency leave. 77 FR 8970. Proposed § 825.309(a) tracked § 825.309(a) in permitting an employee to use either a copy of the military member's active duty orders or other documentation issued by the military to establish that the military member is on covered active duty or call to covered active duty status. However, the Department explained in the NPRM that it had received information from employees and employers indicating that family members have experienced difficulty obtaining copies of active duty orders or that the available documentation is insufficient to comply with current certification requirements. 77 FR 8970. The Department therefore sought comment on whether active duty orders of members of the Regular and Reserve components of the Armed Forces contain sufficient information to determine that the covered active duty involves deployment to a foreign country (and, in the case of the Reserve components, that the deployment is in support of a contingency operation), and, if not, what other documentation would meet the certification requirements. The Department also sought comment on whether employees have experienced difficulty in obtaining copies of active duty orders or other military documents establishing their family member's covered service, and whether employers have experienced difficulty in confirming covered service. *Id.*

The Partnership and SHRM commented that employees have experienced difficulty obtaining copies of active duty orders, particularly when the servicemember is a member of the Regular Armed Forces. The Letter Carriers reported that a member contacted DOD on behalf of an employee and was unable to secure active duty orders, with DOD citing concern for national security. The Letter Carriers suggested that the determination of whether a military member meets the covered active duty requirement should be left up to the military. They proposed that a standardized certification form could be issued by the appropriate branch of the military or that a section indicating that the military member is on covered active duty, to be signed by the appropriate military official, could be added to the Form WH–384 (FMLA Certification of Qualifying Exigency for Military Family leave) or an equivalent form without requiring that further, sensitive information about the deployment be disclosed. Several commenters, including Senators Harkin and Murray and the North Carolina Justice Center, suggested the regulations should clarify that acceptable ''other documentation'' permitted under the regulation includes official military correspondence indicating a foreign deployment, such as a letter from the military member's commanding officer.

The Department considered the commenters' concerns that employees experience difficulties in obtaining the active duty orders for members of the Regular Armed Forces. Several factors weigh against adding a new section to the Form WH–384 or creating a separate certification form that a military member could present to the appropriate member of the military member's command to utilize for verification of covered active duty. Obtaining an official signature, especially if the military member is already deployed, would present logistical challenges. Electronic document transmission may not be available at remote deployment locations and postal delays could result in undue delay for the eligible employee. Additionally, the information contained on the Form WH–384 concerning the specific reason for qualifying exigency leave may be personal and raise privacy issues for the employee or the military member. The Department also considered creating an additional form, but believes doing so

could be confusing for employees and administratively burdensome for employers. However, the Department believes that official military correspondence such as a letter from a superior officer in the military member's chain of command will be sufficient to establish that the military member is on covered active duty or under a call to covered active duty and will fulfill the requirements of § 825.309(a). Therefore, the Department adopts proposed § 825.309(a) in the Final Rule without modification.

Current § 825.309(b) addresses information that may be required to support a request for qualifying exigency leave. Consistent with the proposed changes to § 825.126(b)(6), *Rest and Recuperation* qualifying exigency leave, the Department proposed a new paragraph at § 825.309(b)(6) to permit an employer to request a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military indicating that the military member has been granted Rest and Recuperation leave, and the dates of the leave, in order to determine the employee's specific qualifying exigency leave period available for *Rest and Recuperation.* 77 FR 8970. No other changes were proposed to § 825.309(b). SHRM endorsed the Department's proposal. Twiga suggested that the Department and the DOD should agree on a certification form that is easy for a civilian employer to use to verify that the employee's requested period of qualifying exigency leave corresponds with the military member's allotted Rest and Recuperation orders. It is the Department's understanding that the military's Rest and Recuperation orders clearly state the member's dates of leave, and will therefore be sufficient to establish that the employee's requested period of qualifying exigency leave corresponds with the military member's allotted Rest and Recuperation leave. The Department does not believe that it is necessary to create another certification form specific for *Rest and Recuperation* qualifying exigency leave. Accordingly, the Department adopts § 825.309(b)(6) as proposed.

Current § 825.309(c) identifies optional-use Form WH–384, which may be used by an employee when requesting qualifying exigency leave and states that another form containing the same basic information may be used by an employer as long as no information beyond that specified is required. The Department proposed to make minor changes to this form to reflect the FY 2010 NDAA amendments. As discussed above, the Department proposed to delete the optional-use forms from the Appendices to the regulations. Accordingly, the Department proposed to delete the reference in § 825.309(c) to Appendix G, and proposed to add language explaining that Form WH–384 may be obtained from local WHD offices or the WHD Web site. No other changes were proposed for § 825.309(c). Several comments were received concerning the removal of the forms from the Appendices. Those comments and the Department's decision to remove the forms from the Appendices in the Final Rule are discussed earlier in this preamble. No comments were received on the proposed revisions to Form WH–384. The form is modified to refer to a military member, use the term covered active duty, and contain the requirement that the member be deployed to a foreign country. The Final Rule implements § 825.309(c) as proposed.

Current § 825.309(d) indicates that where a complete and sufficient certification is submitted in support of a request for leave, an employer may not request additional information from an employee. Where the qualifying exigency involves a third party, employers may contact the individual or entity for purposes of verifying the meeting or appointment and the nature of the meeting. Employers may also contact the appropriate unit of the DOD to verify that the military member is on active duty or call to active duty status. The employee's permission is not required to conduct such verifications. The employer may not, however, request any additional information. The Department solicited information on how this provision has been working for employers and employees, specifically whether any privacy issues have arisen for employees and whether any employees have been denied qualifying exigency leave because their employers have been unable to verify their leave requests. The Department also sought information on whether employers have encountered any difficulties in making third-party verifications, and if so, why and whether they have denied an employee leave as a result. 77 FR 8971. The Department received several comments concerning third-party meeting verification and privacy issues related to third-party verification. The National Business Group on Health supported the provision that allows the employer to contact the individual or third parties to verify meetings, appointments, and the purpose of meetings for FMLA purposes and to contact the appropriate unit of DOD to verify that military members are on active duty or call to active duty status. SHRM commented that there was nothing to justify any change to this provision. World at Work's survey indicated that 18 of the 94 respondents reported that making third-party verifications of qualifying exigency leave is one of their top three challenges in administering qualifying exigency leave. Only nine respondents listed ''concern about privacy issues surrounding third-party verification of qualifying exigency leave'' as one of their top three challenges in administering the FMLA. By contrast, Legal Aid expressed privacy concerns and asserted that such contacts should occur under very limited circumstances.

Although the commenters were divided on the issue of third-party contact, the Department did not receive any comments addressing administrative difficulties making third party contacts, nor did the Department receive any specific comments from employees or employee advocacy groups indicating that this provision has not been adhered to or has been abused. Accordingly, the Department maintains that where the qualifying exigency involves a third party, employers may contact the third party to verify the meeting and the purpose of the meeting, and may contact the appropriate unit of the DOD to verify that a military member is on covered active duty or call to covered active duty status. The Department makes no changes to § 825.309(d) in the Final Rule.

5. Section 825.310 Certification for Leave Taken To Care for a Covered Servicemember (Military Caregiver Leave)

Section 825.310 sets forth the certification process and the elements of a complete certification for military caregiver leave. Current § 825.310(a) permits an employer to require that a request for leave to care for a covered servicemember with a serious injury or illness be supported by a certification issued by an authorized health care provider, defined as: (1) A DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; or (4) a DOD non-network TRICARE authorized private health care provider. The Department proposed in § 825.310(a)(5) to add health care providers, as defined by regulation in § 825.125, as a fifth component to the definition of an authorized health care provider from whom medical certification can be obtained for a serious injury or illness. The Department based this proposal on its

understanding that in certain circumstances, such as when seeking treatment for a mental health condition, some current servicemembers may wish to seek care from a health care provider unaffiliated with the DOD. As explained in the NPRM, the Department believes that a family member of a current servicemember who is seeking treatment outside of the military's health care network for an injury or illness that was incurred or aggravated in the line of duty on active duty should be eligible for FMLA leave under this provision. 77 FR 8971. The Department noted that the proposed expansion of authorized health care providers would apply to covered veterans as well because veterans may use non-military-affiliated health care providers (private health care providers) rather than DOD, VA, or TRICARE network health care providers. *Id.* Additionally some veterans may no longer be entitled to seek care through DOD or VA affiliated health care providers, or veterans may also be covered by the private health care plans of a spouse or parent and may utilize the services of private health care providers through these plans. Whether it is because there is no VA center in the area or due to other circumstances, the Department stated that families of veterans should be able to rely upon the determination of the veteran's own private health care provider, who otherwise meets the definition of an FMLA health care provider at § 825.125, in determining if the treated condition is a qualifying serious injury or illness. The Department also noted that expanding the pool of health care providers would avoid increasing the administrative burdens on the VA and DOD. *Id.*

The Department expressed concern, however, that private health care providers would not have the specialized information available to DOD, VA, and TRICARE network health care providers that is necessary to make several of the military-related determinations. Therefore, the Department sought public comment on the available processes for a private health care provider to obtain information related to whether an injury or illness was incurred in the line of duty while on active duty or whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty while on active duty. The Department also sought comment on whether the covered servicemember will have a copy of medical records from his or her military service, or whether the covered servicemember, or family member, would be able to access medical records or other documentation that would support the determination that an injury or illness was incurred in the line of duty while on active duty, and the types of documentation that may be available to the covered servicemember or family member. Finally, the Department requested comment on whether a veteran or family member has access to documentation of a VASRD disability rating. *Id.*

Many of the comments, including those submitted by Senators Harkin and Murray, the North Carolina Justice Center, and the National Business Group on Health, expressed support for the proposal to expand the list of medical providers in § 827.310(a) to include health care providers as defined by the FMLA regulation at § 825.125. The CCD stated that this expansion will reduce the administrative burden on the DOD, VA, and TRICARE network health care providers, while also providing some measure of confidentiality for those family members concerned about the impact on a servicemember's military career of an FMLA application based on certain mental health conditions. Twiga stated that this expansion will make taking leave easier for families. The Partnership affirmed the Department's belief that veterans are frequently treated in private facilities and applauded the proposal. Aon Hewitt supported permitting private health care providers to certify serious injuries or illnesses as long as the Department retains its proposal that employers are permitted to obtain second and third opinions from such providers.

Several comments were received on the private health care provider's ability to determine if a serious injury or illness is related to the servicemember's military service. The Partnership, as well as the National Business Group on Health and the Coalition, requested additional guidance for private health care providers to determine what constitutes a serious injury or illness since private health care providers do not necessarily have experience in providing medical certifications related to military service. Sedgwick Claims Management Services requested that the Department provide private health care providers with directions on how to evaluate whether a caregiver situation applies and to provide such health care providers with the resources to access information necessary to make this determination. This commenter suggested that if private health care providers do not have this necessary information, that they not be added to the list of authorized health care providers. One individual commenter opposed the proposal based on her belief that it could lead to increased abuse of intermittent leave usage. She expressed concern that a health care provider as defined by the FMLA regulations, is likely to be a family health care provider who would not be able to determine if the medical condition was incurred during or aggravated by the covered servicemember's military duty, and who may be willing, according to the commenter, to certify the frequency and duration of absence requested by the patient. The CCD explained that all veterans receive written notice from the VA of their disability rating, as do servicemembers in the case of a service department disability rating. The CCD further explained that for veterans who have filed claims for disability compensation through the VA, but who have not yet received an official determination of service-connection and a disability rating, veterans or their veterans' service officers may be able to provide documentation to assist the health care provider. It also commented that if a veteran has not received a VASRD rating, and has not received a medical opinion, then the health care provider could make a determination that it is as likely as not that the disability is service-connected, which should be sufficient for FMLA military caregiver leave benefits. According to the CCD, health care providers can also review service medical and administrative records that veterans and their representatives can obtain from the National Personnel Records Center (NPRC) in St. Louis, Missouri. These records may be obtained by submitting a request through the NPRC Web site. The Partnership recommended that the regulations permit the health care provider to contact veteran service officers, with the veteran's permission, since veteran service officers are familiar with the veteran's service record and are often called upon to make similar assessments about their veteran-clients.

With respect to the commenters' request that the Department provide guidance for private health care providers on making medical determinations related to military service, the Department believes that health care providers will be able to make the determinations necessary for a certification, without further regulatory instruction, based on the information provided by the servicemember and any military documentation that may be supplied by the servicemember. The Department understands, based on

consultation with the DOD and VA, that current servicemembers and veterans have access to their medical records for their time during service through eBenefits, an electronic portal provided by the DOD and VA. Veterans may also request their records through their local VA medical facility. In addition, the commenters indicated that veterans who have received a VASRD rating will possess documentation of their disability ratings, which can be produced as part of the medical certification process. While the servicemember is not required to provide the health care provider with military records to complete a certification, if the servicemember does so, the information in these medical records and any other military documentation may aid a health care provider in making a determination that a servicemember's injury or illness is related to the individual's military service. Moreover, private health care providers, while not necessarily familiar with military related determinations, are frequently called upon in conjunction with a patient's Worker's Compensation claim to determine that the patient's medical condition was caused by the patient's work even if the health care provider is not intimately familiar with that patient's particular occupation. Based on their medical experience, private health care providers are able to make such determinations. The Department believes that private health care providers will similarly be able to determine if the servicemember's injury or illness was incurred in or aggravated in the line of duty on active duty. In addition, as discussed in more detail below, if employers have reason to question the certification provided by a private health care provider, employers may seek a second, and if necessary, a third medical opinion. For these reasons, § 825.310(a)(5) is adopted as proposed.

The Department proposed to modify portions of paragraph (b), which sets forth the information an employer may request from the health care provider in order to support the employee's request for leave. The Department proposed to modify the language at the beginning of paragraph (b) and in subparagraphs (1)–(4) to reflect the changes to the statute to add preexisting conditions aggravated by service for current servicemembers and to add leave to care for veterans. Proposed § 825.310(b) was modified to indicate that an authorized health care provider may rely on military-related determinations from an authorized VA representative in addition to an authorized DOD representative. Consistent with the Department's proposal to allow covered servicemembers to utilize any health care provider as defined in § 825.125, the Department proposed to add a new provision (v) to paragraph (b)(1) clarifying that the medical certification may be provided by any health care provider as defined in § 825.125. The Department proposed to add language to paragraph (b)(2) to allow an employer to obtain information that specifies whether the covered servicemember's injury or illness existed before beginning service and was aggravated by service in the line of duty on active duty. The Department sought comment on what processes are or may be used to determine that an injury or illness existed prior to active duty service and was aggravated by service in the line of duty on active duty. Comment was also sought on the basis that a non-DOD or non-VA health care provider would determine that an injury or illness is a condition that existed before the military member's service and was aggravated in the line of duty on active duty. Proposed paragraph (b)(3) allowed an employer to request the approximate date on which the serious injury or illness commenced or was aggravated and its probable duration. The Department proposed to move the description of the medical facts that must be included in the certification for a serious injury or illness of a current servicemember from current § 825.310(b)(4) to proposed § 825.310(b)(4)(i), without any changes in that subparagraph. The Department proposed to describe in § 825.310(b)(4)(ii) the medical facts that must be included in the certification for an injury or illness of a covered veteran, which tracked the proposed definition of a serious injury or illness of a covered veteran. In light of the Department's consideration of adding enrollment in VA's Program of Comprehensive Assistance for Family Caregivers as a fourth definition of serious injury or illness of a veteran, the Department sought comment on whether the medical documentation required for enrollment in that program provides sufficient medical facts to support the need for FMLA leave. The Department proposed no other changes to § 825.310(b).

The National Business Group on Health generally supported the proposal permitting employers to require this new information in the certification supporting military caregiver leave. The Sedgwick Management Group requested that the criteria for determining a pre-existing condition be clearly stated in the regulation, and that the FMLA forms contain questions to identify whether such a condition exists in order to reduce potential ambiguity and employer burden in having to make that determination. As noted in the discussion of § 825.127(c)(1), the Department received two comments from Senators Harkin and Murray and the CCD suggesting that the Department should consider participation in or meeting the eligibility requirements of the SCAADL Caregiver Program as establishing a current servicemember's serious injury or illness. The SCAADL program is available to current servicemembers who have a permanent catastrophic injury or illness that was incurred or aggravated in the line of duty, as certified by a licensed DOD or VA physician, and who need assistance from another person to perform the personal functions required in everyday living. *See* 37 U.S.C. 439(b); DODI 1341.12 (May 24, 2012). Twiga expressed concern that requiring servicemembers to disclose medical information could raise privacy issues and possibly deter a servicemember from seeking medical treatment, particularly for mental health issues and for conditions such as alcohol or drug dependence. To address these concerns, Twiga suggested that the regulation make clear that the certification need only describe whether a qualifying serious injury or illness exists, but need not include a description of the specific medical condition.

With respect to the commenters' request that the Department provide guidance for health care providers on making medical determinations regarding preexisting conditions, the Department believes that health care providers will be able to make the determinations necessary for a certification, without further regulatory instruction, based on the information provided by the servicemember and any military medical records the servicemember may provide. The Department believes that documentation indicating a current servicemember's enrollment in the SCAADL program may be considered by a health care provider in determining whether the current servicemember has a serious injury or illness that makes the current servicemember unable to perform the duties of the member's office, grade, rank, or rating. Similarly, SSDI determinations may be considered by private health care providers in determining whether a veteran has a qualifying serious injury or illness. To the extent that additional information is necessary to establish a complete and

sufficient FMLA certification (*e.g.,* information showing the relationship of the employee to the covered servicemember for whom the employee is requesting leave to care, that the injury or illness was incurred or aggravated in military service, the probable duration of the serious injury or illness, and the servicemember's need for care and an estimate of the time period during which care will be needed), the employee seeking leave will be responsible for providing the employer with the additional information. The Final Rule adopts the provision as proposed.

The privacy concerns raised by Twiga, while not directed at the new information that can be required under the proposal, nonetheless merit discussion. As an initial matter, the Department reiterates that the certification of a serious injury or illness, both for a current servicemember and a veteran, addresses only the serious illness or injury related to military service for which the family member seeks leave. Any medical information unrelated to that serious injury or illness is not part of the certification process for FMLA leave. In addition, the same standard applies to the amount of information required for the certification of the serious illness or injury of a covered servicemember as applies to the amount of information required for the certification of serious health condition. As the Department stated in the 2008 Final Rule in the preamble discussion of certification of a serious health condition in § 825.306:

> [T]he determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition at issue, and is appropriately left to the health care provider.* * * [T]he Department continues to believe that it would not be appropriate to require a diagnosis as part of a complete and sufficient FMLA certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis.

73 FR 68014. Other than the information necessary to show that the servicemember has a qualifying serious injury or illness, as well as the other regulatory requirements (*e.g.,* need for care, probable duration), the certification does not require identification of the servicemember's diagnosis. Inclusion of such information is left to the discretion of the servicemember's health care provider. The Department does not believe that further clarification is necessary.

As noted above in the discussion of § 825.127(c)(2)(iii), the Department removed the term service-connected disability or disabilities in the third definition of a serious injury or illness of a covered veteran and replaced it with the term a disability or disabilities related to military service. This change was in response to comments that only the VA can determine if a disability is service-connected. For the reasons outlined in the discussion of § 825.127 above, the Department makes the same modification to § 825.310(b)(4)(ii)(C) by replacing the term service-connected disability or disabilities with the term a disability or disabilities related to military service.

The Department did not receive any comments in response to its query on whether the medical documentation required for enrollment in VA's Program of Comprehensive Assistance for Family Caregivers provides sufficient medical facts to support the need for FMLA leave. As discussed above in conjunction with § 825.127(c)(2), the Department has decided to add in the Final Rule at § 825.127(c)(2)(iv), a veteran's enrollment in the VA's Program of Comprehensive Assistance for Family Caregivers as the fourth definition for establishing a qualifying serious injury or illness for a covered veteran. The VA has advised the Department that upon enrollment in VA's Program for Comprehensive Assistance for Family Caregivers, the caregiver receives a letter from the VA indicating that the caregiver has been designated and approved as the caregiver for the veteran named in the letter. Therefore, the Final Rule provides in § 825.310(b)(4) that such documentation may be produced as part of the certification process to demonstrate that a covered veteran has a qualifying serious injury or illness under the fourth definition of a serious injury or illness. The Department noted in the NPRM that medical documentation prepared in connection with the VA's Program of Comprehensive Assistance for Family Caregivers may be submitted as part of the FMLA certification process under the second and third alternative definitions of serious injury and illness in § 825.127(c)(2)(ii) and (c)(2)(iii). 77 FR 8972. While that is still the case, documentation establishing enrollment in the program will meet the definition of a serious injury or illness under § 825.127(c)(2)(iv) and therefore will not need to meet the definition under (c)(2)(ii) or (iii). The Department notes that, similar to the treatment of invitational travel orders and international travel authorizations in § 825.310(e), enrollment documentation for the VA Program for Comprehensive Assistance for Family Caregivers may be used by eligible employee family members other than the designated VA caregiver to support a need for military caregiver leave. However, as the Department explained in the NPRM, to the extent that additional information is necessary to establish a complete and sufficient FMLA certification (*e.g.,* information showing the relationship of the employee to the covered servicemember for whom the employee is requesting leave, that the veteran is within five years of discharge, the probable duration of the serious injury or illness, and the servicemember's need for care and an estimate of the time period during which care will be needed), the employee seeking leave is responsible for providing the employer with the additional information. Therefore, the Department adopts paragraph (b) in the Final Rule with the addition of provision (D) to subparagraph (b)(4)(ii) to permit documentation of enrollment in the VA Program for Comprehensive Assistance for Family Caregivers program to show that the veteran has a qualifying serious injury or illness as defined in § 825.127(c)(2)(iv) of the Final Rule.

The Department proposed to modify portions of § 825.310(c), which sets forth the information an employer may request from the employee or covered servicemember, by adding a new paragraph (c)(6) and renumbering current paragraph (c)(6) as (c)(7). Proposed paragraph (c)(6) permitted an employer to require that the employee or covered servicemember indicate whether the member is a veteran, the date of separation, and whether the separation was other than dishonorable. The proposal also permitted the employer to request documentation confirming this information. It indicated that an eligible employee may provide a copy of the veteran's DD Form 214 (Report of Separation) or other proof of veteran status to satisfy such documentation requirement. Two commenters addressed this subparagraph. The Partnership and the North Carolina Justice Center commented that the Department should use the discharge date on DD Form 214 as the date when the veteran officially transitioned from being active duty to being a veteran. The Department's intention in referencing DD Form 214 in the proposal was to indicate that this form was one available method of showing the veteran's discharge date. Therefore, the Department adopts

paragraph (c) in the Final Rule without modification.

Current § 825.310(d) identifies an optional-use form that may be used to provide certification for military caregiver leave, Form WH–385, Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave. The Department proposed to make revisions to this form to implement the statutory amendments. 77 FR 8963. The Department stated in the NPRM that it was considering the development of a new form for certification of military caregiver leave for a covered veteran. 77 FR 8972. The Department sought comments on whether it would be less confusing to develop a separate form or whether adapting the current Form WH–385 would be preferable.

No comments were received on the Department's proposal to revise Form WH–385 to reflect the statutory amendments concerning the definition of a serious injury or illness for current servicemembers. However, the Department received comments supporting the creation of a new form, as well as comments urging the Department to adapt current Form WH–385 to reflect the expansion of military caregiver leave to covered veterans. Aon Hewitt supported the creation of a separate form as this structure would mirror the separate forms available for FMLA leave for a serious health condition for an employee and a family member. Moreover, Aon Hewitt asserted that one form, combining both current servicemembers and covered veterans, would be too cluttered, too long, and harder to use. However, the North Carolina Justice Center and the Partnership recommended that the Department adapt current Form WH–385 for covered veterans in order to avoid confusion and unnecessary complication. The Partnership stated that if the Department does adopt a separate form for covered veterans, then an employee who has previously submitted a form for military caregiver leave for a current servicemember should not have to submit a new certification for leave to care for that same servicemember when he or she becomes a covered veteran.

The Department considered these comments and has decided to create a new form for military caregiver leave for a covered veteran. The Department believes that the addition of a separate form will ultimately be less confusing for employees, employers, and health care providers. Adding information related to the serious injury or illness of a covered veteran to current WH–385 would increase the length and complexity of the form. Two separate forms, one containing the instructions and information germane to a current servicemember and one containing the instructions and information germane to a covered veteran, will lessen the administrative burden on health care providers. Form WH–385 will continue to be the form for military caregiver leave for current servicemembers, and the form for covered veterans is marked WH–385–V for easy identification. While an eligible family member may take military caregiver leave for a current servicemember, and again for the same servicemember when he or she becomes a covered veteran, the employee must submit a new certification form for each leave request. However, the eligible family member, assuming he or she is asserting that the covered veteran has a qualifying serious injury or the first definition at § 825.127(c)(2)(i), may attach the original certification with appropriate veteran documentation attached as part of the certification for leave to care for the covered veteran.

Form WHD–385 is updated to include injuries and illnesses that pre-existed the servicemember's active duty but were aggravated in the line of duty on active duty. The Department has also amended this form to reflect that a health care provider as defined in § 825.125 may certify a serious injury or illness for a current servicemember and that a serious injury or illness includes a condition that existed before the member's military service and was aggravated by service in the line of duty on active duty in the Armed Forces.

As discussed previously in this preamble, the Department has decided to remove the forms from the Appendices. The forms for military caregiver leave, like the other FMLA forms, are available on the WHD Web site (*www.dol.gov/whd*) and at local WHD offices. Accordingly, consistent with the proposal, in this Final Rule the reference to Appendix H in paragraph (d) is deleted, and in its place language is inserted stating that the applicable form may be obtained either from a local WHD office or the WHD Web site.

In conjunction with the Department's proposal to allow family members of covered servicemembers to rely upon certifications completed by health care providers that are not affiliated with DOD, VA, or TRICARE, the Department proposed in § 825.310(d) to permit second and third opinions in these instances. As discussed in the NPRM, when a medical certification is completed by a private health care provider unaffiliated with the DOD, VA, or TRICARE network system, the process is more akin to the certification process for the serious health condition of civilian family members. 77 FR 8972. Consequently, the Department concluded that in such situations there is no basis to prohibit employers from obtaining second and third opinions. For these reasons, the Department proposed in § 825.310(d) to state that second and third opinions are not permitted when the certification has been completed by a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider (identified in § 825.310(a)(1)–(4)), but are permitted when the certification has been completed by a health care provider that is not one of the types identified in § 825.310(a)(1)–(4).

Aon Hewitt and the National Business Group on Health expressed their support for permitting second and third opinions in cases of military caregiver certifications completed by health care providers who are not affiliated with the VA, DOD, or TRICARE. In contrast, the CCD and Twiga opposed this provision. The CCD questioned the logic of permitting second and third opinions, since the current regulation does not permit second and third opinions even though a DOD non-network TRICARE authorized provider could be almost any health care provider, and recommended that the sufficiency of the certification be based on the health care provider's expertise and not his or her affiliation. Twiga expressed the view that second and third opinions are burdensome on military families, especially if a specialist's care is necessary because wait times to see a specialist can be long and additional expenses may be incurred by family members.

After considering these comments, the Department has decided to retain this provision without change in the Final Rule. In response to the CCD's comment that DOD non-network TRICARE authorized providers may be any health care provider, the Department continues to believe that it is appropriate to distinguish between health care providers who are affiliated in some way with DOD, VA, or TRICARE and health care providers who have no such affiliation in permitting second and third opinions on certifications for military caregiver leave. While obtaining second and third opinions may be time consuming, the employee remains provisionally entitled to FMLA leave while obtaining the second (or third) opinion, and the costs associated with a second or third opinion are the responsibility of the employer. *See*

§ 825.307(b). As the Department explained in the NPRM, permitting authorized health care providers as defined in § 825.125 to certify military caregiver leave is more akin to the traditional FMLA certification process for a serious health condition. Therefore, the Department adopts the provision regarding second and third opinions when the certification for military caregiver leave is provided by a health care provider who is not affiliated with DOD, VA, or TRICARE in § 825.310(d) as proposed.

Other than to update internal references, the Department did not propose any changes for § 825.310(e), which addresses the use of invitational travel orders (ITO) or invitational travel authorizations (ITA) issued for medical purposes, in lieu of a certification form. The Department sought comment on the effectiveness of the substitution of ITOs and ITAs in support of a need for military caregiver leave, and no comments were received. The Final Rule adopts § 825.310(e) as proposed.

In light of the modifications to § 825.310(b)(4)(i) and (ii) to permit documentation of a veteran's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers to show that the veteran has a qualifying serious injury or illness, the Department creates a new paragraph (f) in the Final Rule to address such documentation. Section 825.310(f) of the Final Rule requires an employer that is requiring an employee to submit a certification for leave to care for a covered servicemember to accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers. This is similar to the provision in paragraph (e) regarding ITOs and ITAs, except that the documentation indicating the servicemember's enrollment in the VA's Program for Comprehensive Assistance for Family Caregivers serves only to show that the covered veteran has a serious injury or illness, but does not necessarily establish the other requirements necessary for a complete certification. The Final Rule further provides at § 825.310(f) that such documentation is sufficient certification of the servicemember's serious injury or illness regardless of whether the employee is the named caregiver in the enrollment documentation. As with ITOs and ITAs, the Final Rule at § 825.310(f)(1) permits an employer to seek authentication and clarification of the documentation indicating the servicemember's enrollment in the program under § 825.307, but indicates that an employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program. Lastly, the Final Rule at § 825.310(f)(2) permits an employer to require that an employee provide confirmation of covered family relationship to the servicemember and documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge when an employee supports his or her request for FMLA leave with documentation of enrollment in this program.

Section 825.310(f) currently states that it is the employee's responsibility to provide the employer with a complete and sufficient certification and describes the consequences of failing to do so. The Department proposed to add text that clarified this requirement, providing that ''an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents.'' While current § 825.305(b) states that employees who are unable to provide the requested FMLA certification (including certification for military caregiver leave) within 15 days despite their diligent, good faith efforts must be provided with additional time, the Department believed that it was important to reiterate this principle in § 825.310(f). The Department sought to clarify that employees may not be held responsible for administrative delays in the issuance of military documents where a good faith attempt is made by the employee to obtain such documents. Two organizations provided comments on this proposal. Legal Aid commended the Department for making this clarification in § 825.310(f). Twiga suggested that, in light of the burden on military families of obtaining second and third opinions from a non-military-affiliated health care provider, § 825.310(f) should be clarified to ''make clear that the extension also applies to second and third opinions of non-military doctors.''

In response to Twiga's comment, the Department notes that the current regulations do not prescribe a time frame for completion of second or third opinions. Instead, § 825.307(b) provides that when an employer seeks a second (and third) opinion, the employee is provisionally entitled to the benefits of the FMLA pending the receipt of the second (and third) opinion. There is no prescribed time within which an employee must obtain the second or third opinion. Therefore, the Department believes that it is unnecessary to state in the regulation that administrative delays in obtaining medical certifications cannot be held against the employee in obtaining second and third opinions. Because the Final Rule creates a new paragraph (f), the Final Rule redesignates proposed § 825.310(f) as § 825.310(g) without modification to the text of the paragraph.

B. Revisions To Implement the AFCTCA Amendments Subpart H—Special Rules Applicable to Airline Flight Crew Employees

1. Section 825.800 Special Rules for Airline Flight Crew Employees, General

Current § 825.800 contains the definitions of significant terms, phrases, and acronyms used in the regulations. In the NPRM, the Department proposed to move the definitions section of the regulations to § 825.102 to enhance the utility of the regulations. As explained earlier in this preamble, the Department has made that change, leaving § 825.800 available for the use described here.

The AFCTCA established special rules for determining whether airline flight crew employees meet the hours of service requirement for FMLA eligibility, authorized the Department to issue regulations providing a method of calculating leave for airline flight crew employees, and authorized the Department to issue regulations regarding employers' maintenance of certain information for airline flight crew employees. In the NPRM, the Department proposed that the regulations implementing these provisions of AFCTCA be incorporated by topic in §§ 825.110 (employee eligibility), 825.205 (calculation of leave), and 825.500 (recordkeeping). In the Final Rule, the provisions specific to airline flight crew employees are located in a separate, newly titled subpart, Subpart H—Special Rules Applicable to Airline Flight Crew Employees.

Accordingly, § 825.800, *Special rules for airline flight crew employees, general,* explains that airline flight crew employees are subject to special rules for determining employee eligibility and calculation of leave, and that special recordkeeping provisions also apply. Section 825.800 also explains that, except as noted, the other provisions of the FMLA regulations also apply to airline flight crew employees. The proposed revisions concerning the hours of service requirement for airline

flight crew employees are located in § 825.801, *Special rules for airline flight crew employees, hours of service requirement;* the proposed additions regarding calculation of leave for airline flight crew employees, as modified in response to comments, will be located in § 825.802, *Special rules for airline flight crew employees, calculation of leave;* and the proposed addition discussing special recordkeeping requirements for employers of airline flight crew employees will be located in § 825.803, *Special rules for airline flight crew employees, recordkeeping requirements.* The Department believes this reorganization will enhance the utility of the regulations and minimize confusion regarding the rules applicable only to airline flight crew employees. The Department emphasizes, and has noted in the regulatory text, that except as otherwise provided in Subpart H, airline flight crew employees and their employers continue to be subject to all requirements of the FMLA as set forth in part 825, subparts A, B, C, D, E, and G.

2. Section 825.801 Special Rules for Airline Flight Crew Employees, Hours of Service Requirement

The AFCTCA established a special hours of service requirement for airline flight crew employees. In the NPRM, the Department proposed to insert into § 825.110(c) language implementing this new requirement. After considering the comments received, the Department has adopted the regulation as proposed in § 825.801.

Proposed § 825.110(c)(2) provided that airline flight crew employees are eligible for FMLA leave if they have worked or been paid for not less than 60 percent of the applicable monthly guarantee and for not less than 504 hours during the previous 12-month period.

Proposed paragraph (c)(2)(i) defined the applicable monthly guarantee for airline flight crew employees on reserve and non-reserve status. As required by the AFCTCA, the Department proposed to define the *applicable monthly guarantee* for non-reserve airline flight crew employees as the number of hours for which an employer has agreed to schedule the employee for any given month. For airline flight crew employees on reserve status, the *applicable monthly guarantee* would be defined as the minimum number of hours for which an employer has agreed to pay such employee for any given month. The Department proposed to refer to airline flight crew employees who are not on reserve status as ''line holders'' in the definition of applicable monthly guarantee in proposed § 825.102.

In the first sentence of proposed § 825.110(c)(2)(ii), the Department provided that the number of hours that an airline flight crew employee has worked would be the employee's duty hours during the previous 12-month period. The Department noted its understanding that while duty hours may not always reflect all hours that would be considered hours worked under the FLSA, duty hours are closely tracked in a similar manner by all employers in the industry. The Department noted its understanding that the schedule for non-reserve employees is based on duty hours, and that duty hours include the *flight* or *block* hours as determined by the Federal Aviation Administration (FAA) as well as additional time before and after the flight as determined by employer policy or applicable collective bargaining agreement. The Department sought comments on whether this was an accurate interpretation of what comprises non-reserve employees' scheduled hours or whether some other basis such as flight or block hours would be more appropriate for this calculation.

The second sentence of proposed paragraph (c)(2)(ii) provided that the hours for which an airline flight crew employee has been paid are the number of hours for which the employee received wages. The Department explained that airline flight crew employees are generally paid on an hourly basis, and that these hours are routinely tracked by each airline.

In the NPRM, the Department noted that airline flight crew employees are eligible for FMLA leave if they meet either the hours worked or hours paid requirement. It invited comments on whether the proposed calculation methods are the most appropriate bases for determining whether an airline flight crew employee has met the hours of service requirement.

Finally, the Department proposed to add language to current § 825.110(c)(3), which explains an employer's burden when it does not maintain accurate records of hours worked for an employee, clarifying the application of this rule to airline flight crew employees.

Few comments were received on the Department's implementation of the AFCTCA eligibility requirements in proposed § 825.110(c)(2) and (c)(2)(i). Two employee associations, the Air Line Pilots Association (ALPA) and the Association of Flight Attendants (AFA), suggested that where an employer has determined that an employee meets the 504 hours requirement and is prepared to confirm FMLA eligibility based upon that criterion alone, the employer should not have to perform the calculation for determining whether the employee has worked or been paid for 60 percent of the applicable monthly guarantee. Similarly, Airlines for America (A4A) [3] commented that as a matter of administrative efficiency, employers should not be required to look beyond the 504 hours requirement where that criterion is met. A4A suggested that there be a rebuttable presumption that airline flight crew employees who have been paid for 504 hours have satisfied the eligibility requirements.

With reference to the Department's implementation of the statutory definition of applicable monthly guarantee for airline flight crew employees on reserve and non-reserve status, both ALPA and the International Association of Machinists and Aerospace Workers (IAM) agreed that the Department appropriately defined the applicable monthly guarantee. The ALPA further stated that the Department's characterization of non-reserve employees as ''line holders'' reflects common industry parlance. A4A stated that the distinction between line holder and reserve employees has some validity ''insofar as the monthly guarantee test for eligibility''.

The vast majority of commenters who addressed the Department's proposal to use duty hours as the number of hours that an airline flight crew employee has worked for purposes of meeting the hours of service requirement supported the proposal. Employer and employee groups, such as ALPA, AFA, APFA, IAM, United Steelworkers (USW), and US Airline Pilots Association (USAPA), stated that duty hours provide the most uniform basis for determining hours of service for FMLA eligibility purposes, and most accurately represent the amount of time an airline flight crew employee is working in any single day. Senators Harkin and Murray also supported the Department's use of duty hours to determine the hours an employee has worked for purposes of

[3] A4A is the principal trade and service organization of the U.S. scheduled airline industry. Its members include: Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings; United Parcel Service Co.; and US Airways, Inc. In addition, Air Canada is an A4A associate member, and ABX Air, Inc., Allegiant Air, LLC, Global Air Holdings, NetJets, Inc., and Virgin America participated in A4A's Labor and Employment Council and joined in its comment.

determining the hours of service requirement, stating that they understand that duty hours are tracked by all airlines, as required by the FAA. In addition, several commenters, including ALPA, Transportation Trades Department, AFL–CIO (TTD), IAM, and USAPA, confirmed the Department's understanding that scheduled hours for line holders encompass duty hours. ALPA, AFA, APFA, IAM, and TTD commented that the term duty hours should also encompass time spent in mandatory training such as ground school and simulator training or training for new aircraft or services as required by the FAA and carriers. AFA further commented that the Department should provide a definition for duty hours in the regulations, explaining all of the duties that may be encompassed within the term, including training time.

Two commenters opposed the Department's use of the term duty hours. Legal Aid stated that hours of service should be measured by hours paid rather than duty hours, arguing that there are many different contractual definitions of on duty within the industry. RAA claimed that defining eligibility as duty hours imposes an ''artificial and undefined term upon the industry.'' RAA suggested that the Department should instead utilize either the carrier's own minimum guarantee components or an industry standard such as flight or block hours.

The Department received few, and only positive, comments regarding its proposal to define hours paid to an airline flight crew employee as the number of hours for which the employee received wages. ALPA stated that the Department proposed an appropriate measure because airline flight crew employees are generally paid on an hourly basis, and such hours are regularly tracked by carriers. AFA agreed that the proposed definition was ''appropriate and fair.''

Several commenters supported the Department's proposed revision to the explanation of the employer's burden of proof in current § 825.110(c)(3). ALPA, TTD, and IAM stated that the provision appropriately places the burden of proving employee ineligibility if the employer fails to keep accurate records of hours worked or paid, and is consistent with application of the law for non-airline flight crew employees.

After careful consideration of the comments received, the Department has decided to adopt the provisions as proposed, with the aforementioned relocation to Subpart H. Section 825.801(a) explains that airline flight crew employees remain subject to the eligibility requirements in § 825.110 other than those regarding the hours of service requirement. Section 825.801(b) contains the text that appeared in proposed § 825.110(c)(2). (Consistent with this change, the Department has updated the cross references in the definitions of *airline flight crew employee* and *applicable monthly guarantee* in § 825.102 to refer to § 825.801.) Section 825.801(c) explains the exception to the special rules in paragraph (b) for absences from work due to or necessitated by USERRA-covered service, consistent with § 825.110(c)(2). Section 825.801(d) contains the proposed text regarding the employer's burden of proof in the absence of accurate records.

The Department has adopted the definition of *applicable monthly guarantee* as proposed because it received positive comment on this portion of the proposal and the text conforms to the requirements of the AFCTCA. With regard to commenters that requested that the Department approve use of an abridged method for determining whether an employee meets the hours of service requirement, basing eligibility only on the 504-hour criterion, the Department notes that the AFCTCA sets forth a two-part test for eligibility and the Department does not have authority to alter its requirements. The AFCTCA requires that both criteria be met, stating that an employee that has worked or been paid for not less than 60 percent of the applicable monthly guarantee and for not less than 504 hours (not including personal commute time or time spent on vacation leave or sick or medical leave) during the previous 12-month period meets the hours of service eligibility requirement. The Department notes that consistent with the purpose and intent of the FMLA, and the Department's longstanding policy, an employer is not prohibited from providing a more generous leave policy provided the employer complies with the FMLA. *See* § 825.700(b) (explaining that nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies than are required). Therefore, if an employer of airline flight crew employees chooses to assume that all employees who meet the 504-hours requirement also meet the 60 percent requirement, the employer may do so, provided that they only deduct from employees' FMLA leave entitlements leave that is covered under the Act.

Additionally, the Department notes that it continues to use the term line holder in the definition of *applicable monthly guarantee* in § 825.102. Because comments confirmed that the industry uses the term line holder to refer to an airline flight crew employee who is not on reserve status, the Department believes use of this term is appropriate.

The Final Rule will also, as proposed, define an airline flight crew employee's hours worked as duty hours. The response to this proposal was largely positive. As many industry commenters indicated, an airline flight crew employee's typical day of work can include a variety of support duties that begin before a plane takes flight and end after it lands. In contrast to *flight* or *block* hours, duty hours encompasses time spent performing these duties. Furthermore, the inclusion of time worked beyond actual flight time is consistent with the FAA's definition of duty period. *See* 14 CFR 121.467(a) (defining duty period as ''the period of elapsed time between reporting for an assignment involving flight time and release from that assignment''). Furthermore, the Department did not find Legal Aid or RAA's comments opposed to use of the term duty hours persuasive. Even if duty hours are not always precisely or consistently defined by different air carriers, they are, as other commenters noted, the most accurate readily available measure of hours worked in the airline industry. As explained, the alternative definition of hours worked considered by the Department and suggested by RAA, flight or block hours, discounts significant amounts of time when airline flight crew employees are working. RAA's other suggestion, to define hours worked as the hours used by each carrier to measure the applicable monthly guarantee, would similarly undercount time spent working as to many airline flight crew employees because, according to RAA itself, the guarantee is ''[t]ypically'' based on flight or block hours.

In light of the overwhelming response from commenters that the term duty hours is recognized and widely utilized by carriers and employees in the industry, the Department does not find it necessary to provide further definition of the term in the regulatory text. Further, in response to comments specifically requesting the inclusion of training time in the definition of duty hours, the Department declines to alter the proposed regulatory text but notes that some airline employers pay for training time and to the extent airline flight crew employees are paid for time spent in training, that time will be counted toward the employee's hours of service requirement.

The Department adopts in § 825.801(b)(2) its definition of hours

paid to airline flight crew employees as proposed because, based on the positive comments received, the Department believes that definition is logical, easy to understand, and easy to administer. The Department also inserts a new paragraph § 825.801(c) to address the application of USERRA covered service to airline flight crew employees. This paragraph is consistent with the general provisions concerning USERRA-covered service in determining employees' eligibility found at § 825.110(c)(2).

The Department also adopts the proposed language regarding an employer's burden of proof. Placing the burden of proving employee ineligibility on the employer if the employer does not maintain accurate records of the employee's hours worked or paid is consistent with application of the law to non-airline flight crew employees. This statement, proposed as a revision to current § 825.110(c)(3), is located in § 825.801(d), with some duplication of the text in current § 825.110(c)(3) to provide appropriate context.

3. Section 825.802 Special Rules for Airline Flight Crew Employees, Calculation of Leave

The current regulations contain no provision regarding the calculation of FMLA leave specifically for airline flight crew employees. The AFCTCA explicitly authorized the Department to promulgate such regulations.

In the NPRM, the Department proposed to address FMLA leave calculation for airline flight crew employees in § 825.205(d). Proposed § 825.205(d)(1) provided the method for calculating leave usage for airline flight crew employees who are line holders, *i.e.,* who are not on reserve status, based on principles established for the calculation of FMLA leave for eligible employees who are not airline flight crew employees. Specifically, the Department proposed that the employee's scheduled workweek (defined as the number of scheduled duty hours for that workweek) would serve as the basis for calculating FMLA leave usage. The amount of FMLA leave used would be determined on a pro rata or proportional basis.

Proposed § 825.205(d)(2) provided the method for calculating leave usage for airline flight crew employees on reserve status. For those employees, an average of the greater of the applicable monthly guarantee or actual duty hours worked in each of the prior 12 months would be used to calculate the employee's average workweek. The amount of FMLA leave used would be determined on a pro rata or proportional basis. The Department proposed use of the calculation method described for airline flight crew employees on reserve status for employees who work as both line holders and on reserve status, as this method was flexible enough to encompass both the applicable monthly guarantee and duty hours.

The Department sought comment on these proposed methods of calculation of leave. It also requested comment on industry practice in this area, application of the FMLA regulations to employees who work on both reserve and non-reserve status, and alternative FMLA leave calculation methods. For the reasons stated below, the Department is modifying the method for calculation of leave for airline flight crew employees, and is implementing a uniform leave entitlement for such employees at § 825.802, *Special rules for airline flight crew employees, calculation of leave.*

Comments from both employee and employer groups opposed the Department's proposed methods of FMLA leave calculation for airline flight crew employees. Almost uniformly, commenters representing air carrier employers, flight crew employee organizations, and labor organizations, such as TTD, A4A, IAM, and Senators Harkin and Murray, asserted that due to the unique scheduling practices in the airline industry, the proposed calculation of leave methods would be complicated to administer, cause confusion, and lead to inequitable deductions from employees' FMLA entitlements. Even commenters who appreciated that the Department's proposal was an attempt to treat airline flight crew employees similarly to other employees with variable schedules, such as ALPA, nevertheless opposed the proposal because of its complexity and variability.

The Department received two comments regarding the proposed distinction between line holders and employees on reserve status for leave calculation purposes, both of which were critical. RAA stated that many line holders also work reserve days, while reserves are often assigned lines during their reserve period. A4A cautioned that drawing this distinction for calculation of leave purposes would be inappropriate, because airline flight crew employees do not clearly fit within the Department's proposed categories. Both RAA and A4A suggested that by requiring air carriers to use the 12-month averaging option for employees who worked as both line holders and reserves, the Department was unnecessarily complicating FMLA leave calculation.

There was near consensus among commenters representing both employers and employees in the airline industry regarding an appropriate alternative method for calculating FMLA leave for airline flight crew employees. Employer and employee groups, including IAM, ALPA, TTD, APFA, A4A, AFA, and USAPA, supported the establishment of a uniform FMLA leave entitlement for airline flight crew employees, with a one-day increment for leave use. A4A noted that prior to the AFCTCA, various air carriers had instituted internal FMLA programs, including leave entitlement banks, which have proved to be successful. ALPA, among other commenters, believed this approach would be easier for airline flight crew employees to understand and for employers to administer.

RAA opposed the Department's proposal but did not suggest the establishment of a uniform leave entitlement. Rather, RAA suggested that unique calculation provisions for airline flight crew employees are unnecessary. RAA stated that the Department's two proposed calculation methods are historical methods, long utilized to administer FMLA leave, and that under the current regulations, airline carriers should be able to make the proper distinction as to what method (fractional workweek method versus 12-month averaging) to use based on an individual employee's work schedule, regardless of reserve status.

Although commenters were nearly universally in favor of a uniform FMLA leave entitlement or ''bank'' for airline flight crew employees, there were several different suggestions regarding the appropriate size of that entitlement. IAM noted that they had already negotiated an entitlement bank of 90 days for flight attendant contracts, and stated that a uniform bank of 84 days (7 days × 12 weeks) for all airline flight crew employees would be a ''fair application'' of the FMLA entitlement. APFA agreed that all airline flight crew employees should be entitled to a uniform bank of 84 days, and explained that this 84-day bank is currently used by American Airlines. TTD stated that while an 84-day bank was ''ideal,'' a 72-day bank was the ''absolute minimum benefit'' that should be considered. AFA also suggested a bank of 72 days, contending that this would be the ''simplest calculation'' for an FMLA entitlement. USAPA and ALPA both supported a bank of 72 days. These commenters explained that a 72-day bank was based on FAA regulations mandating that airline flight crew employees have one 24-hour period off

duty in any 7-day period, giving the employee a maximum possible 6-day workweek. (6 days × 12 weeks = 72 days of FMLA leave.) A4A suggested significantly smaller numbers, reasoning that for non-airline flight crew employees, the FMLA entitlement represents 23 percent of the average work year (52 weeks divided by 12 weeks) and therefore the uniform entitlement for airline flight crew employees should consist of a reasonable proxy for 23 percent of the average work year for a typical airline flight crew employee. Because of each airline's unique operations, schedules, policies, and collective bargaining agreements, A4A suggested that each air carrier establish its own entitlement based on the average days worked by its airline flight crew employees. A4A provided the example that if a carrier's pilots averaged 200 work days per year, then an allotment bank of 46 days would be the equivalent of 12 weeks (200 days × 23 percent = 46 days of FMLA leave).

Additionally, APFA urged the Department to provide a definition for ''day.'' APFA believed that a day should be defined as a single scheduled duty period, which they noted is the approach utilized by American Airlines for charging employees for the use of vacation days.

The Department has thoroughly considered the comments, and agrees with the commenters that asserted the unique scheduling practices of the airline industry could make administering FMLA leave as proposed confusing and difficult for airline flight crew employees and their employers. In particular, because of the constantly and widely fluctuating workweeks of many airline flight crew employees, the calculation of leave rules proposed would have created uncertainty about how much intermittent or reduced schedule FMLA leave an employee had used and/or had available. Further, the Department understands that the proposed differentiation between line holders and reserves for purposes of leave calculation is inconsistent with the realities of the airline industry. Although the Department attempted to create a method that was similar to the way other employers and employees calculate FMLA leave, the Department is convinced by the many comments it received that the airline industry is best served by a different system.

The Department adopts in § 825.802(a) a uniform entitlement, expressed as a number of days, for eligible airline flight crew employees taking leave for an FMLA-qualifying reason. The Department believes that a uniform day entitlement of FMLA leave allows for clear FMLA entitlement calculations for the airline industry. It also reflects a consensus among commenters representing both airline flight crew employees and their employers. The Department has considered RAA's comment and acknowledges that the adopted method does not track employees' actual workweeks as is required for FMLA leave usage for all other types of employees. However, the Department was persuaded by the majority of comments from the airline industry which made clear how difficult the proposed methods of calculation of FMLA leave, from which RAA's proposal would not significantly differ, would be to administer and understand.

Additionally, the Department concludes that the appropriate size of the uniform entitlement is 72 days of leave for one or more of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5). This number corresponds to the maximum 6-day workweek an airline flight crew employee can work under FAA regulations. (6 days × 12 workweeks = 72 days of FMLA leave.) *See, e.g.,* TTD, USAPA, AFA, ALPA; *see also* 14 CFR 121.471(d) (mandating that airline flight crew employees have one 24-hour period off duty in any seven-day period). By the same method, the Department concluded that airline flight crew employees are entitled to 156 days of military caregiver leave. (6 days × 26 workweeks = 156 days of military caregiver leave.)

Section 825.802(b) explains that an employer must account for an airline flight crew employee's intermittent or reduced schedule FMLA leave usage utilizing an increment no greater than one day. In light of the practical realities of the airline industry, the Department agrees with the numerous commenters representing both airline flight crew employees and their employers who agreed that one day is the most suitable increment of FMLA leave. As stated in § 825.802(b)(1), if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave, during which the employee would not return to work. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and would be deducted from the employee's 72-day entitlement. Further, if the employee must miss work for a physical therapy appointment for an FMLA-qualifying reason once a week for eight weeks, the employer may subtract one day each week from the employee's entitlement, provided that in each instance of leave, the employer restores the employee to work the following day. After eight weeks, if no other FMLA leave had been taken, the employee would have used eight days of FMLA leave and have 64 days of FMLA leave remaining.

The Department emphasizes that the provisions set forth in § 825.802 maintain an FMLA entitlement of 12 workweeks, as required by statute, and assumes a uniform six-day workweek for airline flight crew employees. For example, an airline flight crew employee who takes four weeks of FMLA leave will use 24 days of FMLA leave regardless of how many days he or she was scheduled to work, or for which he or she would have been paid, during that week. (6 days × 4 workweeks = 24 days of FMLA leave.) Where an airline flight crew employee takes two days of intermittent FMLA leave in one workweek, he or she has taken leave for two days of his or her six-day workweek regardless of the number of days he or she was scheduled to work or for which he or she would have been paid during that week and two days would be subtracted from the employee's leave entitlement.

The Department further emphasizes that the rules set forth in § 825.802, including the use of one-day increments, are applicable only to airline flight crew employees. The AFCTCA specifically provided the Department with authority to promulgate regulations regarding the calculation of leave for airline flight crew employees. Congress clearly contemplated that the general FMLA leave calculation provisions might not be appropriate for flight crew employees. The Department has determined that a special leave calculation rule is necessary in light of the unique scheduling constraints of the airline industry. The one-day increment in § 825.802 applies only to airline flight crew employees. All eligible employees who are not airline flight crew employees, as defined in § 825.102, are subject to the minimum increment rules set forth in § 825.205(a)(1), which, among other requirements, permit the use of FMLA leave in increments no greater than one hour.

Concerning APFA's comment addressing what constitutes a ''day,'' the Department understands a ''day'' to mean one calendar day, consistent with other provisions of the Act. *See* §§ 825.115; 825.120; 825.126; 825.213; 825.305; 825.308; 825.313. The Department is concerned that accounting for days in any other manner would create administrative difficulties.

Finally, as indicated in § 825.800(b), except as otherwise provided in this subpart, airline flight crew employees and their employers continue to be subject to the requirements of the FMLA as set forth in part 825. In particular, the Department emphasizes that two broadly applicable rules about the calculation of FMLA leave continue to apply to airline flight crew employees despite the special calculation method set out in § 825.802. First, the physical impossibility provision set forth in § 825.205(a)(2) applies to airline flight crew employees. Section 825.802(c) makes this point by explaining that § 825.205, which sets forth rules for calculation of intermittent or reduced schedule FMLA leave for all employees who are not airline flight crew employees, does not apply to airline flight crew employees except for paragraph (a)(2) of that section, the physical impossibility provision. Second, as required by the Act, in all cases, if an employer chooses to restore an employee to work on the same day during which intermittent or reduced schedule FMLA leave is taken, the employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. *See* 29 U.S.C. 2612(b)(1).

4. Section 825.803 Special Rules for Airline Flight Crew Employees, Recordkeeping Requirements

The current regulations do not contain recordkeeping requirements that apply specifically to employers of airline flight crew employees. In the NPRM, the Department proposed to add a new paragraph, § 825.500(h), that described the statutory requirement, established by AFCTCA, that employers of airline flight crew employees maintain certain records ''on file with the Secretary.'' The Department explained that proposed paragraph (h) provided that records are to be maintained on file by the employer by making, keeping, and preserving records in accordance with the requirements already delineated in § 825.500, with no actual submission to the Secretary unless requested. Proposed § 825.500(h)(1) and (h)(2) outlined additional records that employers of airline flight crew employees must maintain on file. Paragraph (h)(1) required employers of airline flight crew employees to make, keep, and preserve any records or documents that specify the applicable monthly guarantee for each type of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee. Proposed paragraph (h)(2) required employers of airline flight crew employees to make, keep, and preserve records of hours scheduled.

The Department received no substantive comments regarding proposed § 825.500(h). The Department adopts the text essentially as proposed, but proposed § 825.500(h) will be located in § 825.803, *Special rules for airline flight crew employees, recordkeeping requirements.*

In the Final Rule, § 825.803(a) makes clear that the requirements of § 825.500 apply to employers of airline flight crew employees. Section 825.803(b) describes, as proposed § 825.500(h)(1) and (h)(2) did, the additional recordkeeping requirements that apply to those employers. The Department has slightly modified proposed paragraph (h)(2); the text of § 825.803(b)(2) now specifies, consistent with the AFCTCA, that employers of airline flight crew employees must make, keep, and preserve records of hours worked and hours paid, as those terms are defined in new § 825.801(b)(2).

C. Proposed Revisions Definitions (§ 825.102), Employee Eligibility (§ 825.110), Calculation of Leave (§ 825.205), and Recordkeeping (§ 825.500)

1. Section 825.102 Definitions

In the NPRM, the Department proposed to move § 825.800, which currently contains the definitions of significant terms, phrases, and acronyms used in part 825, to § 825.102, which is currently reserved. The Department intended the reorganization to enhance the utility of the regulations by defining terms before they are used in the substantive provisions. Additionally, the proposed change would organize the regulations to be more consistent with other regulations implementing statutes administered by the WHD.

The Department received comments from the Coalition and SHRM addressing the proposed relocation of the definitions section, both of which supported the change. Therefore, the Department adopts the proposal, and the definitions section appears in the Final Rule as § 825.102.

Discussions of comments regarding the proposed substantive changes to certain definitions, as well as modifications to those definitions, appear in the parts of this preamble addressing each of the relevant substantive regulatory sections to which those definitions correspond.

In the Final Rule, the Department modifies the definitions of the terms *covered servicemember, eligible employee, serious injury or illness,* and *son or daughter on covered active duty or call to covered active duty status* in § 825.102 to mirror the modifications to the definitions of these terms that are made in the corresponding relevant substantive regulatory sections. In addition, in the Final Rule, the Department adds definitions for the new terms *airline flight crew employee, applicable monthly guarantee, covered active duty or call to covered active duty status, and covered veteran* to § 825.102 to mirror the addition of these terms and their definitions that are made in the corresponding relevant substantive regulatory sections. The Department also updated the cross-references that appear in the definitions of *contingency operation, next of kin of a covered servicemember, parent of a covered servicemember,* and *son or daughter of a covered servicemember in the Final Rule* in § 825.102. The Department modified the definition of *outpatient status* in the Final Rule in § 825.102 to reflect the fact that this term is only relevant to current servicemembers. The Department also proposed to add, as an aid and service to the reader, definitions of the terms *ITO or ITA, key employee, military caregiver leave, reserve components of the Armed Forces,* and *TRICARE,* which are terms that are already used in the regulations. The Final Rule adopts these definitions as proposed. Lastly, the Department removes, as proposed, the terms *active duty or call to active duty status* and *covered military member* from the Final Rule because these terms are no longer relevant.

2. Section 825.110 Eligible Employee

Section 825.110 sets forth the eligibility standards an employee must meet in order to take FMLA leave. To be eligible, an employee must have been employed by the employer for at least 12 months, must have been employed for at least 1,250 hours of service in the 12-month period immediately preceding the commencement of the leave, and must be employed at a worksite where 50 or more employees are employed by the employer within 75 miles.

The Department proposed revisions to § 825.110(a), (c) and (d) to reflect the AFCTCA's special definition of the hours of service requirement for airline flight crew employees. As explained earlier in this preamble, the Department has decided to place the provisions implementing the AFCTCA in new Subpart H—Special Rules Applicable to Airline Flight Crew Employees.

Proposed § 825.110(c)(2), as well as the proposed addition to § 825.110(d) relevant to airline flight crew employees, are moved to § 825.801, *Special rules for airline flight crew employees, hours of service requirement,* and comments on that topic are discussed in the section of this preamble addressing § 825.801. Because proposed paragraph (c)(2) will now appear in Subpart H, the Department will not implement its proposal to renumber current paragraphs (c)(2) and (c)(3) and cross-references to § 825.801 have replaced references to proposed paragraph (c)(2) in current paragraphs (a)(2) and (c)(1) of § 825.110. Additionally, for accuracy where statements apply to airline flight crew employees as well as other types of employees, the Department has replaced references to 1,250 hours with the term ''hours of service requirement'' in §§ 825.110(c)(2) and (d), 825.300(b)(3), and 825.702(g). The Department has also inserted, after the references to hours worked in §§ 825.301(b)(2) and 825.702(g), clarification that, as required by AFCTCA and set forth in § 825.801(b), the relevant number for airline flight crew employees only is of hours worked or paid. Corresponding updates are made to the definition of *eligible employee* in § 825.102.

The Department also proposed clarifying edits to §§ 825.110(b), (c), and (d) that were not specific to airline flight crew employees. Two of these changes were to references in the current regulations to the Uniformed Services Employment and Reemployment Act (USERRA). Current § 825.110(b)(2)(i) concerns employee eligibility when there is a break in service occasioned by the fulfillment of the employee's National Guard or Reserve military service. The Department proposed to modify the language in the first sentence of § 825.110(b)(2)(i) to clarify that the protections afforded by USERRA extend to all military members (active duty and reserve) returning from USERRA-qualifying military service. Current § 825.110(c)(2) provides rules pursuant to USERRA for crediting an employee returning from a National Guard or Reserve obligation with the hours of service that would have been performed but for the military service when evaluating whether the hours of service eligibility requirement has been met. The Department proposed to modify the language in this paragraph in recognition that USERRA rights may extend to certain employees returning to civilian employment from service in the Regular Armed Forces.

The Department received two comments regarding the proposed references to USERRA in the regulations. The Coalition supported the Department's proposed change to current § 825.110(c)(2), stating that the language properly aligns with the USERRA regulations. NELA recommended clarification of current § 825.110(c)(2), expressing concern that the reference to the period of military service in the regulatory text could be misconstrued as allowing an employer to count only the amount of time spent performing military duty rather than—as required by the USERRA regulation at 20 CFR 1002.210—the entire length of absence due to or necessitated by military service. Accordingly, NELA suggested that the Department replace the phrase ''the period of military service'' with ''the period of absence from work due to or necessitated by military service.'' NELA also suggested similar edits to the definition of eligible employee in proposed § 825.102. NELA also commented that the current definition of eligible employee in § 825.800 includes only National Guard and Reserve service as service that may be credited toward FMLA eligibility requirements, and recommended that the phrase National Guard or Reserve military service obligation in paragraph (1)(i) and the phrase National Guard or Reserve military obligation in paragraph (2)(i) be replaced with USERRA-protected military service obligation.

The Department has carefully considered the comments regarding the proposed changes to the USERRA provisions and has decided to adopt the proposed changes to § 825.110(b)(2)(i) and (c)(2), with modification, as well as corresponding modifications elsewhere in the regulations, in response to comments and for consistency with USERRA regulations. The Department believes the revised language clarifies that these provisions refer to both active and reserve military members. Additionally, the Department agrees that using the language of the USERRA regulations provides consistency and should prevent any misunderstanding concerning the impact of the employee's military service on his or her entitlement to FMLA, and is therefore implementing NELA's suggested revisions. The Department is also referring to the protected services as USERRA-covered service throughout the regulations to accurately reflect that these provisions apply to an absence from work due to any service covered by USERRA. Accordingly, the phrase the period of military service is replaced by the period of absence from work due to or necessitated by USERRA-covered service in paragraph (c)(2), and the Department makes corresponding changes to language in § 825.110(b)(2)(i), the definition of eligible employee in § 825.102, and § 825.702(g), which also addresses the interaction of USERRA and the FMLA. The Department believes that these revisions will ensure that, consistent with the USERRA regulations, the entire absence necessitated by USERRA-protected service will be counted in computing a returning military member's eligibility.

Finally, the Department also proposed, for purposes of clarity, replacing the general reference to eligibility requirements in the second sentence of § 825.110(d) with a specific reference to the 12-month eligibility requirement. The Department did not receive any comments regarding this proposed revision, and adopts § 825.110(d) as proposed.

3. Section 825.205 Increments of FMLA Leave for Intermittent or Reduced Schedule Leave

In the NPRM, the Department proposed several changes to § 825.205 to clarify the existing rules regarding intermittent or reduced schedule FMLA leave and to implement the AFCTCA provisions regarding calculation of FMLA leave for airline flight crew employees. The Department also proposed removing the varying increments of leave rule from this section and sought comment on whether the physical impossibility rule should also be removed. The Department is adopting most of the changes as proposed, declining to adopt others, and making additional clarifying changes in response to comments. The Department is revising the proposed provision regarding the calculation of FMLA leave for airline flight crew employees, but because the Department has relocated the relevant regulatory text to § 825.802, those revisions are discussed in that section of this preamble.

Minimum Increment

Current § 825.205(a)(1) defines the permissible increment of intermittent or reduced schedule FMLA leave as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour and further provided that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. This paragraph also permits employers to utilize different increments of FMLA leave at different times of the day or shift under certain circumstances, a provision referred to in this preamble as

the ''varying increments rule.'' In the NPRM, the Department proposed three clarifying changes and one substantive change to § 825.205(a)(1). 77 FR 8974.

The Department's three proposed clarifying changes were intended to more thoroughly explain concepts already set forth in the Act and in paragraph (a)(1). First, the Department proposed re-inserting language used in the 1995 regulation at § 825.203(d) to clarify that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. Second, the Department proposed inserting an example to illustrate that when an employer uses different increments to account for different types of leave, the employer must use the smallest of the increments to account for FMLA leave usage. Third, the Department proposed adding language to emphasize that an employer may only reduce an employee's FMLA entitlement by the amount of leave actually taken, excluding any time after an employee has returned to work.

The Department received few comments addressing these three proposed clarifications to paragraph (a)(1). Labor organizations, such as the Brotherhood of Locomotive Engineers and Trainman (BLET) and United Transportation Union (UTU), supported the proposed clarification regarding the prohibition on requiring an employee to take more FMLA leave than necessary, commenting that ''returning this language to the regulations * * * is a needed reminder to employers.'' The Equal Employment Advisory Council (EEAC), however, expressed concern that the proposed clarification would result in additional confusion, because ''it could be read as requiring employers to return to counting intermittent leave in the smallest increments that their payroll system is capable of calculating.'' SHRM also opposed insertion of this language because, SHRM believed, it is redundant and could cause confusion. No commenters addressed the insertion of the example regarding an employer's use of different increments for different types of leave. As to the third clarification, regarding the prohibition on reducing an employee's entitlement by more than the amount of leave actually taken, the Coalition acknowledged that this requirement appears in the statute but stated that ''[a]bsent a showing the current language has somehow resulted in harm to affected employees, the language should not be amended from its current form.'' In contrast, one individual commenter thought that because this third proposed addition is merely a clarification of an existing requirement, ''there is no cogent reason not to include it.''

After careful consideration of the comments regarding the three clarifying changes proposed in paragraph (a)(1), the Department adopts the clarifying language as proposed, with one modification. The Department adopts the proposed language stating that an employer may not require an employee to take more leave than necessary. As explained in the NPRM, the proposed language was reinserted as a clarification of an employer's statutory obligation. The adopted regulatory text makes clear that this principle does not alter an employer's obligation to account for FMLA leave in an increment no greater than the smallest increment the employer uses to account for other forms of leave so long as it is not greater than one hour and the employee is not required to take more leave than is necessary. For that reason, the Department disagrees with the comments asserting that the language could be understood to impose a requirement to use the smallest increment made possible by a company's timekeeping system. In response to those comments, the Department emphasizes that it is not creating a requirement that employers track FMLA leave using the smallest increment possible under their payroll timekeeping systems. Rather, as explained in the 2008 Final Rule, the increment of FMLA leave is determined by the increment of leave used by the employer for other types of leave (subject to a one hour maximum). The regulatory text further explains that the clarifying provision is subject to the physical impossibility rule in paragraph (a)(2) and the special rules for intermittent leave for school employees in §§ 825.601 and 825.602. The Final Rule modifies the proposed language to make clear that this provision is also subject to the unique increment of leave rules for airline flight crew employees in § 825.802.

The Department also adopts the proposed illustrative example regarding an employer's use of different increments for different types of leave. The Department received no comments addressing this clarifying edit, and continues to believe the new example serves to make § 825.205(a)(1) more understandable.

Additionally, the Department adopts the proposed clarifying language concerning an employer's obligation to deduct from an employee's FMLA entitlement only the amount of leave actually taken. As the Coalition acknowledged, the proposed regulatory text simply restates a statutory requirement. *See* 29 U.S.C. 2612(b)(1). Furthermore, the Department believes this clarification in the regulatory text will aid employers and employees to better understand the counting of FMLA leave usage when an employee returns to work after intermittent or reduced schedule leave. Accordingly, where an employer chooses to waive its increment of leave policy in order to return an employee to work—for example, where an employee arrives a half hour late to work due to an FMLA-qualifying condition and the employer waives its normal one-hour increment of leave and puts the employee to work immediately—only the amount of leave actually taken by the employee may be counted against the FMLA entitlement.

In addition to proposing specific clarifying language for paragraph (a)(1), the Department also proposed to remove the sentence stating that if an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. In the NPRM, the Department noted that its enforcement experience indicated some confusion regarding this provision. Specifically, the Department understands that some employers have interpreted the varying increments rule to permit the use of a larger increment of FMLA leave at certain points in a shift than the increment used for other forms of leave in the same time period.

Employers and employer groups opposed the elimination of the varying increments rule. The rule was one subject of the letter-writing campaign by members of SHRM, and the Department therefore received hundreds of comments stating that eliminating the rule would make administration of FMLA leave more difficult, as the current provision ''is important for [] ease in implementing FMLA leave.'' In addition, World at Work reported that employers have difficulty administering intermittent FMLA leave, so the Department should ''maintain the maximum amount of flexibility for employers'' by retaining the varying increments rule. SHRM similarly noted that the varying increments rule gives employers flexibility in administering intermittent or reduced schedule FMLA leave. Furthermore, SHRM members and the Coalition asserted that the varying increment rule discourages employees from using intermittent FMLA leave as an excuse to avoid discipline for arriving late to work. EEAC commented that no confusion

exists in the application of the rule and that employers understand that ''they may only count as FMLA leave the shortest increment of time available to all employees for other types of leave during that time period.'' Sedgwick Claim Management Services, Inc. and SHRM suggested that the Department clarify, rather than remove, the rule to eliminate any confusion about its application. The Department did not receive any comments in support of deleting the varying increments rule.

After reviewing the comments, the Department has decided to retain the varying increments rule but to modify the regulatory text to clarify the intended application of the rule. The Department did not eliminate the provision because comments from employers, which were universally opposed to that proposal, made clear that the varying increments rule is helpful in administering FMLA leave, and there were no comments supporting the Department's proposal to delete the rule. The Department is concerned, however, that some employers have found the provisions confusing and has therefore clarified the regulatory text to emphasize that employers who use varying increments of other types of leave may use varying increments of FMLA leave but may not account for FMLA leave in a larger increment than the smallest increment used for any other form of leave during the period in which the FMLA leave is taken. This clarification is meant to better explain that employers may not apply a varying increment of leave only to FMLA leave, but instead must use the varying increment for all types of leave. For example, if an employer usually accounts for all types of leave in increments of 15 minutes, but accounts for all non-FMLA leave for the first hour of the day in 30-minute increments, the employer may also account for FMLA leave in an increment no greater than 30 minutes *only* during the first hour of the day. This modified text is intended as a clarification of the existing varying increment rule, not as a substantive change to the current regulations.

Physical Impossibility

Section 825.205(a)(2) sets forth the physical impossibility provision, which provides that where it is physically impossible for an employee to commence or end work mid-way through a shift, the entire period that the employee is forced to be absent is designated as FMLA leave and counted against the employee's FMLA leave entitlement. The Department revisited this provision in the proposed rule in connection with the AFCTCA because of the impact of the physical impossibility provision on the airline industry. In the NPRM, the Department proposed adding language to § 825.205(a)(2) clarifying that the period of physical impossibility may not extend beyond the period during which the employer is unable either to permit the employee to work prior to a period of FMLA leave, or to return the employee to work after a period of FMLA leave, because of physical impossibility. The proposed language was intended to emphasize that the physical impossibility provision be applied in only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his or her same position or to an equivalent position at the time the employee no longer needs FMLA leave. The Department also noted that it was considering deleting the physical impossibility provision in its entirety because of concern that employers may be applying the provision where reinstatement was possible but inconvenient and requested comments on whether the provision should be retained.

Employers, employer groups, and industry organizations, a majority of whom represented the airline and railroad industries, opposed the removal of the physical impossibility provision and emphasized that the airline and railroad industries rely on the exception. For example, they stated that when a flight crew member or railroad employee uses intermittent or reduced schedule FMLA leave at a time that causes him or her to miss a flight or trip, the employer must find a replacement employee to fill in for the employee for the duration of the trip, which can sometimes span several days. Commenters including RAA also asserted that for reasons including travel time and contractual agreements, it is usually not possible, and where possible, it is costly, to return the original worker to his or her scheduled trip. Similarly, A4A argued that it is not always possible to assign the original worker to a new trip the day after he or she returns from FMLA leave because collective bargaining agreements often require that employers prioritize giving assignments to employees based on factors such as seniority, work rules on reserve staffing, and minimum and maximum flight hours when making trips available. The Association of American Railroads (AAR) raised analogous concerns.

A4A and AAR also contended that the provision prevents railroad and airline employees from misusing FMLA leave, because allowing employees to use only a small amount of intermittent or reduced schedule FMLA leave in order to miss work over the entire duration of a trip may create an incentive to manipulate the system. World at Work, as well as the members of SHRM who submitted hundreds of form letters opposed to deletion of the rule in response to the NPRM, emphasized that employers understand the application of the provision is limited and the existing regulation makes clear the provision is meant to apply narrowly. In addition, both SHRM and the AAR noted they were unaware of any evidence that the exception is being misused by employers, and asserted that the provision protects employees because if FMLA protection does not cover the full period during which reinstatement is physically impossible, the employee may be subject to discipline based on the unprotected portion of the leave.

A number of employee advocacy groups and labor organizations also commented on the physically impossibility provision and generally recommended that the Department remove the exception. These commenters, including BLET and UTU, asserted that the railroad and airline industries have used the exception to improperly diminish employees' FMLA entitlements, because the provision allows employers to deduct more time from an employee's FMLA entitlement than the employee has asked to use. For example, TTD stated that a flight attendant who needs only a single day of FMLA leave at the beginning of a scheduled five-day trip could lose five days of her FMLA entitlement. Airline employee groups asserted that the airline industry is not adversely affected by employees' use of intermittent or reduced schedule FMLA leave, and there is no need for the physical impossibility provision. ALPA and AFA noted that flight crew members frequently take short-term leave for a variety of reasons, often without advance notice, so the industry is prepared to address such situations when they arise because of the use of intermittent or reduced schedule FMLA leave.

Both employer and employee groups argued that the statute compels their preferred result concerning this provision. AAR asserted that the statute's requirement to calculate FMLA leave based on ''actual work time'' mandates that employers be permitted to deduct from an employee's FMLA entitlement the entire work period the employee missed when the use of FMLA leave caused him or her to be

unavailable at the time a trip commences. In contrast, ALPA, TTD, and BLET and UTU argued that because the FMLA provides that the use of intermittent or reduced schedule leave ''shall not result in a reduction in the total amount of leave to which the employee is entitled * * * beyond the amount of leave actually taken,'' 29 U.S.C. 2612(b)(1), deductions from FMLA entitlements for more than the amount of leave needed are prohibited.

Numerous comments addressed how the Department should clarify the physical impossibility provision. SHRM opposed the Department's proposed clarification, asserting that it is ''unnecessary and likely to cause confusion'' and that the changes would ''[add] little if any clarification.'' Specifically, SHRM contended that the Department's proposed clarification concerning an ''equivalent position'' could be misinterpreted to mean that an employer could transfer or reassign to a new position an employee involved in a physical impossibility scenario. Other employer organizations were concerned that the proposed clarifying sentence was meant to indicate that when an employee returns from intermittent or reduced schedule FMLA leave, his or her employer must prioritize assignment to a new trip above the assignment of other employees. For example, AAR asserted that treating FMLA leave users differently by allowing them to jump to the top of the list of employees waiting for assignments would violate the statute. The Coalition also requested that the Department not require employers to demonstrate that no equivalent position exists. Furthermore, some employer groups, such as RAA, suggested that the definition of physical impossibility should include contractual and other restrictions on an employer's ability to return an employee to work, including requirements in collective bargaining agreements to assign employees to trips based on seniority. Employee groups, including BLET and UTU, opposed any such expansion to the provision. AFA asked the Department to clarify, should it maintain the provision, that for purposes of the airline industry, an ''equivalent position'' to which an employee may be assigned to allow the return to work after the use of intermittent or reduced schedule FMLA leave includes equivalence regarding the type of trip to which the employee is entitled due to seniority.

Commenters also offered suggestions regarding an employee's obligation to make him or herself available for work after using intermittent or reduced schedule FMLA leave. A4A suggested that the Department add language to the provision clarifying that if the employer finds an alternative trip that makes the employee's return to work after the use of intermittent or reduced schedule FMLA leave possible, the employee must make him or herself available for the trip or accept that the full duration of the original trip will be deducted from the employee's FMLA entitlement. IAM proposed that flight crew members who miss the beginning of a trip be given two options: take the entire duration of the trip as protected FMLA leave or take one day of FMLA leave and agree to be available to work for the remaining days of the trip, with no FMLA leave deduction for that remaining time if no work assignment is forthcoming.

After careful consideration of the comments, the Department has decided to retain the physical impossibility rule. The Department recognizes the unique circumstances that can make it physically impossible to immediately return employees to work when they need to use intermittent or reduced schedule FMLA leave in certain industries. Although employee groups supported the proposal to remove the rule, they offered only general objections. In addition, the Department notes that the physical impossibility rule is protective of employees who may be subject to disciplinary action because they need to take leave beyond that required for their FMLA condition to account for time not worked due to the physical impossibility. In contrast, under the provision, all of the leave taken due to physical impossibility is counted as FMLA leave. Further, as explained in the 2008 Final Rule, employers have an obligation not to discriminate between employees taking FMLA leave and employees taking other forms of leave in restoring employees or offering alternative work. *See* 73 FR 67978.

With regard to comments asserting that the Act itself mandates a particular result, the Department rejects these contentions. As explained in the 2008 Final Rule, the Department does not believe that a physical impossibility exception contravenes 29 U.S.C. 2612(b) or any other provision of the Act because only the amount of leave used will be counted against the employee's FMLA leave entitlement, and no FMLA provision requires employers to provide alternative work to employees when the employee is unable to return to his or her same or equivalent position due to physical impossibility. *See* 73 FR 67977.

Furthermore, after consideration of the comments regarding clarification to the physical impossibility rule, the Department is adopting the clarifying language as proposed. The Department believes that the clarification effectively responds to the concerns raised by employee groups and labor organizations regarding misapplication of the rule by emphasizing the Department's intent that the physical impossibility rule apply solely to situations in which it is truly physically impossible to return the employee to work. *See* 73 FR 67977.

The Department will not modify the clarifying language in accordance with the suggestions of employer groups because the Department does not consider contractual or other scheduling restrictions to be appropriate reasons to delay an employee's return to the same or an equivalent position. The FMLA regulations provide that the rights established by the Act may not be diminished by any employment benefit program or plan. The FMLA would supersede a provision of a collective bargaining agreement that allows seniority to take precedence over an employee's reinstatement to an equivalent position. *See* § 825.700(a). The physical impossibility provision is intended to make a limited allowance for the practical realities of the airline, railroad, and other industries with unique workplaces in which it is physically impossible for employees to leave work early or start work late.

The Department also will not modify the proposed regulatory text referring to an ''equivalent position.'' In response to SHRM's comments that the clarifying language concerning ''equivalent position'' may be misinterpreted, the Department notes that § 825.204 already addresses the limited scenarios in which an employer may transfer or reassign an employee during intermittent leave. Additionally, with regard to comments requesting that the Department define ''equivalent position'' and state that, in the case of airline flight crew employees, an employee must be returned to the same type of trip, the Department believes addressing this issue in the regulations is unnecessary. The Department has already promulgated a general ''equivalent position'' regulation, *see* § 825.215, and has further clarified in this preamble that a contractual restriction is not an appropriate reason to delay restoration.

Calculation of Leave

Section 825.205(b) addresses the rules concerning the calculation of leave when FMLA leave is taken on an intermittent or reduced schedule basis. The Department proposed only clarifying changes to this paragraph.

The Department proposed to include in the regulatory text language from the 2008 Final Rule preamble to reinforce the requirements that the employee's total available entitlement is 12 workweeks (or 26 workweeks in the case of military caregiver leave), that FMLA leave does not accrue at any particular hourly rate, and that the specific number of hours contained in the workweek is dependent upon the hours the employee would have worked but for the taking of leave. The Department also proposed minor edits making uniform the references to fractions contained in this paragraph. The Department did not receive any comments regarding these changes and adopts paragraph (b) essentially as proposed. The Department makes one correction to the proposed language, changing ''but for the FMLA leave'' to ''but for the use of leave,'' to accurately reflect the method of calculating an employee's workweek. In addition, because in the Final Rule, the calculation of leave rules for airline flight crew employees appear in § 825.802, the Department has added to paragraph (b) a reference to that section.

Overtime

Section 825.205(c) addresses when overtime hours that are not worked may be counted as FMLA leave. The Department proposed to change the term ''serious health condition'' in the last sentence in paragraph (c) to ''FMLA-qualifying reason.'' In the NPRM, the Department explained that this change would be consistent with the language used in the first sentence of the paragraph to more accurately reflect that overtime hours missed by an employee may be due to any FMLA-qualifying reason. The Department did not receive any comments concerning this proposed change, and adopts the modification in the Final Rule.

Calculation of Leave for Airline Flight Crew Employees

Finally, the Department proposed adding a new paragraph (d) to § 825.205 that would provide the method for calculating FMLA leave use for airline flight crew employees. As explained earlier in this preamble, the Department has decided to place all of the regulatory provisions implementing the AFCTCA in Subpart H—Special Rules Applicable to Airline Flight Crew Employees. Accordingly, the Final Rule does not include a paragraph (d) in § 825.205, and the discussion of calculation of FMLA leave for airline flight crew employees appears in the section of this preamble addressing new § 825.802, Special rules for airline flight crew employees, calculation of leave.

4. Section 825.500 Recordkeeping requirements

Section 825.500 explains the recordkeeping requirements under the FMLA. The Department proposed two changes to this section, both of which it is adopting, although the second addition will appear in a different regulatory section than proposed.

First, the Department proposed to add a new sentence at the end of paragraph (g) setting forth the employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), Public Law 110–233. To the extent that records and documents created for FMLA purposes contain family medical history or genetic information as defined in GINA, employers must maintain such records in accordance with the confidentiality requirements of Title II of GINA. GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

The Department received two comments addressing this proposed change. SHRM expressed agreement with this change. The Illinois Credit Union League commented that because the Equal Employment Opportunity Commission (EEOC) is the agency with authority from Congress to administer GINA, the Department ''is not and should not be empowered to exercise authority which it is not delegated to use.''

The Department adopts the proposed new sentence regarding GINA. While the EEOC is the agency charged with administering GINA, as noted in the NPRM, employers must maintain FMLA records in accordance with the confidentiality requirements of Title II of GINA. The GINA regulations provide a narrow exception to the limitations on disclosure for genetic information obtained by the employer for records and documents to be disclosed consistent with the requirements of the FMLA. *See* 29 CFR 1635.9. The Department is acting within its authority to require employers to maintain any relevant FMLA records in conformance with applicable GINA confidentiality and disclosure requirements and believes that this provision provides useful guidance to employers regarding their confidentiality obligations in the FMLA process.

The Department also proposed to add paragraph (h), implementing the AFCTCA statutory requirement that employers of airline flight crew employees maintain certain records on file with the Secretary. The substance of proposed § 825.500(h) will be located in § 825.803, Special rules for airline flight crew employees, recordkeeping requirements. In the Final Rule, § 825.500(h) provides a cross-reference to § 825.803. The discussion of the recordkeeping requirements specific to employers of airline flight crew employees appears with the section of this preamble addressing Subpart H.

VII. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, requires that the Department consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA, an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi).

OMB has assigned control number 1235–0003 to the FMLA information collections. In accordance with the PRA, the February 15, 2012 NPRM solicited comments on the FMLA information collections. This paperwork burden analysis estimates the burdens for the Final Rule. The Final Rule implements amendments to the military leave provisions made by the FY 2010 NDAA, which extends the availability of FMLA leave for qualifying exigencies to employee-family members of members of the Regular Armed Forces and defines the deployments covered by such leave, and extends FMLA military caregiver leave to employee-family members of certain veterans with a serious injury or illness and expands the provision of such leave to cover serious injuries or illnesses that existed prior to a covered servicemember's active duty and were aggravated in the line of duty while on active duty. The Final Rule also implements the AFCTCA, which establishes special hours of service eligibility requirements for airline flight crew members and flight attendants eligibility requirements for airline flight crew members and flight attendants and authorizes the Department to promulgate regulations regarding the calculation of leave for airline flight crew employees as well as recordkeeping requirements for their employers.

Many of the estimates in the analysis of the paperwork requirements derive from data developed for the Regulatory

Impact Analysis (RIA) under Executive Orders 13563 and 12866. However, the specific needs that the PRA analysis and RIA are intended to meet often require that the data undergo a different analysis to estimate burdens imposed by the paperwork requirements from the analysis used in estimating the effect the regulations will have on the economy. In addition, for certain sections, a range of values is provided in the RIA; the PRA uses the midpoint of those ranges. Consequently, the differing assessment in the PRA analysis and the RIA of the regulatory changes may lead to different results. For example, the PRA analysis measures the additional burden of the information collection on those who are providing information due to the regulatory changes; however, the RIA measures the incremental changes expected to result in the broader economy due to the regulatory changes. Thus, this PRA analysis will calculate the additional paperwork burden in relation to the existing FMLA information collection burden arising from this rule. Conversely, the regulatory definition of collection of information for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public. 5 CFR 1320.3(c)(2). The RIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. Finally, the PRA definition of burden can exclude 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 (*e.g.,* in compiling and maintaining business records) if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary. 5 CFR 1320.3(b)(2). The RIA, however, must consider the economic impact of any changes in the Final Rule.

On December 31, 2011, the previous approval for the FMLA information collections expired. Accordingly, the Department issued a 60-day notice on September 28, 2011, on the proposed extension of the approval of information collection requirements (paperwork re-clearance). The burden analyses that were calculated for the paperwork re-clearance only accounted for the increased burdens stemming from the expansion of qualifying exigency leave to the Regular Armed Forces, pursuant to the 2010 NDAA, and the enactment of AFCTCA. The analyses did not account for the increased burden resulting from the expansion of military caregiver leave to care for covered veterans.[4] OMB approved the request for renewal of the FMLA information collection on February 10, 2012, thereby extending the expiration date to February 28, 2015.

On January 30, 2012, the Department announced that it would be publishing the NPRM proposing changes to the regulations to implement the FY 2010 NDAA and AFCTCA amendments to the FMLA. On February 15, 2012, the NPRM was published in the **Federal Register**. *See* 77 FR 8960. In the NPRM, the Department specifically solicited comments on the proposed changes to the FMLA information collections. The publication of the NPRM subsequent to the approval of the paperwork re-clearance package required the Department to re-conduct the paperwork analyses for the Final Rule. The final burden analyses for this Final Rule are based upon the most recently approved burdens by OMB for the FMLA information collections. A copy of the NPRM was submitted to OMB and on March 28, 2012 OMB requested that the Department resubmit the information collection request upon promulgating the Final Rule and after considering public comments on the FMLA NPRM. The Department did receive one comment on the PRA, which is discussed later in this section.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The information collection requirements contained in this Final Rule have been approved by OMB under OMB control number 1235–0003 through February 28, 2015. A copy of the information collection request can be obtained at *www.reginfo.gov* or by contacting the WHD as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Circumstances Necessitating Collection: The Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601, *et seq.,* requires private sector employers who employ 50 or more employees, all public and private elementary schools, and all public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons (*i.e.,* for birth of a son or daughter and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; because of a serious health condition that makes the employee unable to perform the functions of the employee's job; to address qualifying exigencies arising out of the deployment of the employee's spouse, son, daughter, or parent to covered active duty in the military), and up to 26 workweeks of unpaid, job-protected leave during a single 12-month period to an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember for the employee to provide care for the covered servicemember with a serious injury or illness. FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. In addition, the FY 2010 NDAA amended the FMLA to expand qualifying exigency leave to employee-family members of the Regular Armed Forces, and military caregiver leave to employee-family members of certain veterans with a serious injury or illness. Public Law 111–84. The FMLA was also amended by the AFCTCA, which created special hours of service eligibility requirement for airline flight crew employees. Public Law 111–119.

The Department's authority for the collection of information and the required disclosure of information under the FMLA stems from the statute and/or the implementing regulations. These third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA. The required disclosures, which now also include the disclosure of a serious injury or illness for a covered veteran, are listed below.

A. *Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, 825.303].* An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member or planned medical treatment for a serious injury or illness of a

[4] As explained earlier in this preamble, it is the Department's position that the expansion of qualifying exigency leave to the Regular Armed Forces was effective on October 28, 2009, the date the FY 2010 NDAA was enacted. It is also the Department's position that the provisions of the AFCTCA were effective on the date of its passage, December 9, 2009. However, the Department's position is that the provision of the FY 2010 NDAA permitting military caregiver leave to care for certain veterans is not effective until the Department issues regulations defining a *serious injury or illness for a covered veteran* as required by the statute.

covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. When an employee seeks leave for the first time for an FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide sufficient information that indicates that leave is potentially FMLA-qualifying and the timing and anticipated duration of the absence. Such information may include that a condition renders the employee unable to perform the functions of the job, or if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness, and whether the employee or the employee's family member is under the continuing care of a health care provider. Sufficient information for leave due to a qualifying family member's call (or impending call) to covered active duty status may include that the military member is on or has been called to covered active duty and that the requested leave is for one of the categories of qualifying exigency leave. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. *Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice [29 CFR 825.219–.300(b)].* When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee—within five business days, absent extenuating circumstances—of the employee's eligibility to take FMLA leave and any additional requirements for taking such leave. The eligibility notice must provide information regarding the employee's eligibility for FMLA leave, and, if the employee is determined not to meet the eligibility criteria, provide at least one reason why the employee is not eligible. The rights and responsibilities notice must detail the specific rights and responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. If an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, the employer does not have to provide an additional eligibility notice if the employee's eligibility status has not changed. If the employee's eligibility status has changed, then the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances. The rights and responsibilities notice must be provided to the employee each time the eligibility notice is provided to the employee. Form WH–381 allows an employer to satisfy the regulatory requirement to provide employees with specific information concerning eligibility status and with written notice detailing specific rights as well as expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.300(b) and (c).

C. Employee Certifications—Serious Health Condition of Employee or Employee's Family Member, Recertification, Fitness for Duty, Leave for a Qualifying Exigency, and Leave to Care for a Covered Servicemember.

1. Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d), 825.305–.308]. An employer may require that an employee's leave due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position or to care for the employee's spouse, son, daughter, or parent with a serious health condition, be supported by a certification issued by the health care provider of the eligible employee or of the employee's family member. In addition, an employer may request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification, and any subsequent recertification, unless the employee is not able to do so despite his or her diligent good faith efforts. An employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient and must provide the employee seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any identified deficiency. The employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any identified deficiencies. An employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. Form WH–380–E allows an employee requesting FMLA leave for his or her own serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the employee's own serious health condition. *See* § 825.305(a). Form WH–380–F allows an employee requesting FMLA leave for a family member's serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification (including a second or third opinion and recertification) to support the need for leave for the family member's serious health condition. *See* § 825.305(a).

2. Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.312]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly applied policy or practice that requires all similarly situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. An employer may require that the fitness-for-duty certification specifically address the employee's essential job functions if the employer has provided the employee with a list of those essential functions and notified the employee of the need for a fitness-for-duty certification in the designation notice. Certain managers for an employer, but not the employee's immediate supervisor, may contact a health care provider for purposes of clarifying and authenticating a fitness-for-duty certification. An employer is not entitled to a fitness-for-duty certification for each absence taken on an intermittent or reduced leave schedule; however, an employee may be required to furnish a fitness-for-duty certificate no more often than once every 30 days if an employee has used

intermittent leave during that period and reasonable safety concerns exist.

3. Certification for Leave for a Qualifying Exigency [29 CFR 825.309]. An employer may require an employee who requests FMLA leave due to a qualifying exigency to certify the need for leave. In addition, the first time an employee requests leave for a qualifying exigency related to a qualifying family member's active duty status, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military that indicates the military member is on covered active duty. Optional form WH–384 allows an employee requesting FMLA leave based on a qualifying exigency to satisfy the statutory requirement to furnish, upon the employer's request, appropriate certification to support leave for a qualifying exigency.

4. Certification for Leave to Care for Covered Servicemember [29 CFR 825.310]. An employee who requests FMLA leave to care for a covered servicemember (either a current servicemember or a veteran) may be required by his or her employer to certify the need for leave. An employee requesting FMLA leave based on a covered servicemember's serious injury or illness may satisfy the statutory requirement to furnish, upon the employer's request, a medical certification from an authorized health care provider with optional form WH–385 or WH–385–V. An employer must accept as sufficient certification of leave to care for a current servicemember an invitational travel order or invitational travel authorization (ITO or ITA) issued to the employee or to another family member in lieu of optional form WH–385 or the employer's own form.

D. *Notice to Employees of FMLA Designation [29 CFR 825.300(c)–.301(a)].* When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided upon request by the employee but not more often than once every 30 days if leave is taken during the 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation. In addition, if the employer will require the employee to submit a fitness-for-duty certification, the employer must provide notice of the requirement with the designation notice. Form WH–382 allows an employer to meet its obligation to designate leave as FMLA-qualifying. *See* 29 CFR § 825.300(d).

E. *Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)].* An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period for FMLA leave for reasons other than care of a covered servicemember with a serious injury or illness (which is subject to a set single 12-month period). An employer wishing to change to another alternative is required to give at least 60 days notice to all employees.

F. *Key Employee Notification [29 U.S.C. § 2614(b)(1)(B); 29 CFR 825.217–.219 and 825.300(c)(1)(v)].* An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination, including that the employer cannot deny FMLA leave and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

G. *Periodic Employee Status Reports [29 CFR 825.300(b)(4)].* An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

H. *Notice to Employee of Pending Cancellation of Health Benefits [29 CFR 825.212(a)].* Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

I. *Documenting Family Relationship [29 CFR 825.122(k)].* An employer may require an employee giving notice of the need for FMLA leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee

is entitled to the return of the official document submitted for this purpose.

J. *General FMLA Recordkeeping [29 U.S.C. 2616; 29 CFR 825.500].* The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Covered employers who have eligible employees must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; total compensation paid; and dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave and leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.,* not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.

Employers must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family member created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable Americans with Disabilities Act (ADA) and GINA confidentiality requirements; except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in Regulations 29 CFR part 516, are currently approved under OMB control number 1215–0018; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

Public Comments: On February 15, 2012, the Department published a proposed rule and sought comments on the burdens imposed by the information collections covered by the proposed regulations. 77 FR 8960. The same notice provided that comments could also be sent directly to OMB, in accordance with provisions of 5 CFR 1320.11.

As part of the proposed rule, the Department sought public comment regarding the burdens imposed by the information collection contained in this Final Rule. The Department received one comment from an individual identifying himself as a labor-employment attorney stating that the agency's FMLA information collections are necessary for the proper performance for the functions of the agency. This comment, along with all of the comments relating to the other provisions of the NPRM that were received, are a matter of public record, and posted without change to *http://www.regulations.gov,* including any personal information provided.

Burden Hours Estimates: The PRA section of the FMLA NPRM published February 15, 2012 (77 FR 8960) used the 2008 analysis as the baseline to determine the burden increase for this paperwork package, and accounts for respondent and burden increases resulting from the statutory amendments to the FMLA covering qualifying exigency leave, military caregiver leave, and airline flight crew employee eligibility. Subsequent to OMB's clearance of the NPRM, but before its publication in the **Federal Register**, OMB approved the re-clearance of the existing FMLA ICRs under the PRA. That re-clearance reflected increases in respondents and burden stemming from the self-executing portions of the FY 2010 NDAA (qualifying exigency leave for family members of members of the Regular Armed Forces) and the Airline Flight Crew Technical Corrections Act. The following burden analyses are based upon the 2012 reclearance issued on February 9, 2012, and reflect the increase in respondents and burdens resulting from the extension of military caregiver leave to covered veterans. Additionally, due to refinements in the analysis conducted under E.O. 12866, the number of eligible employees assumed to take leave to care for a covered veteran has decreased.

Except as otherwise noted, the Department bases the following burden estimates on the Regulatory Impact Analysis in the Final Rule and the 2012 paperwork reclearance. The Department estimates that the FMLA covers 91.1 million workers. The Department estimates 381,000 employers, comprised of 291,000 private businesses and 89,566 government entities, respond to the FMLA collections. For PRA purposes 89,499 employers are assumed to be state, local, or tribal governmental entities and 67 are assumed to be Federal entities. The Department assumes a proportional response burden between the employer entities (74.033172415 percent private, 25.94333834 percent state, local, and tribal governments, and 0.02348951 percent Federal). Within each information collection, the respondents, responses, and burden estimates are rounded to the nearest whole number.

In the interest of transparency, for each FMLA information collection requirement this PRA discussion includes references to the incremental burden changes that would be imposed by the rule, the burden imposed by existing requirements, and the total burden after the rule takes effect.

A. *Employee Notice of Need for FMLA Leave.* The Department estimates that there are 26,908 employees who are newly eligible to take leave to care for a covered veteran under the FY 2010 NDAA. Based on leave usage patterns, 7,000 of these employees will take leave to care for a covered veteran (26 percent of 26,908 employees).

Based on the leave patterns estimated by the Department in the PRIA analysis, the Department estimates that there will be 357,000 employee requests for military caregiver leave.

New burden: 357,000 employee respondent notices of leave × 2 minutes/60 minutes per hour = 11,900 hours.

Existing burden for this requirement: 13,829,680 responses and 460,990 hours.

Total estimated burden requested for this requirement: 14,186,680 responses and 472,890 hours.

B. *Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice.* Based on the leave usage patterns for military caregiver leave, the Department is assuming that all subsequent leave requests will be for the same servicemember for whom the leave was originally requested. The employee is required to notify the employer in each instance of the need for leave. But the employer is not required to provide the employee with a notice of eligibility or rights and responsibilities unless the employee's eligibility status changes. For military caregiver leave, 7,000 leave takers will provide 357,000 employee notices of their need for leave, but employers will only have to issue 7,000 eligibility and rights and responsibilities notices.

New burden: 7,000 total responses (notices of eligibility and rights and responsibilities) × 10 minutes/60 minutes per hour = 1,167 hours

Burden Disaggregation by Sector:

Private (74.03317215%): 5,182 responses × 10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses × 10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses × 10 minutes/60 minutes = 0 hours

Existing burden requirement:

Private: 16,142,733 responses and 7,031,756 hours

State, local, tribal: 5,656,874 responses and 2,464,128 hours

Federal: 5,121 responses and 2,231 hours

Total estimated burden requested for this requirement:

Private: 16,147,915 responses and 7,032,619 hours

State, local, tribal: 5,658,690 responses and 2,464,431 hours

Federal: 5,123 responses and 2,231 hours

C. *Employee Certifications: Employee Certifications–Serious Health Condition Certification, Recertification, and Fitness-for-Duty Certification; Documenting Call to Military Active Duty; Certification of Qualifying Exigency Due to Call to Military Active Duty; Covered Servicemember's Serious Injury or Illness Certification.*

1. *Medical Certification and Recertification.* The Department assumes that the number of employees who will obtain medical certifications to care for a covered veteran from a health care provider as defined in § 825.125 will be very small as most employees will obtain medical certifications from VA, DOD, TRICARE, or DOD non-network TRICARE providers, which are not subject to second or third opinions or recertifications. As such, the Department assumes that five percent of employees will be asked to obtain a second or third opinion/recertification. Utilizing these assumptions, 7,000 employees taking leave multiplied by 5% asked to provide medical certification results in 350 employees requiring additional certification.

New burden: 350 employees × 20 minutes/60 minutes per hour = 117 hours.

2. *Fitness-for-Duty Medical Certification.* No change from current burden estimate.

3. *Certification of Qualifying Exigency for Military Family Leave.* Although this Final Rule adds parental leave as a new qualifying exigency for FMLA leave the Department did not update the burden because it lacks any data on which to base an estimate of the number of days of qualifying exigency leave that might be taken for parental leave. Therefore, there is no change from the current burden estimate.

4. *Certification for Leave Taken to Care for a Covered Servicemember—Current Servicemember.* Pursuant to the FY 2010 NDAA, an eligible employee-family member may take FMLA leave to care for a current servicemember who has a serious injury or illness that existed before the member's active duty and was aggravated by service in the line of duty while on active duty. At the NPRM stage the Department did not have sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty, and, thus, did not revise the current burden analysis for certification of leave to care for a current servicemember. The Department did not receive any comments in response to the NPRM addressing this issue. Consequently, the Department still lacks sufficient information to develop an estimate of employees who will qualify for military caregiver leave for a covered servicemember with a serious injury or illness that existed prior to the servicemember's active duty and was aggravated in the line of duty on active duty. However, as stated in the Regulatory Impact Analysis, the Department believes that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the selection process used by the Armed Forces.

5. *Certification for Leave Taken to Care for a Covered Servicemember—Covered Veteran.* The FY 2010 NDAA provided FMLA leave for eligible employees to care for a covered veteran with a serious injury or illness that was incurred in the line of duty on active duty (or existed before the member's active duty and was aggravated in the line of duty on active duty) and manifested itself before or after the member became a veteran. The Department estimates that 7,000 employees will take leave to care for a covered veteran. The Department expects that employers will request certification forms for this leave. The Department estimates that it will take a Human Resources specialist 30 minutes to request, review, and verify the employee's certification papers.

New burden: 7,000 responses (certification papers) × 30 minutes/60 minutes per hour = 3,500 hours.

All new certification and recertification requirements: 7,350 responses and 3,617 hours.

Existing total burden for this requirement: 12,118,019 responses and 4,022,236 hours.

Total estimated burden for this requirement: 12,125,369 responses and 4,025,853 hours.

D. *Notice to Employees of FMLA Designation.* The Department estimates that each written FMLA designation

notice takes approximately ten minutes to complete.

New burden: 7,000 total responses (designation notices) × 10 minutes/60 minutes per hour = 1,167 hours.

Burden Disaggregation by Sector:

Private (74.03317215%): 5,182 responses × 10 minutes/60 minutes = 864 hours

State, local, tribal (25.943338%): 1,816 responses × 10 minutes/60 minutes = 303 hours

Federal (0.02348951%): 2 responses × 10 minutes/60 minutes = 0 hours

Existing total burden for this requirement:

Private: 12,898,914 responses and 3,479,716 hours

State, local, tribal: 4,520,148 responses and 1,219,392 hours

Federal: 4,092 responses and 1,104 hours

Total estimated burden requested for this requirement:

Private: 12,904,096 responses and 3,480,580 hours

State, local, tribal: 4,521,964 responses and 1,219,695 hours

Federal: 4,094 responses and 1,104 hours

E. *Notice to Employees of Change of 12-month period of determining FMLA eligibility.* No change from current burden estimate.

Existing burden for this requirement:

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

Total estimated burden requested for this requirement:

Private: 7,099,082 respondents and 3,536 hours

State, local, tribal: 2,487,721 respondents and 1,239 hours

Federal: 2,351 respondents and 1 hour

F. *Key Employee Notification.* The Department assumes that a very small percentage of employees taking leave to care for a covered veteran will be determined key employees and even fewer of those employees will receive notice from the employer that they intend to exercise the option to not reinstate those employees. As such, the Department does not associate a new burden hour estimate with this particular provision for employees taking leave to care for a covered veteran.

Existing burden for this requirement:

Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

Total estimated burden requested for this requirement:

Private: 31,676 respondents and 2,640 hours

State, local, tribal: 11,100 respondents and 925 hours

Federal: 11 respondents and 1 hour

G. *Periodic Employee Status Reports.* The Department estimated in the 2008 paperwork analysis that employers require periodic reports from 25 percent of FMLA leave users, and since it has not received any evidence to believe otherwise, it continues to estimate 25 percent today. The Department also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the Department estimates that 10 percent of employees will respond to a request only because of the regulatory requirement, imposing a burden of two minutes per response. The Department also estimates that each such employee provides two annual periodic status reports.

New burden: 7,000 leave takers × 25% × 10% = 175 employee responses.

175 employee responses × 2 responses = 350 total responses.

350 responses × 2 minutes/60 minutes = 12 hours.

Existing burden for this requirement: 371,547 responses and 12,384 hours.

Total estimated burden for this requirement: 371,897 responses and 12,396 hours.

H. *Documenting Family Relationships.* The Department assumes that under the military amendments all employees who take leave will be doing so for a family-related reason. (7,000 leave takers). In the 2008 PRA analysis, the Department estimated that employers may require additional documentation to support a family relationship in five percent of these cases, and the additional documentation will take five minutes.

New burden: 7,000 (employees taking leave for family-related reasons) × 5% (additional documentation) = 350 employees required to document family relationships. 350 employees × 5 minutes/60 minutes per hour = 29 hours.

Existing burden for this requirement: 185,681 responses and 15,473 hours.

Total estimated burden requested for this requirement: 186,031 responses and 15,502 hours.

I. *Notice to Employee of Pending Cancellation of Health Benefits.* The Department believes that most employees who take leave to care for a covered veteran will be covered by the military member's health benefits and not by his or her employer's health plan. As such, the Department assumes that a very small percentage of employees taking leave for a covered veteran will receive notification of the pending cancellation of his or her health benefits. The Department does not associate a new burden hour estimate with this provision.

Existing burden for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

Total burden requested for this requirement:

Private: 105,585 responses and 8,799 hours

State, local, tribal: 37,000 responses and 3,083 hours

Federal: 34 responses and 3 hours

J. *General Recordkeeping.* No change from current burden estimate.

Existing burden for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours

Total burden requested for this requirement:

Private: 9,934,548 responses and 206,970 hours

State, local, tribal: 3,481,350 responses and 72,528 hours

Federal: 3,152 responses and 66 hours.

PRA SUMMARY OF BURDEN INCREASE DUE TO THIS RULE

Required disclosure	Existing respondents	Increase in respondents	Existing responses	Increase in responses	Existing burden hours	Increase in burden hours
Employee Notice of Need for FMLA Leave	7,249,100	7,000	13,829,680	357,000	460,990	11,900
Notice to Employee of FMLA Eligibility and Rights and Responsibilities Notice: Private	211,170	5,182	16,142,733	5,182	7,031,756	864

PRA SUMMARY OF BURDEN INCREASE DUE TO THIS RULE—Continued

Required disclosure	Existing respondents	Increase in respondents	Existing responses	Increase in responses	Existing burden hours	Increase in burden hours
State, local, tribal	74,000	1,816	5,656,874	1,816	2,464.128	303
Federal	67	2	5,121	2	2,231	0
Employee Certifications	5,461,097	7,350	12,118,019	7,350	4,022,236	3,617
Notice to Employees of FMLA Designation:						
Private	211,170	5,182	12,898,914	5,182	3,479,716	864
State, local, tribal	74,000	1,816	4,520,148	1,816	1,219,392	303
Federal	67	2	4,092	2	1,104	0
Notice to Employee of 12-month Period Change:						
Private	21,117	0	7,099,082	0	3,536	0
State, local, tribal	7,400	0	2,487,721	0	1,239	0
Federal	7	0	2,351	0	1	0
Key Employee Notification:						
Private	21,117	0	31,676	0	2,640	0
State, local, tribal	7,400	0	11,100	0	925	0
Federal	7	0	11	0	1	0
Periodic Employee Status Reports	184,852	175	371,547	350	12,384	12
Documenting Family Relationships	183,987	350	185,681	350	15,473	29
Notice to Employee of Pending Cancellation of Health Benefits:						
Private	105,585	0	105,585	0	8,799	0
State, local, tribal	37,000	0	37,000	0	3,083	0
Federal	34	0	34	0	3	0
General Record Keeping:						
Private	21,1170	0	9,934,548	0	206,970	0
State, local, tribal	74,000	0	3,481,350	0	72,528	0
Federal	67	0	3,152	0	66	0

Grand Total Incremental Increase of Burden Hours = 17,892

Grand Total Annual Burden Hours = 19,027,093 Hours

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the Department used the median hourly wage for a non-supervisory Human Resources Assistant (Except Payroll and Timekeeping) for May 2010. The median hourly wage is $17.69 plus 40 percent in fringe benefits ($24.77). See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010 (*http://www.bls.gov/oes/current/oes434161.htm*). The Department estimates total annual respondent costs for the value of their time to be $471,301,094 ($24.77 × 19,027,093 total annual burden hours).

Other Respondent Cost Burdens (Maintenance and Operation): The Department estimates that it will take approximately 20 minutes to complete the certification for a covered veteran. Thus, the time would equal the employee's time in obtaining the certification. The Department used the median hourly wage for a physician's assistant of $41.54 plus 40 percent in fringe benefits ($58.17) to compute a $19.39 cost for the certification of a serious health condition ($58.17 × 20 minutes/60 minutes per hour). *See* BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2010, *http://www.bls.gov/oes/current/oes291071.htm.*

New burden (covered veterans): 7,000 medical certifications for covered veterans × $19.39 cost per certification = $135,730.

Existing maintenance and operations cost estimate for the existing FMLA information collections: $163,332,185.

Grand total of maintenance and operations cost burden for respondents = $163,467,915.

The total burden imposed by the FMLA information collections (existing and new) is summarized as follows.

Agency: Wage and Hour Division.

Title of Collection: Family and Medical Leave Act, as Amended.

OMB Control Number: 1235–0003.

Affected Public: Individuals or Households; Private Sector—Businesses or other for profits. Not for profit institutions, Farms: State, Local, or Tribal Governments.

Total estimated number of respondents: 14,134,414.

Total estimated number of responses: 89,305,469.

Total estimated annual burden hours: 19,027,093.

Total estimated annual other cost burdens: $163,467,915.

VIII. Executive Order 12866; Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' because, although not economically significant under section 3(f) of Executive Order 12866, it raises novel issues of law and policy. Therefore, the rule was reviewed by OMB. The Family and Medical Leave Act (FMLA or Act) is administered by the U.S. Department of Labor, Wage and Hour Division (WHD). The FMLA provides a means for employees to balance their work and family responsibilities by taking unpaid leave for certain reasons. The Act is intended to promote the stability and economic security of families as well as the nation's interest in preserving the integrity of families.

The FMLA applies to any employer in the private sector engaged in commerce

or in an industry or activity affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; all public agencies and local education agencies; and most Federal employees.[5]

To be eligible for leave, an individual must:

B. Be employed by a covered employer at a worksite that employs at least 50 employees within 75 miles;

C. Have worked at least 12 months for the employer (not necessarily consecutively); and

- Have at least 1,250 hours of service during 12 months preceding the beginning of the FMLA leave (as discussed herein, special hours of service rules apply to airline flight crew employees).

The FMLA provides for job-protected, unpaid leave, which may be continuous or intermittent, and allows for the substitution of paid leave. Employees are entitled to:

- A combined total of 12 workweeks of leave in a 12-month period for:
  - birth and care of the employee's child (within one year);
  - placement with employee of a child for adoption or foster care (within one year);
  - care of a spouse, child, or parent with serious health condition;
  - the employee's own serious health condition; and
  - qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is a military member and is on covered active duty or has been notified of an impending call or order to covered active duty.

Employees are also entitled to 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.

A. Need for Regulation

The changes to the FMLA regulations are primarily to implement statutory amendments to the FMLA's military family leave provisions and separate statutory changes affecting the eligibility requirements for airline flight crewmembers and flight attendants (collectively referred to as airline flight crew employees). The military statutory amendments are designed to make it easier for workers with family in military service to balance their work and family lives during particularly demanding times without the fear of losing their jobs. 73 FR 68070. The amendments relating to the airline flight crew employees established a special hours of service eligibility requirement in order to address this industry's unique scheduling practices and expand access to FMLA-protected leave for airline flight crew employees.

1. National Defense Authorization Act for Fiscal Year 2010 Amendments

On October 28, 2009, the President signed into law the National Defense Authorization Act for FY 2010 (FY 2010 NDAA), Public Law 111–84. Section 565(a) of the FY 2010 NDAA amends the FMLA. These amendments expand the military family leave provisions added to the FMLA in 2008, which provide qualifying exigency and military caregiver leave for employees with family members who are covered military members.

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been notified of an impending call to) covered active duty in the Armed Forces. Covered active duty for members of a regular component of the Armed Forces means duty during deployment of the member with the Armed Forces to a foreign country. For members of the U.S. National Guard and Reserves it means duty during deployment of the member with the Armed Forces to a foreign country under a call or order to active duty in a contingency operation as defined in section 101(a)(13)(B) of title 10, United States Code. Prior to the FY 2010 NDAA amendments, qualifying exigency leave did not apply to employees with family members serving in a regular component of the Armed Forces.

The FY 2010 NDAA also expands the military caregiver leave provisions of the FMLA. Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness, to take up to 26 workweeks of FMLA leave in a single 12-month period to care for the covered servicemember. Under the FY 2010 NDAA amendments, the definition of covered servicemember is expanded to include a veteran ''who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness'' if the veteran was a member of the Armed Forces ''at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.'' Prior to the FY 2010 NDAA amendments, military caregiver leave was limited to care for current members of the U.S. Armed Forces, including members of the Regular Armed Forces and members of the National Guard and Reserves.

In addition, the FY 2010 NDAA amends the FMLA's definition of a serious injury or illness for a current member of the U.S. Armed Forces, including National Guard or Reserves, to include not only a serious injury or illness that was incurred by the member in the line of duty on active duty but also one that ''existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces'' that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. For covered veterans, the term is defined as ''a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.''

2. Airline Flight Crew Technical Amendments

On December 21, 2009, the President signed into law the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111–119. This amendment to the FMLA establishes a special hours of service eligibility provision for airline flight crew employees. This amendment also permits the Secretary of Labor to provide by regulation a method of calculating FMLA leave for airline flight crew employees. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

The amendment provides that an airline flight attendant or flight crewmember meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for:

- Not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and

D. Not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave.

Prior to this amendment, many flight crew employees were not eligible for FMLA leave because the nature of the airline industry, including regulatory limits on the flying time, prevented

[5] Most Federal employees are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the U.S. Code), which is administered by the Office of Personnel Management under regulations set forth at 5 CFR part 630, subpart L.

them from meeting the required 1,250 hours of service requirement. Airline employees other than flight crew employees continue to be subject to the 1,250 hours of service eligibility requirement with hours of service determined according to principles established under the FLSA for compensable work time (*i.e.,* hours worked). *See* § 825.110.

B. Summary of Public Comments

1. Additional Data

World at Work and Airlines for America (A4A) provided additional data about FMLA usage and administration in their comments; these comments were especially relevant to the data and assumptions used in the economic analysis.

World at Work provided a summary of survey results from a recent ''Snapshot Survey'' of their members' opinions about issues raised by the NPRM as well as an overview of insights from earlier surveys related to more general FMLA issues. World at Work found that 65 percent of their members have received no requests for qualifying exigency leave and that members must focus most of their time on administration related to intermittent leaves for other FMLA-qualifying reasons. While the most recent results presented in the World at Work comment are derived from a fairly small sample size (93 responses), they provide useful feedback on qualifying exigency leave that is generally consistent with the estimates in the NPRM.

There were numerous general comments on the burden of tracking intermittent FMLA leave; however, absent new data, the Department continues to rely on its previous surveys as the best available data for calculations regarding intermittent leave usage. The Department notes that it is conducting a new survey of employers and employees to obtain current representative data for FMLA leave usage.

A4A provided a detailed comment including information on trends of usage of FMLA-type leave in the airline industry. In the comment, A4A noted that on the enactment of the AFCTCA all airlines implemented the new eligibility standard and there have been few reported disputes of airline flight crew employee eligibility. Additionally, airline experience implementing FMLA-type leave has shown that for airline flight crew employees, intermittent leave is far more common than block leave, likely due to the way this industry schedules work and provides banks of paid leave for many workers. This commenter further stated that when airline flight crew employees use FMLA leave, they ''almost always request and are charged a minimum of one day usage or the hourly equivalent of one paid day.'' The Department notes that this Final Rule recognizes industry practice and establishes a bank of leave for eligible airline flight crew employees and a minimum increment of one day of leave.

The Department notes that the economic analysis of leave taken by airline flight crew employees as a result of the rule may be an underestimate, because such employees may take more short periods of leave rather than fewer long periods of leave. However, the Department received no data concerning how leave usage by airline flight crew employees may vary from FMLA leave usage by non-airline employees or from the assumption of FMLA leave use contained in the proposed rule: that airline flight crew employees take approximately the same number of FMLA leave periods as the rest of the population of eligible employees. 77 FR 8997. As a result, the costs driven by number of leaves (certifications, notices) may be underestimated; however, it is likely that the underestimated costs are offset by an associated overestimate of costs driven by leave length (maintenance of health benefits).

2. Regulatory Familiarization

Two commenters, Aon Hewitt and the National Coalition to Protect Family Leave, raised concerns about the Department's estimate of the amount of time required for employers to familiarize themselves with the rule. Specifically, both commenters felt that two hours was too low and that it is unclear if this includes time for the employer to make revisions based on its review of the rule. Aon Hewitt observed that its clients usually involve staff in multiple roles to review and make decisions, and that a more appropriate estimate of the time required would be 20 hours for airline companies and 15 hours for all others.

The commenters did not provide justification for why employers already administering FMLA leave should require a 10-fold increase in the amount of time for regulatory familiarization. The Department notes that this rulemaking builds upon changes made in the 2008 Final Rule. Therefore, the Department believes that covered employers are already familiar with the relevant provisions of the FMLA and merely have to apply those provisions to additional groups of workers, or with slight modification for particular types of employees. The Final Rule is limited in scope and length, limiting the time required for familiarization. Furthermore, the Department believes that most employers will make use of guidance and educational materials from the Department, industry trade groups, franchisers and other organizations to help them review the regulations more efficiently. Accordingly, the Department will leave the assumption as is.

3. Other Costs to Employers

Several individual commenters and the National Business Group on Health raised concerns about the administrative burden to employers of tracking FMLA leaves and rescheduling work. The National Business Group on Health noted ''our members, many of whom are the human resources professionals who administer FMLA leave, consistently confirm that compliance with FMLA involves complex and costly processes.'' An individual, identifying himself as an employment law attorney and human resources professional, agreed with business concerns about the time-consuming task of administering FMLA leave, but also noted that there are creative approaches available to lessen this burden.

These commenters did not provide any additional data or observations on which to base any revisions to the analysis. Based on the survey results presented by World at Work, in 2005 respondents indicated that processing a request for FMLA leave requires 30 minutes to two hours of time, which is consistent with the time estimates used in the economic analysis.

4. Costs to Employees

One commenter discussed the burden of certification costs to employees, noting that for workers with multiple serious conditions the cost of obtaining certifications (and recertifications) could become quite expensive. This commenter noted that he typically pays $25 to $55 per certification to the health care provider, depending on specialty.

This range of costs per certification is consistent with the cost the Department cites in the economic analysis. The Department has proposed only minor revisions to the certifications to reflect the statutory amendments under the FMLA but encourages employers to work with employees with multiple conditions to reduce cost.

C. Summary of Impacts [6]

The Department projects that the average annualized cost of the rule will

[6] On certain provisions, the Department provides a range of estimates. Where the ranges provide a

Continued

be somewhat less than $43 million per year over 10 years. The rule is expected to cost $53.9 million in the first year, and $41.3 million per year in subsequent years. The amendment to extend FMLA provisions to airline flight crew employees accounts for 0.7 percent of first year costs and 0.9 percent in subsequent years, while qualifying exigency and military caregiver leave account for 75.9 percent of first year costs and 99.1 percent of costs in subsequent years. Regulatory familiarization costs account for 23.4 percent of first year costs. The costs related to the provision of health benefits account for the largest share of costs, about 44.0 percent of costs in the first year of the rule, and 57.5 percent of costs each in each of the following years.

TABLE 1—SUMMARY OF IMPACT OF CHANGES TO FMLA [a]

Component	Year 1 ($1,000)	Year 2 ($1,000)	Annualized ($1,000)[b]	
			Real discount rate 3%	Real discount rate 7%
Total	$53.9	$41.3	$42.8	$43.0
Cost of Each Amendment				
Any FMLA regulatory revision	12.6	0	1.4	1.7
Flight Crew Technical Amendment	0.4	0.4	0.4	0.4
FY 2010 NDAA	41.0	41.0	41.0	41.0
NDAA Subtotal Qualifying Exigency	*25.8*	*25.8*	*25.8*	*25.8*
NDAA Subtotal Military Caregiver	*15.1*	*15.1*	*15.1*	*15.1*
Cost of Each Requirement				
Regulatory Familiarization	12.6	0	1.4	1.7
Employer Notices	17.1	17.1	17.1	17.1
Certifications	0.4	0.4	0.4	0.4
Health Benefits	23.8	23.8	23.8	23.8

[a] Columns may not sum due to rounding.
[b] Costs are annualized over 10 years.

D. Industry Profile

The first step in the analysis is to estimate the number of firms, establishments and employees in the public and private sectors that will be impacted by the changes. The Department estimates that there are a total of 7.9 million firms and government agencies with 10.6 million establishments in the U.S.[7] These entities employ 133.4 million workers with an annual payroll of $5.9 trillion.[8] Estimated annual revenues equal $33.2 trillion and estimated net income is $1.1 trillion.[9]

After identifying and excluding from the analysis those businesses that are not covered by the FMLA, the Department estimates that there are 381,000 covered firms and government agencies with 1.2 million establishments. These firms employ 91.1 million workers that will potentially be impacted by the Final Rule changes. These employers have an annual payroll of $5.0 trillion, estimated annual revenues of $23.7 trillion, and estimated net income of $1.03 trillion.

Table 2 presents the estimated number of establishments, firms, employment, annual wages, revenue, and net income for all employers; Table 3 presents the same information for covered employers. The following subsection describes in detail the methods and data sources used to develop the industry profile.

TABLE 2—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll ($ bil.)	Estimated revenues ($ bil.)	Estimated net income ($ bil.)
11	Agriculture, Forestry, Fishing & Hunting.	86	93	1,084	$30	$192	$2.4
11f	Farms	2,208	2,205	843	0.02	284	[a]
21	Mining	21	30	729	62	265	23.8
22	Utilities	7	16	561	47	589	28.5
23	Construction	686	789	6,692	348	1,764	13.1
31–33	Manufacturing	285	347	12,992	727	5,042	220.0
42	Wholesale Trade	341	588	5,901	366	5,217	34.9
44–45	Retail Trade	638	1,019	15,737	4,006	5,603	94.0
48–49	Transportation and Warehousing[b].	154	208	4,981	183	920	14.5
51	Information	73	136	2,970	210	830	46.7

summary of information, the midpoint of the range is represented.

[7] Number of firms and establishments includes private industry, farms, and governments.

[8] The Department's analysis is based on: USDA 2007 Census of Agriculture, available at: *http://www.agcensus.usda.gov/Publications/2007/index.asp;* 2007 Annual Survey of State and Local Government Employment and Payroll, available at: *http://www.census.gov/govs/estimate/;* and Unpublished Special Tabulations produced by the Bureau of Labor Statistics, Quarterly Census of Employment and Wages (QCEW) Program. For more information on the QCEW program, please see the Web site: *http://www.bls.gov/cew/.*

[9] Estimated net income does not include net income for farms. The Department's analysis is based on: U.S. Census Bureau, Statistics of U.S. Businesses, ''Number of Firms, Number of Establishments, Employment, Annual Payroll, and Receipts by Employment Size of the Enterprise for the United States, All Industries—2002''; Unpublished Special Tabulations, BLS; and, IRS, 2007 Statistics of Income, Returns of Active Corporations, Table 5—Selected Balance Sheet, Income Statement, and Tax Items, by sector, by Size of Business Receipts.

TABLE 2—2008 INDUSTRY PROFILE: ALL PRIVATE AND PUBLIC SECTOR EMPLOYERS—Continued

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll ($ bil.)	Estimated revenues ($ bil.)	Estimated net income ($ bil.)
52	Finance and Insurance.	234	459	5,824	492	2,590	114.9
53	Real Estate and Rental and Leasing.	243	342	2,085	91	439	14.6
54	Professional, Scientific & Technical Serv.	695	933	7,876	578	1,476	18.5
55	Management of Companies & Enterprises.	35	48	1,896	179	466	57.0
56	Admin, Support, Waste Mgmt & Remed Serv.	315	432	7,705	255	649	4.0
61	Education Services—Total.	68	85	2,502	97	269	4.7
61a	*Education Services—all others.*	51	65	1,624	73	185	3.8
61e	*Education Services—Elementary and Secondary.*	19	20	878	24	83	1.0
62	Health Care and Social Assistance.	594	748	15,911	655	1,750	14.4
71	Arts, Entertainment, and Recreation.	99	116	1,816	62	194	3.0
72	Accommodation and Food Services.	447	592	11,218	189	560	4.2
81&95	Other Services & Auxiliaries.	455	1,112	4,466	128	544	3.3
99	Unclassified	101	140	190	7	30	0.8
	All industries	*7,786*	*10,438*	*113,978*	*5,108*	*29,672*	*717.3*
	Government	*90*	*180*	*19,386*	*770*	*3,537*	*401.3*
Public and Private Sector Total		7,876	10,618	133,364	5,878	33,209	1,118.6

Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

[a] Net income for farms is not available.

[b] NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the final rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

TABLE 3—2008 INDUSTRY PROFILE: COVERED EMPLOYERS

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll ($ bil.)	Estimated revenues ($ bil.)	Estimated net income ($ bil.)
11	Agriculture, Forestry, Fishing & Hunting.	2.0	4.9	538	$9	$90	$1.3
11f	Farms	[a]	[a]	[a]	[a]	[a]	[a]
21	Mining	1.6	5.4	534	54	214	22.1
22	Utilities	0.9	6.4	473	48	504	26.1
23	Construction	19.0	25.9	2,651	181	787	7.0
31–33	Manufacturing	34.9	63.9	10,272	638	4,435	211.7
42	Wholesale Trade	21.3	78.0	3,057	291	2,863	21.1
44–45	Retail Trade	22.3	215.7	10,146	338	3,998	84.8
48–49	Transportation and Warehousing [b].	8.8	32.7	3,908	216	716	12.8
51	Information	5.0	38.8	2,323	205	693	42.9
52	Finance and Insurance	9.3	115.4	4,008	478	2,195	104.3
53	Real Estate and Rental and Leasing.	5.2	37.5	842	62	163	8.4
54	Professional, Scientific & Technical Serv.	17.4	59.8	4,020	408	789	13.7
55	Management of Companies & Enterprises.	24.3	22.2	1,650	188	334	40.9
56	Admin, Support, Waste Mgmt & Remed Serv.	20.0	52.8	5,416	218	389	2.8

TABLE 3—2008 INDUSTRY PROFILE: COVERED EMPLOYERS—Continued

NAICS	Industry	Number of firms (1,000)	Number of establishments (1,000)	Employment (1,000)	Annual payroll ($ bil.)	Estimated revenues ($ bil.)	Estimated net income ($ bil.)
61	Education Services—Total.						
61a	*Education Services—all others.*	3.3	7.6	1,329	67	158	3.5
61e	*Education Services—Elementary and Secondary.*	18.6	20.0	878	24	83	1.0
62	Health Care and Social Assistance.	34.3	114.7	11,364	524	1,202	12.7
71	Arts, Entertainment, and Recreation.	5.8	10.3	1,135	39	116	2.1
72	Accommodation and Food Services.	27.6	105.2	5,956	150	285	3.0
81&95	Other Services & Auxiliaries.	9.5	51.0	1,260	59	171	1.7
99	Unclassified	0.0	0.0	1	0	0	0.0
	All industries	*291.2*	*1,068.2*	*71,761*	*4,199*	*20,187*	*623.7*
	Government	*89.5*	*180.0*	*19,386*	*770*	*3,537*	*401.3*
Total		380.7	1,248.1	91,147	4,969	23,723	1,025.0

Sources: BLS Unpublished special tabulations; 2007 Annual Survey of State and Local Government Employment and Payroll; 2007 Census of Government Finance; Census of Agriculture; IRS 2001 Statistics of Income.

[a] Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few employees would be eligible for FMLA leave even if the farm were covered.

[b] NAICS code 48–49 includes the Postal Service (Source: www.usps.com, and USPS Annual Report 2008); postal service employees are covered by the final rulemaking while most other Federal employees are covered under FMLA regulations administered by the Office of Personnel Management.

1. Methods and Data Sources

The analysis draws on the methods used in the 2008 Final Rule to estimate a profile of employers and employees who will be impacted by the Final Rule. The foundation for the profile is a special tabulation of data produced by the Bureau of Labor Statistics (BLS) Quarterly Census of Employment and Wages (QCEW) Program. The tabulation describes the distribution of establishments and employment by major industry division (two-digit NAICS level) across nine employment size categories. As explained more fully below, the analysis is based on establishment-level data because employer coverage and employee eligibility for the Final Rule is determined, in part, by establishment size.

The number of establishments and employment for each two-digit industry, as defined by the North American Industry Classification System (NAICS), by employment size class, were obtained directly from BLS Quarterly Census of Employment and Wages Business Employment Dynamics (QCEW).[10] The number of farms was obtained from the U.S. Department of Agriculture 2007 Census of Agriculture. The number of governments and number of government workers was obtained from the U.S. Census of Governments.

The number of firms was determined by distributing the BLS QCEW total number of firms at the two-digit industry level to each size class using the proportion of firms in each size class calculated from the Statistics of U.S. Businesses 2006. The Department used a similar approach to determine the annual payroll within each industry. The total annual payroll at the two-digit industry level was distributed to each of the employment size classes using the proportion of payroll in each size class calculated from the Statistics of U.S. Businesses 2006.[11] Annual wages for government entities were obtained from the U.S. Census of Governments.[12]

In order to determine estimated 2008 revenues for each industry and employment size class, the Department calculated the receipts per employee in each size class from the 2007 Statistics of U.S. Business by aggregating the 2007 size classes to match BLS size classes, then dividing total receipts by the number of employees in each size class. Then, the Department estimated the BLS worker output index and producer price index for each two-digit sector as a weighted average of industries composing that sector. For sectors where no indices were available, the Department used the median value from those sectors with indices. Finally, to obtain an estimate of 2008 revenues, the Department multiplied receipts per employee in each size class by the 2008 number of employees in each size class, the worker output index and the producer price index. Government revenues were directly obtained from the 2007 Census of Government Finance.[13]

To determine estimated 2008 net income for each industry and employment class size, the Department calculated the average revenues per firm in each size class and calculated the ratio of net income to total receipts using the 2007 IRS Statistics of Income.[14] The estimated average revenue per firm in each size class was used to select an appropriate ''size of business receipts'' category from

[10] Unpublished Special Tabulations, BLS.

[11] Statistics of U.S. Businesses, 2006 features a range of size classes; in some cases these size classes were aggregated to match the size classes available in the BLS Quarterly Census of Employment and Wages Business Employment Dynamics data set.

[12] 2007 Annual Survey of State and Local Government Employment and Payroll, available at: *http://www.census.gov/govs/estimate/.*

[13] U.S. Census Bureau 2007 Census of Government Finance, available at: *http://www.census.gov/govs/estimate/index.html#state_local.*

[14] Internal Revenue Service, 2007 Statistics of Income, Returns of Active Corporations, Table 5—Selected Balance Sheet, Income Statement, and Tax Items, by Sector, by Size of Business Receipts.

Statistics of Income for a size class in a particular industry and to generate the ratio of net income to total receipts for that category. The 2007 ratio of net income to total receipts was multiplied by the estimated 2008 revenues in each size class to calculate the estimated 2008 net income. Government net income was estimated by subtracting expenditures from revenues.[15]

2. Covered Employers

The FMLA applies to any employer in the private sector engaged in commerce or in an industry affecting commerce who employed 50 or more employees each working day during at least 20 weeks in the current or preceding calendar year; and all public agencies and local education agencies. Most Federal employees are covered by Title II of the FMLA which is administered by the Office of Personnel Management (OPM).

First, the Department dropped from the profile all establishments in employment size classes of less than 50 employees (*i.e.,* 0—49 employees) except for those in elementary and secondary education. For the purpose of this analysis, all Federal government employers are assumed to be covered by FMLA regulations as administered by the OPM and, therefore, not subject to these revisions; state and local government employees, as well as U.S. Postal Service employees, are covered by this final rulemaking and are included in the profile of covered workers. Additionally, based on estimates from the 2007 Census of Agriculture, it is likely that very few farms employ more than 50 employees, and among those that do, very few of their employees are eligible for FMLA as the seasonal nature of the work limits the total number of hours employees work each year. As a result, this analysis assumes that no farm employers are covered by FMLA.[16] *See* Table 3 for a summary of covered employers.

Additionally, the Department used Statistics of U.S. Business, 2006 at the six-digit NAICS level to identify the proportion of employers in NAICS 61 ''Education Services'' who are categorized as ''Elementary and Secondary Education.'' This proportion was used to calculate the number of employers in each size class in NAICS 61 that are considered local education agencies, and, therefore, covered by FMLA regardless of size. These employers were subtracted from the broader category of education services, and treated separately by the analysis; the remaining employers in education services with fewer than 50 employees were dropped from the profile.

Next, in the absence of reliable data on the geographic proximity of establishments owned by the same firm, and employment at those establishments, the Department calculated an adjustment factor to account for establishments with fewer than 50 employees at a worksite owned by a firm with more than 50 employees within 75 miles. This is necessary to avoid underestimating the number of covered employers and eligible employees affected by the Final Rule.

The Department calculated this adjustment factor as the midpoint of a range defined by assumptions concerning the proximity of establishments employing fewer than 50 workers owned by the same company. To define one end of this range, the Department takes employment in establishments with more than 50 employees according to the U.S. County Business Patterns of 2007.[17] This essentially assumes that no establishments with fewer than 50 workers and owned by the same company are located within 75 miles of each other, and therefore excludes all employees in such establishments from the calculation. The other end of this range is defined by taking all employment in firms with greater than 50 employees according to the Statistics of U.S. Businesses 2007 small employment size classes.[18] This assumes that all establishments with fewer than 50 workers owned by the same company are located within 75 miles of each other and includes all such employees in the calculation. The adjustment factor is the midpoint of this range, that isthe Department calculated 50 percent of the difference between the higher and lower number of employees to estimate the number of workers at covered worksites of less than 50 employees in 2007. This estimate was then calculated as a percent of total employment in each industry, and that percent multiplied by the total employment in each industry in 2008 to estimate the number of workers at covered worksites of less than 50 employees in 2008. The Department did not attempt to distribute these workers to size classes. This approach was repeated to estimate the number of establishments and annual payroll for this category.[19] The numbers presented in Table 3 are the Department's best estimates based on this methodology.

E. FMLA Leave Profile

This section describes how, in light of the recent amendments, the Department estimated the number of covered, eligible workers who may be in a position to take qualifying exigency or military caregiver leave and the number of leaves they may take, and the number of covered eligible airline flight crew employees who may take FMLA leave and the number of leaves they may take. Table 4 provides a summary of the estimated leaves, a discussion of the methodology used to produce these estimates follows.

TABLE 4—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE FINAL RULE

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Flight Crew [a]		90,560	5,950	8.9	8.9	
Pilots		41,470	2,070	3.1	3.1	
Flight Attendants		49,090	3,880	5.8	5.8	
NDAA 2010 [b]	218,130	219,908	37,896	758	1,311	10.5
Qualifying Exigency	197,000	193,000	30,900	401	926	7.4

[15] 2007 Census of Government Finance.

[16] Based on the 2007 Census of Agriculture, about 2% of all farms have more than 10 hired employees, suggesting that the number of covered farms is likely very close to zero. Due to the seasonal nature of farm employment, it is similarly likely that few employees would be eligible for FMLA leave even if the farm were covered.

[17] U.S. County Business Patterns of 2007, available at *http://www.census.gov/econ/cbp/download/07_data/index.htm.*

[18] Statistics of U.S. Businesses, available at: *http://www.census.gov/econ/susb/.*

[19] This is the same approach used in the 2007 ''Preliminary Analysis of the Impacts of Prospective Revision to the Regulation Implementing the FMLA of 1993 at 29 CFR 825'' (hereafter, ''the 2007 PRIA''). CONSAD Research Corporation, December 7, 2007, pp. 6–8.

TABLE 4—SUMMARY OF LEAVES TAKEN AS A RESULT OF THE FINAL RULE—Continued

Leave taker	Covered service-members and veterans	Number eligible for leave	Number who will take FMLA leave	Number of leaves (1,000)	Days of leave (1,000)	Hours of leave (mil.)
Military Caregiver	21,130	26,908	6,966	357	385	3.1

[a] Number eligible for leave represents only those flight crew employees not currently covered by an FMLA-type provision under a CBA; thus, the number of leaves equals new leaves as a result of this rule. The Department did not estimate the number of hours of leave for flight crew employees because the rule establishes a bank of days of leave, to be used in full day increments.
[b] Number of days and hours of leave estimated based on leave profiles, see discussion for more detail.

1. Military Family Leave Under the FMLA

The changes to the military family leave provisions of the FMLA impact a variety of employees and employers across the economy. While these changes do not alter the conditions for employer coverage or employee eligibility under the FMLA, they do change the circumstances under which eligible employees who are family members of covered servicemembers qualify for FMLA leave and, as a result, will affect the number and frequency of FMLA leaves taken for those reasons.

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the changes, the Department estimated the number of servicemembers or veterans covered by the amendments, completed an age profile of those individuals and estimated the number of eligible family members or potential caregivers likely to be associated with each age range. This method is described in full detail in Appendix A.

a. Qualifying Exigency

The FY 2010 NDAA amendments to the FMLA provide that an eligible employee may take FMLA leave for any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on (or has been notified of an impending call to) covered active duty in the Armed Forces. For members of a regular component of the Armed Forces, this means duty during deployment to a foreign country. For members of the U.S. National Guard and Reserves, it means duty during deployment to a foreign country under a call or order to active duty under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code.

To determine the number of eligible employees who may take FMLA leave as a result of this amendment, the Department first estimated the number of servicemembers on covered active duty and the number of family members who may be eligible and employed at a covered employer and then subtracted those servicemembers and family members already entitled to take qualifying exigency leave prior to the FY 2010 NDAA amendments. Clear, consistent data on the number of military personnel deployed in any given year are difficult to find; many sources, for example, do not adequately distinguish military personnel deployed overseas from those stationed overseas. For example, the U.S. Department of Defense publishes an annual report profiling the military community including the distribution of geographic location of active duty members, but without any designation of deployed versus stationed status.[20] In addition, estimates might vary significantly depending on sources utilized.[21] Furthermore, when deployments do occur, a Congressional Research Service report showed that estimates of personnel involved might vary significantly depending on definition and source. Thus, estimates of ''boots on the ground'' in Iraq between 2003 and 2008 are only 30 percent to 60 percent of the total involved when personnel outside Iraq are included.[22] Therefore, the Department drew on several data sources to determine the number of servicemembers likely to be called to covered active duty in the Armed Forces annually.

Table 5 provides a summary of deployments of the U.S. Armed Forces from 1960 through 2007. Although composed of the best data found to date, some estimates of personnel deployed appear to use more restrictive definitions than would be covered by the Department's definition of covered active duty. For example, the table shows deployment of 1,200 personnel for operations in Lebanon from 1982 through 1984. However, this appears to include only those Marine Corps troops that were on the ground in Lebanon, but excludes sailors on the Navy support ships that were also deployed in this operation.[23]

TABLE 5—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007

Year	Total active military personnel [b]	Deployed personnel		Total deployed as % of total active	Deployment
		Total [a]	Active		
1960	2,490,000	900	900	0.1	Vietnam [c]
1961	2,550,000	3,000	3,000	0.1	
1962	2,690,000	11,000	11,000	0.4	
1963	2,700,000	16,000	16,000	0.6	
1964	2,690,000	23,000	23,000	0.9	
1965	2,720,000	184,000	184,000	6.8	
1966	3,230,000	385,000	385,000	11.9	
1967	3,410,000	486,000	486,000	14.3	

[20] U.S. Department of Defense. Demographics: Profile of the Military Community. Available for the years 2003 to 2010 at *http://www.militaryhomefront.dod.mil/pls/psgprod/f?p=MHF:DETAIL0:0:::CID:20.20.60.70.0.0.0.0.0.*

[21] *See*, for example, the promisingly, but misleadingly, titled: Kane, T. 2004. Global U.S. Troop Deployment, 1950–2003. The Heritage Foundation. October 27. accessed at *http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950–2003* on July 7, 2012.

[22] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001—FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on July 7, 2012.

[23] For example, the U.S.S. New Jersey provided offshore fire support during this operation; this ship alone has a crew of about 1,900. Thus, this source may use a ''boots on the ground'' definition.

TABLE 5—U.S. DEPLOYMENTS AND TOTAL ACTIVE MILITARY PERSONNEL, 1960–2007—Continued

Year	Total active military personnel [b]	Deployed personnel		Total deployed as % of total active	Deployment
		Total [a]	Active		
1968	3,490,000	536,000	536,000	15.4	
1969	3,450,000	475,000	475,000	13.8	
1970	2,980,000	335,000	335,000	11.2	
1971	2,630,000	157,000	157,000	6.0	
1972	2,360,000	24,000	24,000	1.0	
1973	2,230,000	50	50	0.0	
1974	2,160,000				
1975	2,100,000				
1976	2,080,000				
1977	2,070,000				
1978	2,060,000				
1979	2,030,000				
1980	2,050,000				
1981	2,080,000				
1982	2,110,000	10,000	10,000	0.5	Lebanon [e], Grenada [e]
1983	2,120,000	1,200	1,200	0.1	Lebanon [e]
1984	2,140,000	1,200	1,200	0.1	
1985	2,150,000				
1986	2,170,000				
1987	2,170,000				
1988	2,140,000				
1989	2,130,000	27,000	27,000	1.3	Panama [e]
1990	2,050,000				
1991	1,990,000	560,000	476,000	28.1	Iraq (1) [f]
1992	1,810,000	25,800	25,800	1.4	Iraq OSW [f], Somalia [e]
1993	1,710,000	25,800	25,800	1.5	
1994	1,610,000	26,500	26,500	1.7	Somalia [e], Rwanda [e], Haiti [e]
1995	1,520,000	12,200	12,200	0.8	Somalia [e], Haiti [e], Bosnia [e]
1996	1,470,000	9,300	9,300	0.6	Haiti [e], Bosnia [e]
1997	1,440,000	1,400	1,400	0.1	Iraq ONW [f]
1998	1,410,000				
1999	1,390,000	37,100	37,100	2.7	Kosovo [f]
2000	1,380,000				
2001	1,390,000	83,400	83,400	6.0	Afghanistan [d]
2002	1,410,000	21,100	21,100	1.5	
2003	1,430,000	237,600	178,200	16.6	Afghanistan [d], Iraq (2) [g]
2004	1,410,000	236,100	177,100	16.7	
2005	1,380,000	258,900	194,200	18.8	
2006	1,380,000	265,400	199,100	19.2	
2007	1,380,000	285,700	214,300	20.7	
Average	2,102,000	99,200	90,800	4.7	Overall, 1960–2007
	2,140,000	144,000	132,000	6.7	Deployment Years Only

[a] Total deployed personnel is equal to the active personnel plus Reserve and/or National Guard personnel.
[b] Kane, T. 2004. Global U.S. Troop Deployment, 1950–2003. The Heritage Foundation. October 27. Available at *http://www.heritage.org/research/reports/2004/10/global-us-troop-deployment-1950-2003* on July 7, 2012.
[c] American War Library. Vietnam War Allied Troop Levels 1960–73. Available at: *http://www.americanwarlibrary.com/vietnam/vwatl.htm* on July 7, 2012.
[d] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Available at *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on July 7, 2012.
[e] Sarafino, N.M. 1999. Military Interventions by U.S. Forces from Vietnam to Bosnia: Background, Outcomes, and ''Lessons learned'' for Kosovo. Congressional Research Service. May 20.
[f] U.S. Department of Defense, Deployment Health Clinical Center (DHCC): Deployments by Operation. Available at *http://www.pdhealth.mil/dcs/deploy_op.asp* on July 7, 2012.
[g] ''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Available at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*
OSW (Operation Southern Watch) and ONW (Operation Northern Watch) refer to operations in support of the Iraqi no-fly zones.

According to the Department of Defense reports on active duty military strengths, the number of troops (including Reserve and National Guard) deployed as part of overseas contingency operations deployments has steadily declined since 2007.[24] As of December 31, 2008 there were 226,950 servicemembers deployed as part of an overseas contingency operation; by September 30, 2012 there were 146,712 total servicemembers deployed for such an operation.

Supplementing the deployment data with annual active military personnel counts, the Department estimated the annual number and percent of military personnel deployed on average over the 1960 to 2007 period.[25] Over the entire 48-year period, each year the U.S. deployed on average about 99,200 of its

[24] Active Duty Military Personnel by Service by Region/Country. United States Department of Defense. Retrieved January 24, 2013. Available at: *http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm.*

[25] For the years available in the U.S. Department of Defense ''Demographics'' reports, the numbers of ''Active Duty personnel'' are consistent with the numbers of ''Total Active Military Personnel'' listed in Table 5.

2.1 million personnel active military force (4.7 percent) on operations that meet the definition of covered active duty. The overall average covers a wide variation in the timing, duration, and size of those operations; of the 48 years included in Table 5, in:

- 16 years, essentially no personnel were deployed (with the exception of 50 servicemembers in Vietnam in 1973);
- 18 years, 900 to 37,100 personnel were deployed, an average of 15,400 per year (0.8 percent of active servicemembers);
- 14 years (Vietnam and the two Iraq conflicts), deployments ranged from 83,400 to 560,000 personnel, an average of 320,400 per year (13.9 percent of active servicemembers).

Finally, with the exception of the Vietnam and second Iraq conflicts, most of the conflicts listed in Table 5 were for two years or less.

Based on the information provided in Table 5, and acknowledging the limitations of those data, the Department judged that the simple average of 99,200 deployed personnel does not adequately represent the typical number of service personnel on covered active duty in any given year for projecting the costs associated with this rule. The Department also calculated that, on average, 144,000 personnel per year were deployed in the 33 years in which a deployment occurred. Using this figure instead to represent average annual deployments on covered active duty provides a 45 percent cushion to account for data inconsistencies and omissions. Therefore, for the purposes of this analysis, the Department assumes an average of 144,000 military personnel are deployed per year on covered active duty.

Two additional adjustments to this estimate must be made:

- Qualifying exigency leave for eligible family members of National Guard and Reserve personnel was promulgated in 2008.
- Military personnel may deploy more than once in any given year; if their eligible family members use less than the entire allotment of leave on the first deployment (12 weeks), they may use some or all of the remaining leave on subsequent deployments that year.

Data on U.S. military deployments showed that 17 percent of personnel deployed to Iraq in 1991 were Reserve units, while 28 percent of personnel deployed to Iraq between 2003 and 2007 were Reserve or National Guard units.[26] Therefore, the Department adjusted the estimated number of personnel downward by 15 percent for 1991, and 25 percent for 2003 through 2007. Thus, the Department estimates that on average 132,000 active military personnel per year are deployed on covered active duty.

The Department used a Department of Defense news release on typical deployment lengths in the Iraq conflict by service (Army, one year; Navy and Marines, six months; Air Force, three months)[27] to estimate the average number of deployments per person. This average was weighted by the relative percent of active personnel by service deployed to Iraq (Army, 61 percent; Navy and Marines, 28 percent; Air Force, 11 percent)[28] to determine that the military would use 1.49 deployments to maintain one person in Iraq for one year. Thus, deployment of 132,000 personnel might require 197,000 actual deployments per year.

In the 2008 Final Rule, the Department estimated the joint probability that a servicemember will have one or more family members (parent, spouse, or adult child), that those family members will be employed at an FMLA-covered establishment, and that they would be eligible to take FMLA leave under the qualifying exigency provision (*see* 2007 PRIA and Appendix A). Applying these joint probabilities to the 197,000 annual deployments, the Department estimates approximately 193,000 family members will be eligible to take FMLA leave to address qualifying exigencies. Military deployments represent a non-routine departure from normal family life to potentially long-term exposure to a high stress, high risk environment, often at relatively short notice. Therefore, the Department assumes the rate at which eligible employees take FMLA leave for this purpose will be twice the rate (about 16 percent) of those taking regular FMLA leave (7.9 percent). The Department does not assert that only 16 percent of family members will take leave for reasons related to the servicemember's deployment, but that 16 percent will use leave designated as FMLA leave for qualifying exigencies. Based on these assumptions, the Department estimates 30,900 family members will take FMLA leave annually to address qualifying exigencies.

In the 2008 Final Rule, the Department developed a profile of the ''typical'' usage of qualifying exigency leave over the course of a 12-month period for an eligible employee. 73 FR 68051. Under this leave profile, the typical employee will take a one week block of leave upon notification of the deployment of the servicemember, 10 days of unforeseeable leave during deployment, one week of foreseeable leave to join the servicemember while on rest and recuperation, and one week of foreseeable leave post deployment to address qualifying exigencies. *Id.* The revisions to the rule increase foreseeable leave to join a servicemember while the servicemember is on Rest and Recuperation leave. Table 6 summarizes the revised leave pattern.

TABLE 6—PROFILE OF QUALIFYING EXIGENCY LEAVE

Reason	Description	Days	Hours
Notice of Deployment	1 week unforeseeable	5	40
During Deployment	10 days unforeseeable	10	80
During Deployment, "Rest and Recuperation"	10 days foreseeable	10	80
Post Deployment	1 week foreseeable	5	40
Total		30	240

[26] Belasco, A. 2009. Troop Levels in the Afghan and Iraq Wars, FY2001–FY2010: Cost and Other Potential Issues. Congressional Research Service. July 2. Accessed at: *http://www.fas.org/sgp/crs/natsec/R40682.pdf* on July 7, 2012.

''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Accessed at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*

[27] DOD News Briefing with Secretary Gates and Gen Pace from the Pentagon. April 11, 2007. Available at: *http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=3928. See also* Powers, R. 2007. ''Joint Chiefs Continue to Examine Deployment Lengths.'' April 14. Accessed at: *http://usmilitary.about.com/od/terrorism/a/deploylength.htm.*

[28] ''Contingency Tracking System deployment file for Operation Enduring Freedom and Iraqi Freedom, as of: October 31, 2007.'' Accessed at: *http://veterans.house.gov/Media/File/110/2-7-08/DoDOct2007-DeploymentReport.htm.*

For the purpose of this analysis, the Department is assuming that the average employee will take 10 days of leave to be with their servicemember during rest and recuperation leave. While the Department proposed in the NPRM to increase the number of days of qualifying exigency leave an employee may take for the servicemember's Rest and Recuperation leave to coincide with the number of days provided the servicemember, up to 15 days, the Department does not have a basis at this time to estimate the percentage of servicemembers who would be granted 15 days of Rest and Recuperation or the probability that their family member(s) would join them for the entire Rest and Recuperation leave. Therefore, the Department assumes for the purpose of this analysis that a covered and eligible employee will take 10 days of qualifying exigency leave for the servicemember's Rest and Recuperation leave. The Department invited comment on the amount of Rest and Recuperation leave provided to service personnel and the extent to which employees would take an equal number of days of FMLA qualifying exigency leave to be with their servicemember family member. Several commenters, including the National Association of Letter Carriers, the North Carolina Justice Center, the Partnership, the Military Officers Association of America, Twiga, and the Coalition confirmed that servicemembers are often granted 15 days of leave for Rest and Recuperation and that family members should be allowed to take an amount of leave that is equal to the amount granted to the servicemember. None of these commenters were able to provide any further information on the percent of servicemembers that are granted five, 10, or 15 days of leave, or the frequency with which family members join them or for how long; therefore, the Department will continue to use the midpoint of 10 days for this analysis. Similarly, because the Department has no data on which to base an estimate of the number of days of qualifying exigency leave that might be taken for parental care, it will continue to use 10 days of unforeseen leave during deployment for this analysis.

Based on this profile, the Department estimates that 30,900 eligible employees will take 926,000 days (7.4 million hours) of FMLA leave annually to address qualifying exigencies under the FY 2010 NDAA amendments. These estimates may vary from 770,000 days (6.2 million hours) if eligible employees average five days of leave to 1.1 million days (8.7 million hours) if they average 15 days of leave when a servicemember is on Rest and Recuperation leave.

The Department acknowledges that estimated qualifying exigency leave also represents an average of periods with high levels of deployment and active conflict and periods with low or minimal deployments. Therefore, the Department supplements its analysis by considering a ''heavy conflict'' scenario and a ''low conflict'' scenario to capture the range of leave usage that may be expected in any given year in the future.

Drawing on the data in Table 5, for the purposes of these cost estimates, the Department defines the low conflict scenario as a year containing no deployment exceeding 40,000 servicemembers, while the heavy conflict scenario is one in which deployments exceed 40,000 servicemembers. Applying this standard to the data in Table 5, the average size of a deployment during the low conflict scenario is 15,400 troops, compared to 320,400 during a period of heavy conflict.

The Department applied the same probabilities of having eligible family members and patterns of leave usage as were used for the average analysis. Using this method, the Department estimates that 2,400 employees will take 72,000 days (576,500 hours) of leave for qualifying exigencies under the low conflict scenario, while 50,100 employees will take 1.5 million days (12 million hours) of leave during periods of heavy conflict. *See* Table 7.

TABLE 7—ESTIMATED QUALIFYING EXIGENCY LEAVE USAGE UNDER A RANGE OF CONFLICT SCENARIOS

Leave type	Covered service-members or veterans (1,000)	Number of eligible family or caregivers (1,000)	Number of leave takers (1,000)	Days of leave per year (1,000)	Hours of leave per year (1,000)	Leave events per year (1,000)
Low Conflict	15	15	2	72	576	31
Average Deployment	197	193	31	926	7,393	401
Heavy Conflict	320	313	50	1,503	12,023	651

b. Military Caregiver Leave

Military caregiver leave entitles an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember to take up to 26 workweeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. Under the FY 2010 NDAA amendments, the definition of covered servicemember is expanded to include a veteran ''who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness'' if the veteran was a member of the Armed Forces ''at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.'' The FY 2010 NDAA amendments define a serious injury or illness for a covered veteran as ''a qualifying (as defined by the Secretary of Labor) injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in line of duty on active duty in the Armed Forces) and that manifested itself before or after the member became a veteran.''

The amendments also expand the definition of serious illness or injury to include an injury or illness of a current member of the military that ''existed before the beginning of the member's active duty and was aggravated by service in line of duty'' and that may cause the servicemember to be unable to perform the duties of his or her office, grade, rank, or rating. The Department does not attempt in this analysis to estimate the number of additional current servicemembers who may be covered under this expansion of the definition due to the lack of data to support reasonable assumptions on the potential size of this group. However, for the reasons discussed earlier in this preamble, the Department believes it is reasonable to conclude that the number of servicemembers entering the military with an injury or illness with the potential to be aggravated by service to the point of rendering the servicemember unable to perform the duties of his or her office, grade, rank, or rating is quite small due to the

selection process used by the Armed Forces.

To determine the number of eligible employees that may take FMLA leave as a result of the expansion of caregiver leave to family members of covered veterans, the Department first estimated the number of veterans likely to undergo medical treatment for a serious injury or illness, and the number of family members who are employed by a covered employer and who may be eligible to take FMLA leave to care for them. The Department reviewed several summaries of injuries and illnesses among military servicemembers to estimate the rate at which injuries that are sufficiently severe as to require medical care after separation from the military might occur.[29] A number of data limitations make the estimation of serious injury and illness rates problematic:

- The Department of Defense generally publishes data on the number of servicemembers killed or wounded in action, but little about non-combat injuries and illnesses.
- Except for the most severe injuries (e.g., amputations, severe burns, blindness), little is published about the nature or severity of illnesses and injuries.

After determining the number of servicemembers with serious injuries and illnesses separating from the military annually, the Department adjusts the estimate to account for servicemembers that were covered under the 2008 Final Rule and the percent of veterans likely to seek medical care after separation. This baseline number of servicemembers with serious injuries or illnesses differs from the estimate used in the 2008 Final Rule for several reasons. First, the definition of serious injury and illness has expanded to include injuries or illnesses that existed prior to the servicemember joining the military that were exacerbated by active duty and to reflect the fact that injuries such as PTSD and TBI that manifest following separation from the military have been badly underreported in the past. Second, the analysis relies on improved data sources such as the distribution of servicemembers by VASRD rating. No commenters submitted data or alternative estimates of the numbers of servicemembers who will incur such injuries or illness requiring treatment; the Department reached this estimate based on the following information and analysis.

The Department first estimated the percent of servicemembers that might receive an injury or illness requiring care while in the service or after separation. In 2001, the Department of Veterans Affairs undertook a survey that showed 24 percent of veterans who served during the Gulf War era reported having a service-related disability rating.[30] Service-related disability ratings do not require that the servicemember is totally disabled; the rating might be less than 30 percent (or even zero in the case of a service-related injury that healed prior to separation) however, the mere fact that a servicemember has a rating indicates that a service-related injury occurred.[31]

The Department then examined deployment rates across different time periods. Table 5 indicates that servicemembers deployed during the Gulf War of 1991 account for about 28 percent of the total active military at that time. The same table shows that servicemembers deployed in Operations Enduring Freedom and Iraqi Freedom (Iraq (2)) comprise a smaller percentage of the active military (roughly 20 percent). However, the Department believes this is an underestimate; because the second Iraq conflict lasted several years, it is likely that many in the active military not deployed at the time of the snapshot were deployed sometime during its duration; conversely, the first Iraq war was relatively brief, and personnel had a smaller likelihood of rotating into the war zone during its duration. Therefore, the Department believes that the percent of active military personnel who were deployed to Afghanistan or Iraq is higher than the calculations in Table 5 show, and that the true percent is similar to the first Iraq conflict: approximately 30 percent of active military personnel were deployed. The Department also concludes that the percent of veterans who received a service-connected disability rating from the first Gulf War era is a reasonable proxy for veterans of the period 2003 through 2007, about 25 percent (rounded up from 24 percent). Thus, the Department expects that at least 25 percent of active military personnel in the post-9/11 era will separate from the military with a disability rating.

Data provided by the Department of Veterans Affairs (VA) indicates that among the population of current veterans with a disability rating, 41.3 percent have a rating of 50 percent or greater (Table 8). Assuming the distribution of disability ratings among servicemembers who will separate from the military in years to come is the same as the distribution of disability ratings of current veterans, the Department estimates that 10 percent (25 percent × 40 percent = 10 percent) of separating servicemembers will have a disability rating of 50 percent or greater.

TABLE 8—2011 DISTRIBUTION OF CURRENT VETERANS BY DISABILITY RATING (DR)

Degree of disability (percent)	Number of current veterans with DR	Percent of current veterans with DR	Cumulative percent of current veterans with DR
0	11,423	0.3	0.3
10	780,978	23.8	24.1
20	440,188	13.4	37.5
30	373,677	11.4	48.9
40	322,635	9.8	58.7
50	214,552	6.5	65.3

[29] The most useful of these sources were:

Dole, R. and D. Shalala. Serve, Support, and Simplify. Report of the President's Commission on Care for America's Returning Wounded Warriors. July, 2007.

Fischer, H. United States Military Casualty Statistics: Operation Iraqi Freedom and Operation Enduring Freedom. CRS Report for Congress. Congressional Research Service, March 25, 2009.

Tanielian, T. and L.H. Jaycox (eds.). Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans. Research Highlights. RAND Center for Military Health Policy Research. 2008.

U.S. Department of Defense. DOD Military Injury Metrics Working Group White Paper. December 2002.

[30] U.S. Department of Veterans Affairs. 2001 National Survey of Veterans. Accessed at: *http://www1.va.gov/VETDATA/docs/SurveysAndStudies/NSV_Final_Report.pdf.*

[31] Veterans Administration Service Related Disability Rating (VASRD). Accessed at: *http://myarmybenefits.us.army.mil/Home/Benefit_Library/Federal_Benefits_Page/Veterans_Affairs_Schedule_for_Rating_Disabilities_(VASRD).html.*

TABLE 8—2011 DISTRIBUTION OF CURRENT VETERANS BY DISABILITY RATING (DR)—Continued

Degree of disability (percent)	Number of current veterans with DR	Percent of current veterans with DR (percent)	Cumulative percent of current veterans with DR
60	267,838	8.2	73.4
70	247,636	7.5	81.0
80	192,546	5.9	86.8
90	112,824	3.4	90.3
100	320,059	9.7	100.0

Source: Department of Veterans Affairs.

However, it is possible that a servicemember may not manifest the symptoms of a serious injury or illness at the time of his or her separation, and therefore, not go through the VA disability rating process prior to leaving the service. In 2008, the RAND organization published a report entitled *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans* (Tanielian and Jaycox, 2008) that summarized the results from a survey of servicemembers,[32] and found that among servicemembers who returned from Operation Enduring Freedom and Operation Iraqi Freedom:

- 11.2 percent met the criteria for post-traumatic stress disorder (PTSD) or depression,
- 12.2 percent had likely experienced a traumatic brain injury (TBI),
- 7.3 percent had experienced both a TBI and either PTSD or a TBI and depression, and
- Roughly 50 percent of these servicemembers sought treatment for their symptoms within one year of returning from overseas.

Furthermore, symptoms of such injuries may not appear until several years after the injury was experienced, have traditionally been badly underreported, and are not well understood. Due to the high visibility research performed in this area, and recent initiatives undertaken by the Department of Veterans Affairs,[33] it is reasonable to assume a much higher percentage of these types of injuries will be diagnosed and reported than in previous cohorts of veterans.

Consequently, the Department must also account for veterans who may suffer a serious injury or illness that manifested after their separation from the military. Evidence from the RAND report indicates that approximately 30 percent of servicemembers who were deployed to Afghanistan and Iraq experienced a TBI or met the criteria for PTSD or depression. Data on deployment show that roughly 30 percent of active military personnel were deployed to Afghanistan or Iraq. Assuming that such injuries would result in the equivalent of a Veterans Affairs Schedule for Rating Disabilities (VASRD) rating of at least 50 percent, and did not manifest until after separation from the military, it is reasonable to estimate that 10 percent ($0.3 \times 0.3 = 0.09$, then rounding up) of these veterans incurred such an injury or illness that manifested after separation from the military. The Department added this 10 percent of veterans who suffer a post-separation serious injury or illness to the 10 percent of military members who separate from the military with a VASRD rating. Therefore, the estimated percent of veterans likely to have a service-related injury or illness that might require treatment after separation is 20 percent.

In summary, for the purposes of this analysis, the Department assumes that 20 percent of servicemembers may separate from the military with an injury or illness requiring treatment. This may be an overestimate. The Department assumes that of the additional 10 percent of servicemembers who experience a serious injury or illness that might not manifest until well after the event occurs (*e.g.,* PTSD, TBI, or depression), none go through the VA disability rating process. We also assume that all eventually seek treatment within the five-year period as defined in this Final Rule. Both of these assumptions are very conservative, and therefore, likely overestimate the number of servicemembers who may suffer a serious injury or illness as defined by this rule.

This estimate suffers from a number of qualifications and limitations:

- This injury rate was based on data for military personnel that had a high likelihood of experiencing active combat while in the military; to the extent that future cohorts experience less combat, the injury rate may well be significantly smaller.
- It is not clear that all injuries included in this figure will be severe enough to require treatment.
- Even if the injury is severe, it is unclear that the servicemember will seek treatment; it has long been known that the treatment rate for mental health conditions such as depression amongst the general population is less than 100 percent.
- This estimate does not account for other injuries that might require treatment; however, the Department could find little data on which to base an estimate of such injuries.
- This estimate abstracts from the requirement that treatment must occur within five years of separation for the injury to be eligible for FMLA caregiver leave. Thus, we implicitly assume 100 percent will seek treatment within the five-year period as defined in this Final Rule.

The Department used projections of military personnel separations for fiscal years 2010 through 2036 from the Department of Veterans Affairs as the basis for the average number of personnel (208,000) who might newly seek medical care in a given year, *see* Table 9.[34] We did not model a medical

[32] A more concise discussion of the findings is available in a RAND research brief: Tanielian, T. et al. 2008 Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans. Pages 1–3. Accessed at: *http://www.rand.org/pubs/research_briefs/RB9336.html.*

[33] *See e.g.,* DeKosky, S.T., M.D. Ikonomovic, and S. Gandy. 2010. Traumatic Brain Injury—Football, Warfare, and Long-Term Effects. The New England Journal of Medicine. 363:14. September 30.

U.S. Department of Veterans Affairs. 38 CFR Part 3. Post Traumatic Stress Syndrome. Interim Final Rule. **Federal Register**, Vol. 73, No. 210, p. 64208.

[34] U.S. Department of Veterans Affairs. 2008. Demographics: Veteran Population Model 2007. Table 8S. January. Accessed at: *http://www1.va.gov/VETDATA/Demographics/Demographics.asp.* As a check, the FY2010 number of separations are similar to those in the U.S. Department of Defense ''Demographics 2009'' report (see tables 2.66 and 4.68 for active and reserve separations, respectively). Note: the average number of separations per year in Table 9 has increased from the number reported in the NPRM because the Department now includes Coast Guard separations in the calculation.

care usage pattern for these servicemembers. Because we project this to be an average annual ''stream'' of cohorts of separating servicemembers, as long as we assume each year's cohort follows the same usage pattern, the primary factor governing the number of servicemembers requiring treatment is the total number in each cohort that will seek treatment within the five year period as defined in this Final Rule.[35] Since not all veterans will seek medical treatment in the first year following separation, a true time series representation of the number of veterans seeking medical care would show a ''ramp-up'' over the first few years until the average annual steady state stream comprised of overlapping multiple cohorts of veterans is reached. That is, we model the steady state stream of veterans seeking medical care as if it starts in year 1; by ignoring the ''ramp up'' we have over-estimated the number of veterans seeking care and the number of family members taking military caregiver leave in that year. If all cohorts of separating servicemembers follow the same pattern of care usage, then until the steady state is reached, this overestimate of leave usage is mathematically equivalent to starting the program four years prior to the promulgation date. By using the simplifying assumption of a steady state stream of veterans using the program, we have implicitly already included demand from prior cohorts in the analysis, including those veterans who will benefit from the Final Rule's exclusion of the period between the enactment of the FY 2010 NDAA amendments and the effective date of this Final Rule in calculating the five year period post-discharge.

TABLE 9—MILITARY SEPARATIONS 2010–2036 BY BRANCH AND PERIOD

Fiscal year	Separations by branch (1,000) [a]						
	Army	Navy	Air Force	Marines	Reserve Forces [b]	Coast Guard [c]	Grand total
2010	77.8	46.9	37.1	28.9	48.3	4.4	243.4
2011	78.4	46.8	37.0	28.8	28.1	4.5	223.6
2012	78.8	46.6	36.9	28.7	18.1	4.6	213.7
2013	79.6	46.7	37.0	28.7	8.0	4.8	204.8
2014	80.0	47.0	37.2	28.8	8.1	4.8	205.7
2015	79.5	46.7	36.9	28.6	8.0	4.8	204.5
2016	79.2	46.5	36.8	28.5	8.0	4.8	203.8
2017	79.6	46.7	37.0	28.6	8.0	4.8	204.8
2018	80.1	47.0	37.2	28.8	8.1	4.8	205.9
2019	80.2	47.1	37.3	28.8	8.1	4.8	206.3
2020	80.2	47.1	37.3	28.8	8.1	4.8	206.2
2021	80.3	47.2	37.4	28.8	8.1	4.8	206.6
2022	81.0	47.6	37.7	29.0	8.1	4.9	208.3
2023	81.0	47.5	37.7	29.0	8.1	4.9	208.3
2024	80.4	47.2	37.5	28.8	8.1	4.8	206.8
2025	79.5	46.7	37.1	28.4	8.0	4.8	204.4
2026	79.6	46.7	37.1	28.5	8.0	4.8	204.7
2027	80.0	46.9	37.3	28.6	8.0	4.8	205.5
2028	79.9	46.9	37.3	28.5	8.0	4.8	205.3
2029	79.5	46.6	37.1	28.4	8.0	4.8	204.3
2030	79.9	46.9	37.3	28.5	8.0	4.8	205.5
2031	80.1	47.0	37.4	28.6	8.0	4.8	206.0
2032	80.0	46.9	37.3	28.5	8.0	4.8	205.5
2033	79.9	46.8	37.3	28.4	8.0	4.8	205.2
2034	79.9	46.9	37.3	28.5	8.0	4.8	205.4
2035	79.9	46.8	37.3	28.4	8.0	4.8	205.2
2036	79.9	46.8	37.3	28.4	8.0	4.8	205.2
Average							208.0

[a] Includes only separations from the five armed services; excludes separations from the Public Health Service (PHS) and National Oceanic and Atmospheric Administration (NOAA).

[b] Reserve Forces include only those who have had active Federal military service (other than for training) as a result of their membership in the reserves or National Guard. Reserve forces with prior active military service in the regular military, are classified according to the branch (Army, Navy, Air Force, Marines) in which they served while in the regular military, notwithstanding their subsequent service in the Reserve Forces.

[c] Coast Guard separations estimated from VETDATA ''Non-Defense'' separations by determining the current proportion of non-defense personnel in the Coast Guard (84.8%) versus NOAA and PHS.

Source: *http://www.va.gov/VETDATA/Demographics/Demographics.asp.*

The Department is defining a *serious injury or illness of a veteran* as an injury or illness incurred in the line of duty on active duty (or a pre-existing injury or illness aggravated by service in line of duty on active duty) that manifests itself before or after the member became a veteran and is either: a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; a physical or

[35] For example, compared to a single cohort separating from the military over 5 years, modeling the separation of that same cohort over 10 years will result in fewer servicemembers from that cohort seeking treatment in any given year. However, modeling separation over 10 years will result in servicemembers from more cohorts seeking treatment in a given year. Thus, in a steady state, the one effect will cancel out the other. Different models of separation patterns will, however, result in different numbers of treatments prior to reaching the steady state, and the net present value of the stream of treatments.

mental condition for which the covered veteran has received a VASRD of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; a condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Assuming an annual cohort of 208,000 personnel separate from the military each year, and that about 20 percent of those personnel incurred an injury or illness in service that manifests before or after the servicemember became a veteran, the Department estimates that approximately 42,260 military personnel separating from the military (20.3 percent of 208,000) per year might have family members who may take FMLA caregiver leave, if the regulatory requirements are met. This estimate may be over-inclusive due to data limitations on the severity of service-related injuries and illnesses.

Based on the RAND findings, the Department assumes that about 50 percent of servicemembers will seek treatment as a veteran (*i.e.,* not all the injuries will be severe enough to require treatment beyond active service in the military). Thus, the number of injured servicemembers separating from the military per year who may seek treatment and with family that may be eligible for caregiver leave is equal to 50 percent of 42,260, or 21,130 per year.[36] Using the previously described calculations of the joint probabilities that a servicemember will have one or more family members eligible for FMLA (*see* Appendix A), the Department estimates that those 21,130 veterans and servicemembers will have 26,908 eligible family members who may qualify for FMLA and act as caregivers.[37] The Department assumes that at least 26 percent of eligible employees, or an average of 7,000 per year, will take FMLA leave to care for a veteran undergoing medical treatment for a serious injury or illness. This assumption is based on a survey of injured servicemembers concerning the impact of their needs on their caregivers. The survey found that about 16 percent of working caregivers used ''unpaid leave from their job'' and 10 percent ''cut back their hours'' to care for the servicemember.[38] However, the Department is aware that it is not drawing from a more comprehensive data source and acknowledges the limitations of its estimate. Nevertheless, because the commenters provided no additional data in response to the request for information about this issue in the NPRM, the Department continues to use the best information available.

In the 2008 Final Rule, the Department developed a profile of the ''typical'' usage of military caregiver leave over the course of a 12-month period for an eligible employee. Under this profile of leave, the typical employee will take a block of four weeks of unforeseeable leave upon notification of the serious injury or illness, a second block of two weeks of unforeseeable leave following transfer of the covered servicemember to a rehabilitation facility, two one-week blocks of unforeseeable leave for unanticipated complications, and 40 individual days of foreseeable leave to care for the covered servicemember. 73 FR 68051.

This profile is based on a typical leave pattern of an eligible employee caring for an injured or ill servicemember on active duty; for the purpose of this analysis, the profile was adjusted to capture a likely leave pattern for employees taking leave to care for a covered veteran. In this case, the nature of the serious injury or illness is expected to be different from those encountered during active duty. The Department assumes an injury to an active duty servicemember that results in FMLA caregiver leave is likely to be a sudden, severe injury, which necessitates a large block of leave for the employee to travel to be at the bedside of the injured servicemember. Conversely, ongoing treatment for an existing injury or diagnosis and then treatment of an emerging injury or illness (*e.g.,* PTSD, TBI) might call for frequent but short periods of leave for the employee to take the servicemember to appointments and provide other ongoing support. Adjusting the leave profile to account for these differences generates a leave pattern such as that summarized in Table 10.

TABLE 10—PROFILE OF MILITARY CAREGIVER LEAVE—VETERANS

Reason	Description	Days	Hours
Diagnosis, therapy, or recuperation	1 week unforeseeable	5	40
Travel to appointments and other errands	50 days foreseeable	50	400
Total		*55*	*440*

[36] This number accounts for the 14,000 servicemembers whose family members are expected to take military caregiver leave while the servicemember is still in the military as well as the approximately 3,700 participants in the Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. For reasons discussed above, the Department now estimates that 42,260 servicemembers are likely to separate having had injuries or illnesses that would make them eligible for military caregiver, not just the 14,000 servicemembers per year who might require treatment while still on active duty (as estimated in the 2008 rulemaking). Under the proposed rule, the Department erroneously assumed that it had to account for the additional caregiver leave that might have occurred while on active duty due to the changed baseline estimate. However, although the baseline estimate of eligible servicemembers is now larger, this rule makes no change to caregiver leave while those servicemembers are on active duty. In this rulemaking the Department now only accounts for caregiver leave that occurs after separation and therefore assumes 50 percent of separating servicemembers will require care, instead of 1.5 times the number as it did in the proposed rule. The Department believes that the military's stringent screening procedures result in the intake of few recruits with pre-existing injuries or illnesses that might be aggravated by service. Absent any data on servicemembers with such pre-existing conditions, the Department believes its conservative assumptions used to estimate the number of eligible caregivers (and the rounding up of those estimates) adequately accounts for these servicemembers.

[37] The Department made one modification to the joint probabilities used for caregiver leave. In addition to family members such as parents, spouses, and adult children, designated ''next of kin'' are also eligible to take military caregiver leave under FMLA. The Department accounted for this difference by assuming all servicemembers have at least one potential caregiver eligible for FMLA leave.

[38] Christensen et al. Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured. CNA, April 2009. Available at: *http://www.cna.org/sites/default/files/research/D0019966.A2.pdf.*

Based on this profile, the Department estimates that 7,000 eligible employees will take 385,000 days (3.1 million hours) of FMLA leave annually to act as a caregiver for a veteran who is undergoing treatment for a serious illness or injury. For comparative purposes, if the definition of serious injury or illness was set more stringently to include disability ratings of 60 percent or greater, then the Department estimates that about 6,400 eligible employees would take 354,000 days (2.8 million hours) of FMLA leave; if the definition was set more inclusively to include disability ratings of 30 percent or greater, then 8,800 eligible employees would take 485,000 days (3.9 million hours) of FMLA leave. *See* Table 11.

TABLE 11—ESTIMATED MILITARY CAREGIVER LEAVE USAGE UNDER DIFFERENT DEFINITIONS OF SERIOUS INJURY OR ILLNESS

Leave type	Covered service-members or veterans (1,000)	Number of eligible family (1,000)	Number of leave takers (1,000)	Days of leave per year (1,000)	Hours of leave per year (mil.)	Leave events per year (1,000)
SII VASRD 60%+	19.4	24.7	6.4	354	2.8	328
SII VASRD 50%+	21.1	26.9	7.0	385	3.1	357
SII VASRD 30%+	26.6	33.9	8.8	485	3.9	450

2. Airline Flight Crew FMLA Leave

The changes to the FMLA eligibility requirements for airline flight crew employees do not alter the number of covered employers in the airline industry but increase the number of pilots, co-pilots, flight attendants and flight engineers who are eligible to take FMLA leave, and as a result, will likely increase the total number of FMLA leaves taken by these employees in the airline industry.[39] The amendment changes eligibility such that an airline flight crew employee meets the hours of service requirement if, during the previous 12-month period, he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and worked or been paid for not less than 504 hours, not including personal commute time, or time spent on vacation, medical, or sick leave. Additionally, the rule establishes a bank of 72 days of FMLA leave (156 days for military caregiver leave) for flight crew employees to use in full day increments, and establishes new recordkeeping requirements for the airline industry.

The Department estimated the profile of covered employers in the ''Air Transportation'' industry, the number of airline flight crew employees who would be eligible for FMLA leave, and the number of leaves they may take. The profile of covered employers, *see* Table 12 below, was developed by estimating the proportion of NAICS code 48 classified as ''Air Transportation'' (NAICS 481) in each size class from the 2006 Statistics of U.S. Businesses at the 6-digit NAICS level. This proportion was multiplied by the total number of establishments, firms, employment and payroll in NAICS 48 according to the 2008 BLS special tabulations. Next, employers with fewer than 50 employees were dropped from the profile; as described below, the Department did not attempt to make an adjustment for establishments with fewer than 50 employees that are owned by firms with more than 50 employees in a 75 mile area for this sub-industry.

TABLE 12—2008 COVERED EMPLOYERS IN AIR TRANSPORTATION

Size class (employees)	Firms	Number of establish-ments	Employment	Annual payroll ($ mil.)	Estimated revenues ($ mil.)	Estimated net income ($ mil.)
50 to 99	118	184	5,098	$266	$742	$4.2
100 to 499	113	544	16,577	919	2,370	23.3
500+	135	2,204	439,315	24,905	70,922	2,295
Total	366	2,932	460,990	26,090	74,033	2,323

Source: BLS Special Tabulations, 2008; and Statistics of U.S. Businesses, 2006

Based on conversations with experts in the airline industry, the Department assumes that all potentially eligible airline flight crew employees are employed at a covered worksite. In general, flight crew members are scheduled for flights from a home base, or domicile. A domicile would not only include the airline flight crew employees, but the non-flight crew employees as well; therefore, the interviewees observed that for most carriers it was very unlikely that airline flight crew employees would be employed at a domicile with fewer than 50 total employees.[40] Next, the Department determined the total number of airline flight crew employees employed in air transportation from the BLS Occupational Employment Statistics for 2008; in 2008 there were about 162,200 airline flight crew employees. This includes pilots, co-pilots, flight engineers, and flight attendants.

The next step was to determine the proportion of those airline flight crew employees who will be eligible for FMLA leave. Crew members who are paid for 50 to 60 hours per month will, over the course of a 12-month period, be paid for 600 to 720 hours and they will easily meet the hours of service required

[39] The FAA defines a flight crew member as ''A pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time.'' Available at: *http://www.faa-aircraft-certification.com/faa-definitions.html.*

[40] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG. Janet Zweber. 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

for eligibility under the AFCTCA. According to sample data provided by the industry, about 80 percent of American Airlines flight attendants are paid for 50 or more hours per month, and this is considered reasonably representative of industry patterns.[41] While a similar distribution of paid hours for pilots is not available, the FAA indicates that most pilots are paid for an average of 75 hours per month; based on this observation, the Department assumes that a similar proportion of pilots, 80 percent, would reach the hours of service required for eligibility. Based on these estimates, about 129,760 airline flight crew employees may be eligible to take FMLA leave.

Many airlines have already incorporated FMLA-type provisions in collective bargaining agreements with pilots and flight attendants. In terms of the costs associated with the number of leaves resulting from the changes, it is important to consider the proportion of airline flight crew employees already taking FMLA-type leave under collective bargaining agreements. Based on a review of the current FMLA-type leave policies in the labor contracts for 19 air carriers, the Department finds that about 20 percent of pilots and 35 to 40 percent of flight attendants are covered and eligible for FMLA-type leave policies.[42] Assuming that 80 percent of pilots and 63 percent of flight attendants are not currently covered by FMLA-type policies, the Department estimates, as outlined in Table 13, that, of the 129,760 airline flight crew employees that will be eligible, 90,560 are not already covered by an FMLA-type leave policy under a collective bargaining agreement.

Because there is little information available on the FMLA-type leave usage patterns of airline flight crew employees, the Department assumes that flight attendants will use FMLA leave at a similar rate to the rest of the population. Based on interviews with experts in the airline industry, pilots (also co-pilots and flight engineers) tend to use less FMLA-type leave due to different demographic needs and the availability of other types of paid leave.[43] The 2008 PRIA extrapolated leave usage rates from surveys of FMLA leave usage to estimate expected leave use among the general population for 2007; the Department further extrapolated this number to estimate an expected leave usage rate of 7.9 percent of eligible employees and applied this rate to the number of eligible flight attendants not covered by a collective bargaining agreement.[44] Given that pilots use less FMLA-type leave, the Department used a rate of five percent in its calculation of the estimated number of eligible pilots not covered by a collective bargaining agreement. Based on these estimates and assumptions, just under 6,000 flight attendants, pilots, co-pilots, and flight engineers will take new FMLA leaves under the changes. Assuming that airline flight crew employees will take approximately the same number of leaves per 12-month period as the general population, the Department estimates that each individual will take 1.5 leaves, for a total of 8,930 leaves.[45] Table 13 summarizes the estimates developed in this section.

TABLE 13. ESTIMATED FMLA USAGE BY FLIGHT CREWS

Flight crew	Number of crew [a]	Number of eligible crew [b]	Eligible crew not covered by CBA FMLA-type policy [c]	Eligible crew, not covered by CBA that will take leave [d]	Number of new FMLA leaves [e]
Pilots	64,800	51,840	41,470	2,070	3,110
Flight Attendants	97,400	77,920	49,090	3,880	5,820
Total	162,200	129,760	90,560	5,950	8,930

Sources: BLS Occupational Employment Statistics, May 2008, Scheduled Air Transportation; CONSAD Research Corporation, December 7, 2007.

[a] Number of pilots includes: pilots, co-pilots and flight engineers (532011); and commercial pilots (532012)

[b] Eligibility based on estimated proportion of crew members (80%) meeting hours of service requirement.

[c] Based on a sample of CBA for flight attendants about 35% to 40% are currently covered by an FMLA-type provision such that most are eligible to take leave (we assumed a point estimate of 37% for the calculation); for pilots about 20% are currently covered by an FMLA-type provision such that they are eligible to take leave.

[d] Flight attendants take leave at same rate as other industries (7.9%); pilots and other crew use slightly less FMLA leave (5%).

[e] Individuals taking FMLA leave average 1.5 leaves per year.

F. Costs

This section describes the costs associated with the changes to FMLA, including: regulatory familiarization, employer and employee notices, certifications, and other costs.

1. Regulatory Familiarization

In response to the changes to the FMLA, each employer will need to review the changes and determine what revisions are necessary to their policies, obtain copies of the revised FMLA poster and templates for required notices and certifications, and update their handbooks or other leave-related materials to incorporate the changes (*see* General Notice below). This is a one-time cost to each employer, calculated as two hours at the loaded hourly wage of a Human Resources (HR) staff member in the airline industry and one hour in all other industries to complete the tasks described above.[46] Industries

[41] Table ''AA Flight Attendant Block Hours and Paid Hours'' provided by Interviewee. Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG. Table available at: *http://www.aanegotiations.com/documents/AAFACharts_7.8.10.pdf;* last accessed on July 7, 2012.

[42] Based on a review of excerpts from the collective bargaining agreements of 19 airlines transmitted to the Department by Steve Schembs, Association of Flight Attendants—CWA, on January 19, 2010.

[43] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG. Janet Zweber. 2010. Interview with Janet Zweber of U.S. Airways Pilots Association, Calvin Franz and Lauren Jankovic, both of ERG.

[44] The extrapolation is used because the survey was performed relatively soon after FMLA was enacted; over time, as employee knowledge of FMLA provisions has grown, presumably so has FMLA usage.

[45] CONSAD Research Corporation, December 7, 2007

[46] The loaded hourly wage is the regular hourly wage multiplied by 1.3 to account for payroll taxes and any employee benefits. For this analysis we used a loaded hourly wage of about $27 per hour based on a comparison of two occupations: 43–4161 Human Resources Assistant (loaded hourly wage $24), and 13–1078 Human Resources Training and

Continued

other than the airline industry will need less time for this task because there is no need for them to review the components of the rule pertaining to flight crews and they are already familiar with the requirements of the FMLA, including the FY 2008 NDAA amendments to the FMLA that initially created the military family leave provisions. In the 2008 Final Rule, the Department estimated the FY 2008 NDAA amendments would involve two hours for regulatory familiarization. 73 FR 68047. Because the FY 2010 NDAA amendments are simply an expansion of provisions with which the employers are already familiar, the Department believes one hour is appropriate for that component. The Department requested comment on the suitability of the assumption that regulatory familiarization will require two hours for the airline industry and one hour for all other industries but received few comments on this issue and found no data to justify revising these assumptions. *See* the Summary of Public Comments for a more detailed discussion of the comments.

2. Employer Notices

Under the FMLA, as described in § 825.300, employers are required to provide certain types of notices to employees including FMLA eligibility, employee rights and responsibilities, and employee usage of leave. The estimated time to complete each notice is based on the PRA contained in the 2008 Final Rule. 73 FR 68040.

a. *General Notice.* Every covered employer must provide general notice of the FMLA provisions to all employees; this notice may be provided in employee handbooks or other benefits and leave materials or as a one-time notice to new employees. For the purpose of this analysis, the cost associated with the changes will be a one-time cost to each employer to update the notice provided and is included under regulatory familiarization costs above.

b. *Eligibility Notice and Rights and Responsibilities Notice.* An employer is required to notify an employee of his or her eligibility to take FMLA leave when an employee requests FMLA leave or the employer becomes aware that an employee's leave may be for an FMLA-qualifying reason. The notice must state whether or not the employee is eligible and, if not, the reason the employee is not eligible. Along with the eligibility notice, the employer must include a discussion of employee rights and obligations, that leave may be designated as FMLA, the applicable 12-month period for leave, certification requirements, and other key details. The cost of these combined notices is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

c. *Designation Notice.* The employer is required to determine if leave taken by the employee is for an FMLA-qualifying reason and will be designated and counted as FMLA leave and provide written notice to the employee of this determination. Notice must be provided even if the employer determines that the leave will not be designated as FMLA, and only one notice is required per FMLA reason per 12-month period. The cost of this type of notice is calculated as 10 minutes at the loaded hourly wage of an HR staff member to process each notice.

3. Certifications

Under the FMLA, as described in § 825.305, employers are allowed to request certification to support an employee's need for FMLA leave due to his or her own or a family member's serious health condition, the serious injury or illness of a covered servicemember, a qualifying exigency, or to verify an employee's fitness for duty after an absence due to the employee's own health condition.[47] In addition, an employer, at its own expense and subject to certain limitations, may also require an employee to obtain a second and third medical opinion. The costs associated with these certifications include: Employer cost to request, review, and verify the certification and second and third opinions, and employee cost to obtain the certification from the designated authority.

a. *Medical Certification.* This type of certification may be requested of employees who take FMLA leave for their own serious health condition or that of a family member and is obtained from the health care provider. This is a recurring cost to both the employee and the employer for each FMLA leave event that is required to have medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately $50 per visit.[48] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. The changes in this Final Rule will only impact the usage of FMLA leave for the employee's own or the employee's family member's serious health condition for airline flight crew employees; therefore, for the purposes of this analysis, the additional costs of the changes will only accrue to airline flight crew employees and airline industry employers. (The cost for medical certification for military caregiver leave is discussed below.)

Under the Final Rule the employer may seek a second or third opinion for certification of a serious injury or illness of a covered servicemember if the original certification was obtained from a health care provider other than: A DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider. The number of employers able to seek additional opinions on certifications under these circumstances is likely very close to zero, as most current military members and recently separated veterans rely on one of the aforementioned health care providers for care. As a result, the Department did not estimate these costs, which are expected to be minimal.

b. *Qualifying Exigency.* Employees taking FMLA leave for a qualifying exigency may be asked to provide a copy of the relevant military orders or other documentation, and a copy of Form WH–384 Certification of Qualifying Exigency to their employers to substantiate their need for leave. This is a recurring cost to the employer for each FMLA qualifying exigency leave for which the employer requires the employee to provide certification. The cost is calculated as 20 minutes at the loaded hourly wage of an HR staff person to review and verify each certification.

c. *Military Caregiver.* Employees taking FMLA military caregiver leave to care for a covered servicemember with a qualifying illness or injury may be asked to provide medical certification of the condition from an authorized health care provider. This is a recurring cost to both the employee and the employer for each FMLA military caregiver leave event for which the employer requires medical certification. The cost to the employee is calculated as the cost of the visit to the health care provider

Labor Relations Specialists (loaded hourly wage $36).

[47] An unknown percent of employers require employees to periodically recertify their need for FMLA leave. The Department does not have any data on the percent of employers that require certification, and believe the percent of employers that require recertification is a small percent of those that require certification. Therefore the Department has not attempted to estimate the number of employers that require recertification or the costs associated with it; we expect that these costs are small.

[48] CONSAD, December 2007.

completing the certification, assumed to be approximately $50 per visit.[49] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, these costs accrue to employees taking FMLA military caregiver leave to care for a covered veteran with a qualifying illness or injury and their employers.

d. *Fitness for Duty.* For certain occupations, employers may desire certification from a medical professional that an employee is well enough to fulfill their duties following an FMLA leave for the employee's own serious health condition. Under prescribed circumstances, an employer may request a fitness-for-duty certification. The cost to the employee is calculated as the cost of the visit to the health care provider completing the certification, assumed to be approximately $50 per visit.[50] The cost to the employer is 30 minutes at the loaded hourly wage of an HR staff person to review and verify each certification. For the purposes of this analysis, the additional costs of the changes will only accrue to airline flight crew employees and airline industry employers.

4. Other Employer Costs

The FMLA includes employer recordkeeping requirements but those costs are not addressed here. Employers must continue to keep and maintain records under the Final Rule as they are required to do so under the current regulations. Additionally, while the Final Rule implements the statutory amendments that more broadly cover airline flight crew employees, the Department expects that employers in the airline industry have already been tracking hours to comply with the FMLA. Prior to enactment of the AFCTCA, covered airlines were already required to comply with FMLA with respect to employees, such as ticketing agents, baggage handlers, and administrative personnel, as well as some airline flight crew employees. Further, A4A noted that prior to the AFCTCA, various air carriers had instituted internal FMLA programs, including leave entitlement banks, and therefore had been tracking flight crew employees' hours for internal business purposes as well. As such, the Department expects the Final Rule will create minimal additional recordkeeping burdens on airline employers.

a. *Employee Health Benefits.* Employers are required by the FMLA to maintain employee health benefits during their absence on FMLA leave. This is a recurring cost to each employer that is calculated as the cost per hour to cover employee health benefits multiplied by the total number of hours of FMLA leave taken.[51] This cost results from additional reasons an employee may take FMLA leave (qualifying exigency, military caregiver), and additional employees entitled to leave (airline flight crew employees). The Department estimated this cost as part of the 2008 Final Rule and is using the same methodology here, noting that ''the marginal costs related to workers taking * * * military family leave * * * result from the cost of providing health insurance during the period the worker is on leave * * * The Department believes these * * * costs are reasonable proxies for the opportunity cost of the NDAA provisions, since health insurance coverage represents the marginal compensation an employer is still required to cover under the FMLA when a worker is absent.'' 73 FR 68051. According to the BLS ''Employer Costs for Employee Compensation Survey'' of June 2008, employers spend an average of $2.25 per employee per hour worked on health insurance coverage.[52] For the purpose of this analysis, for leaves related to the NDAA the Department used the estimated hours of leave taken, for flight crew leaves the Department assumed each leave is eight hours in length.

b. *Replacement Workers.* In some businesses, employers are able to redistribute work among other employees while an employee is absent on FMLA leave but in other cases the employer may need to hire temporary replacement workers. This process involves costs resulting from recruitment of temporary workers with needed skill sets, training the temporary workers, and lost or reduced productivity of these workers. The cost to compensate the temporary workers is in most cases offset by the amount of wages not paid to the employee absent on FMLA leave.

In the initial FMLA rulemaking in 1993, the Department drew upon available research to suggest that the cost per employer to adjust for workers who are on FMLA leave is fairly small. 58 FR 31810. As in previous rulemakings, the Department requested information from businesses on the impact of different strategies for compensating for workers on leave, particularly the extent to which work is redistributed among other workers, and the costs of recruiting and training temporary workers. With no additional information forthcoming from public comments, we will continue to assume that these costs are fairly small for the purpose of this analysis. Furthermore, most employers subject to this rule change have been implementing the FMLA for some time and have already developed internal systems for work redistribution and recruitment and training of temporary workers. The air transportation industry, however, is an exception to this reasoning and employers in this industry may face additional challenges with respect to scheduling.

Due to the nature of the industry, airlines have varied and complex approaches to scheduling airline flight crew employees for flights.[53] Based on seniority, these employees may bid on their desired domicile (*i.e.,* primary airport), equipment (*i.e.,* type of airplane), and flying schedule (*e.g.,* international, shuttle). Generally, the employees can bid a ''line of flying'' or a ''block'' of flights or may bid on a number of days on reserve. According to our interviewees, approximately 15 to 20 percent of employees may be on reserve at any point in time and this amount fluctuates by airline and demand.[54] There are different types of reserve that are loosely based on the proximity of the employee to the airport; an employee on ''short call'' may be required to arrive at the domicile within 90 minutes, while an employee on ''long call'' may be given nine hours notice to arrive at the domicile for a flight.

Overall, the scheduling is fairly flexible in order to manage schedule changes; for example, ''block holders'' can be rescheduled to cover additional flights, flight attendants can engage in ''trip trading'' or volunteer for open flying time, and airlines can use ''dead heading'' to fly in a crew from another airport.

There are several key limitations to the flexibility of the system; the primary one being regulatory limits on flying

[49] CONSAD, December 2007.

[50] CONSAD, December 2007.

[51] The Department notes that this methodology overstates the cost associated with this provision as not all employees who take FMLA leave receive insurance from their employers.

[52] BLS Employment Cost Trends, available at: http://www.bls.gov/ncs/ect/. Accessed on July 7, 2012.

[53] This discussion is highly generalized and may not represent the practices of a specific airline. The purpose of the discussion is to provide context for understanding the impact of FMLA leave on overall scheduling practices.

[54] Rob DeLucia. 2010. Interview with Rob DeLucia of AIR Conference (now A4A), Calvin Franz and Lauren Jankovic, both of ERG.

time and equipment. This limitation is the most stringent for pilots who have more restrictive limitations on flying time than other flight crew members and who may only fly specific types of aircraft. Additionally, schedule changes due to events such as severe weather can impact scheduling; reserve flight crew members are utilized to make up for cancelled and rescheduled flights.

Based on comments received from A4A and employers in the industry, the Department does not expect the AFCTCA to impose a significant cost on air transportation employers. The Department believes that the rule will increase the number of flight crew leaves classified as, and thus protected by, FMLA, but does not have data to quantify the amount of any such increase.

G. Regulatory Impacts

This section draws on the estimates of potentially affected employees, and the unit costs discussed above to determine the anticipated impact of the final regulations in terms of total cost across all industries as well as estimated cost per firm and per employee.

1. Projected Regulatory Cost

The total estimated impact of the Final Rule is $53.9 million in the first year with $41.3 million in recurring costs in subsequent years. Table 14 summarizes the total estimated costs of the changes to the FMLA by cost type (first year, recurring), amendment (flight crew, military caregiver), and regulatory requirement (familiarization, notices, certifications, benefits).

TABLE 14—SUMMARY OF IMPACT OF CHANGES TO THE FMLA

Component	Year 1 ($ mil.)	Year 2 ($ mil.)
Total	$53.9	$41.3
Cost of Each Amendment:		
Any FMLA regulatory revision	12.6	0
Flight Crew Technical Amendment	0.4	0.4
NDAA 2010	41.0	41.0
NDAA Subtotal Qualifying Exigency	25.8	25.8
NDAA Subtotal Military Caregiver	15.1	*15.1*
Cost of Each Requirement:		
Regulatory Familiarization	12.6	0
Employer Notices	17.1	17.1
Certifications	0.4	0.4
Health Benefits	23.8	23.8

Note: Columns may not sum due to rounding.

All covered employers will incur costs of $12.6 million during the first year for regulatory familiarization associated with any new FMLA revision. Other than the initial regulatory familiarization costs that occur only in the first year, all other costs are annual costs; they occur in the first year, and in each subsequent year. Covered employers in the air transportation industry who are not already providing family and medical leave to flight crew employees will incur costs of about $372,000 per year to implement the changes. Covered employers of workers eligible for military family leave will incur costs of about $41 million per year as a result of the changes. Looking at the key requirements of the FMLA, most of the costs of the changes will stem from generation of employer notices and maintenance of health benefits in recurring years.

To facilitate the public's understanding of the impact of this Final Rule, the Department provides some alternative assumptions on the utilization of leave and corresponding costs.

The Department estimates the cost of the FY 2010 NDAA as $41.0 million, with qualifying exigency leave costing $25.8 million and military caregiver leave costing $15.1 million. However, under different scenarios, the cost of the FY 2010 NDAA may increase or decrease. The cost of qualifying exigency leave will vary between $2.0 million and $41.9 million in times of low conflict and high conflict with 10 days of Rest and Recuperation leave (*see* Table 7 for leave estimates).[55] As a result, the cost of the FY 2010 NDAA will vary from $17.1 million in low conflict times and $57.0 million in high conflict times. The cost of qualifying exigency leave will also change depending on whether leave taken for *Rest and Recuperation* is closer to five days or to 15 days. In an average conflict scenario, the cost of qualifying exigency leave might range from $23.0 million to $31.4 million, and, thus, the total cost of the FY 2010 NDAA will range from $38.2 million to $46.5 million. *See* Table 15.

Similarly, if the definition of serious injury or illness was set only to include disability ratings of 60 percent or greater (*i.e.,* was more stringent), or alternatively to include more ratings of 30 percent or greater (*i.e.,* was more inclusive), then the cost of military caregiver leave would range from $13.9 million to $19.1 million (*see* Table 11 for leave estimates). As a result, the total cost of the NDAA would vary between $39.7 million and $44.9 million. *See* Table 15.

[55] In addition, no deployments take place in 16 of the 48 years of data examined (33.3 percent), and costs associated with qualifying exigency leave for deployment would be zero in those years. Low levels of conflict occurred in 18 of 48 years (37.5 percent) and high levels of conflict took place in 14 of 48 years (29.2 percent).

TABLE 15—COST OF THE NDAA UNDER DIFFERENT CONFLICT SCENARIOS, AMOUNTS OF TIME FOR REST AND RECUPERATION LEAVE, AND DEFINITIONS OF SERIOUS INJURY OR ILLNESS

Leave type	Covered service-members or veterans (1,000)	Number of eligible employees (1,000)	Number of leave takers (1,000)	Costs	
				Leave type total ($ mil.)	NDAA total ($ mil.)
Qualifying Exigency					
Low Conflict, R&R 10 days	15.4	15.0	2.4	$2.0	$17.1
Average Deployment, R&R 10 days	197.0	192.5	30.8	25.8	41.0
R&R 5 days	197.0	192.5	30.8	23.0	38.2
R&R 15 Days	197.0	192.5	30.8	28.6	43.7
Heavy Conflict, R&R 10 days	320.4	313.1	50.1	41.9	57.0
Military Caregiver					
SII VASRD 60%+	44.0	56.1	14.6	13.9	39.7
SII VASRD 50%+	49.1	62.5	16.3	15.1	41.0
SII VASRD 30%+	65.5	83.5	21.7	19.1	44.9

Table 16 provides the total, net present value and average annualized projected compliance costs over 10 years. Average annualized costs take the entire stream of costs over 10 years, including both first-year costs that are only incurred once, and recurring costs that are incurred every year, and converts them into a stream of equal annual payments with a net present value equal to the original stream of time-varying costs at the specified real discount rate.

Calculating annualized costs allows the examination of an appropriate measure of average costs (by accounting for the time-value of money) over time without overestimating impacts by focusing on initial costs, or underestimating impacts by focusing solely on recurring costs. The OMB directs that the streams of costs and benefits should be discounted using three and seven percent real discount rates.

TABLE 16—AVERAGE ANNUALIZED COSTS BY AMENDMENT AND REQUIREMENT

Component	Ten year total ($ mil.)	Annualized [a]	
		Real discount rate 3% ($ mil.)	Real discount rate 7% ($ mil.)
Total	$426	$42.8	$43.0
By Amendment:			
Any FMLA revision	13	1.4	1.7
Flight Crew Technical Amendment	4	0.4	0.4
FY 2010 NDAA	410	41.0	41.0
Qualifying Exigency	258	25.8	25.8
Military Caregiver	151	15.1	15.1
By Requirement:			
Regulatory Familiarization	13	1.4	1.7
Employer Notices	171	17.1	17.1
Certifications	4	0.4	0.4
Health Benefits	238	23.8	23.8

[a] Columns may not sum due to rounding.

The results presented in the table show that the Final Rule is projected to cost an average of $43 million per year over 10 years using a seven percent real discount rate.

The military family leave provisions (FY 2010 NDAA) account for about 96.2 percent of the rule's total annualized cost. In terms of requirements of the rule employer notices and maintenance of health benefits each account for about 40 and 56 percent of the total cost, respectively.

2. Impacts of Projected Cost on Business Income

In this section we review the impact of projected regulatory costs on business income. To avoid misrepresenting impacts, they are presented in four different ways: first-year costs are the largest, thus the ratio of first-year costs to income (business and worker) represent the most severe impacts that might be incurred in any one year; the ratio of recurring costs to income are more typical impacts—those that can be expected in any year except the first year; finally, average annualized costs, as described above, reflect the overall average over 10 years. Table 17 presents aggregate projected costs, projected costs per firm, and projected costs per firm as a percent of firm revenue and payroll. Costs are also disaggregated by amendment and regulatory requirement.

The projected first year costs of the Final Rule are about $142 per firm, which is less than one-hundredth of a percent of average annual revenues and payroll. For most firms, the military family leave provisions account for the largest part of this impact, at $108 per firm. With the exception of regulatory familiarization, first year costs for employer notices, certifications, and the maintenance of health benefits are identical to the amounts incurred in each subsequent year. The cost of the flight crew technical amendments may be a small portion of overall first year costs, but the impact will be concentrated on the air transportation industry. As a result, the cost per firm

is $1,070 ($1,016 for airline flight crew leave plus $54 for regulatory familiarization), which is less than one-hundredth of a percent of average annual revenues or payroll.

The impact of recurring costs will be about $109 per firm; the military family leave provisions continue to be the driver of the size of the impact due to the cost of employer notices and maintenance of employee health benefits associated with the requirement.

TABLE 17—IMPACT OF COMPLIANCE COSTS ON FIRM INCOME

Component	Costs		Projected impacts	
	Total cost ($ mil.)	Cost per firm [a]	Cost per firm as percent of revenues	Cost per firm as percent of payroll
First Year Cost	$53.9	$142	0.0002	0.0011
By Amendment:				
Any FMLA revision	12.6	33	0.0001	0.0003
Flight Crew Technical Amendment	0.4	1,016	0.0004	0.0014
FY 2010 NDAA	41.0	108	0.0002	0.0008
By Requirement:				
Regulatory Familiarization	12.6	33	0.0001	0.0003
Employer Notices	17.1	45	0.0001	0.0003
Certifications	0.4	1	0.0000	0.0000
Health Benefits	23.8	62	0.0001	0.0005
Recurring Cost	41.3	109	0.0002	0.0008
By Amendment:				
Any FMLA revision	0	0	0.0000	0.0000
Flight Crew Technical Amendment	0.4	1,016	0.0004	0.0014
NDAA 2010	41.0	108	0.0002	0.0008
By Requirement:				
Regulatory Familiarization	0	0	0.0000	0.0000
Employer Notices	17.1	45	0.0001	0.0003
Certifications	0.4	1	0.0000	0.0000
Health Benefits	23.8	62	0.0001	0.0005
7% Real Discount Rate	43.0	113	0.0002	0.0009
By Amendment:				
Any FMLA revision	1.7	4	0.0000	0.0000
Flight Crew Technical Amendment	0.4	1,016	0.0004	0.0014
NDAA 2010	41.0	108	0.0002	0.0008
By Requirement:				
Regulatory Familiarization	1.7	4	0.0000	0.0000
Employer Notices	17.1	45	0.0001	0.0003
Certifications	0.4	1	0.0000	0.0000
Health Benefits	23.8	62	0.0001	0.0005

[a] Calculated as total cost divided by the number of affected firms. For example, first year cost per firm for the flight crew technical amendment is $372,000 divided by 366 firms.

Table 17 also presents the impact of projected costs on firm and worker income for average annualized costs with a seven percent real discount rate. The results demonstrate that the overall average annualized cost of the rule is $43 million, or about $113 per firm ($1,016 per firm in the air transportation industry). Total cost per firm is approximately two ten-thousandths of one percent of average annual firm revenue. However, it is likely that some of these costs will be borne by the firm and some by the workers; the exact incidence of these impacts will depend on the relative bargaining strength of firms and workers, which will vary by industry.

H. Benefits

The Department anticipates significant benefits resulting from the revisions. Employers that have adopted flexible workplace practices cite many economic benefits such as reduced worker absenteeism and turnover, improvements in their ability to attract and retain workers, and other positive changes that translate into increased worker productivity. *See* ''Work-Life Balance and the Economics of Workplace Flexibility'' at 16, Executive Office of the President, Council of Economic Advisors (March 2010). However, quantifying the benefits is challenging. *Id.* The Department does not attempt to quantify these benefits in this analysis, but does, however, describe the expected benefits of each major revision in the proceeding section.

1. Military Family Leave

The benefits stemming from improving access to military family leave were described in the 2008 Final Rule as follows:

> [T]he families of servicemembers will no longer have to worry about losing their jobs or health insurance due to absences to care for a covered seriously injured or ill servicemember or due to a qualifying exigency resulting from active duty or call to active duty in support of a contingency operation.

73 FR 68069. Based on the preceding analysis, and the availability of recent research examining the impacts of service-connected injuries and illnesses, the Department also anticipates additional benefits to accrue to servicemembers and their families from the FY 2010 NDAA amendments.

Providing job-protected leave for caregivers of covered veterans under the military caregiver provision is expected to have several benefits, including increased family involvement in recovery, improved self-reliance and access to resources for caregivers, and a

reduction in negative outcomes for covered veterans and their families.

Recent research suggests that as many as 30 percent of returning servicemembers may suffer from symptoms of PTSD, major depression, and/or TBI. These individuals often suffer from:

E. Co-morbidities such as anxiety and mood disorders, and substance abuse;

F. increased risk of suicidal ideation and attempts;

G. higher rates of unhealthy behaviors such as smoking, poor diet, and unsafe sex;

H. higher rates of other health problems and mortality; and

I. decreased work productivity in the form of missed work days and decreased performance at work.[56]

While this study focused on active servicemembers, these disorders involve long timeframes for recovery and management of the symptoms, so it is reasonable to conclude that these same issues would impact the servicemember following separation from service. Furthermore, the impact of these disorders, and other serious injuries or illnesses incurred by covered servicemembers and veterans, extends to family members as well. Common issues include marital discord and increased likelihood of divorce, intimate partner violence, poor parenting skills and poor child outcomes, and caregiver burden. In ''Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured,'' the authors describe the impact on caregivers as follows:

> Family support is critical to patients' successful rehabilitation. Especially in a prolonged recovery, it is family members who make therapy appointments and ensure they are kept, drive the servicemember to these appointments, pick up medications and make sure they are taken, provide a wide range of personal care, become the impassioned advocates, take care of the kids, pay the bills and negotiate with the benefits offices, find suitable housing for a family that includes a person with a disability, provide emotional support, and, in short, find they have a full-time job—or more—for which they never prepared. When family members give up jobs to become caregivers, income can drop precipitously.[57]

The support provided by caregivers plays a pivotal role in the course of the servicemember's recovery, as noted in ''Invisible Wounds of War'':

> The likelihood that the condition will trigger a negative cascade of consequences over time is greater if the initial symptoms of the condition are more severe and the afflicted individual has other sources of vulnerability * * * Early interventions are likely to pay long-term dividends in improved outcomes for years to come; so, it is critical to help servicemembers and veterans seek and receive treatment.[58]

Providing caregivers with job-protected FMLA leave to care for their family member who is a covered veteran creates a window of opportunity to interrupt the negative cascade of consequences experienced by sufferers of PTSD, TBI and depression. Furthermore, maintaining the flow of resources and self-sufficiency provided by a secure employment situation ensures that the caregivers are able to maintain their own mental and physical health during the veteran's recovery process.[59]

At this point, there is not sufficient data to accurately estimate the number of servicemembers suffering from these disorders or the range of severity of symptoms; as a result, we are unable to quantify the benefits of reduced rates of negative outcomes for affected veterans and their families. However, in ''Invisible Wounds of War,'' RAND developed estimates of costs associated with PTSD, major depression, and TBI stemming from the conflicts in Afghanistan and Iraq. For example:

J. Servicemembers diagnosed with PTSD incur costs of $5,000—10,000 per servicemember during the first two years after returning home.[60]

K. Servicemembers diagnosed with major depression incur costs of $15,000—25,000 per servicemember during the first two years after returning home.[61]

L. Servicemembers diagnosed with TBI incur costs of $27,000—32,000 for a mild case and up to $268,000—408,000 for severe cases.[62]

The Final Rule will likely reduce these costs, and the costs associated with other negative outcomes associated with these diagnoses; but, at this point in time we do not have sufficient data to estimate the reduction in costs.

2. Airline Industry FMLA Leave

As a result of the AFCTA, airline flight crew employees will enjoy all the benefits of FMLA coverage that have been afforded to employees in other industries. Additionally, as discussed in the 2008 Final Rule, employers may see reduced ''presenteeism''—the loss of productivity due to employees working while injured or ill—and a resultant increase in overall productivity, workplace safety, and wellness among employees. 73 FR 68071.

IX. Final Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations and small governmental jurisdictions. *See* 5 U.S.C. 603–604. If the rule is not expected to have a significant economic impact on a substantial number of small entities, the RFA allows an agency to certify such, in lieu of preparing an analysis. *See* 5 U.S.C. 605.

The Department certifies that this Final Rule will not have a significant economic impact on a substantial number of small entities. The FMLA covers private employers of 50 or more employees; employers with fewer than 50 employees are exempt. Therefore, changes to the FMLA regulations by definition will not impact small businesses with less than 50 employees. The Department acknowledges that some small employers that are within the SBA definition of small business (50–500 employees) will still have to comply with the regulation and incur costs. However, based on the analysis in section VIII Executive Order 12866; Executive Order 13563, even if all businesses subject to this Final Rule were considered to be small businesses, the economic impact would not be significant. As discussed above, the initial and recurring annual costs of the rule to all employers will be low. Further, as shown in Table 17, the first year cost per firm is estimated to be $142 and the recurring cost per year per firm is estimated to be $109. Therefore, the data and economic implications of the rule do not reveal a significant economic impact on any small entities. The Department also notes that no comments were received from businesses, small or otherwise, regarding the cost of this Final Rule.

Appendix A: Military Family Leave Profile

In order to estimate the number of individuals who may take leave under the qualifying exigency or military caregiver provisions as a result of the amendments to the FMLA included in the FY 2010 NDAA, the Department estimated (1) The number of active duty

[56] Tanielian, Terri and Lisa Jaycox. 2008. Invisible wounds of war: psychological and cognitive injuries, their consequences, and services to assist recovery. RAND. Available at: *www.rand.org.*

[57] Christensen, et. al., April 2009, Economic Impact on Caregivers of the Seriously Wounded, Ill, and Injured, CNA, p. 8.

[58] Tanielian and Jaycox, 2008.

[59] Christensen, et. al., 2009, p.9.

[60] RAND, 2008, p. xxiii. Variation due to severity and inclusion, or not, of cost of lives lost to suicide. Costs do not include costs due to substance abuse, domestic violence, homelessness, or family strain.

[61] RAND, 2008, p. xxiii. Costs associated with co-morbid PTSD and depression are approximately $12,000 to 16,000.

[62] RAND, 2008, p. xxiii. Costs presented in 2007 dollars.

servicemembers whose family members are entitled to qualifying exigency leave and the number of veterans whose family members will be entitled to caregiver leave, (2) the age profile of those servicemembers and veterans, and (3) the ratio of the number of eligible family members or caregivers associated with that age profile. The first estimate is described in more detail in the text of the economic analysis. This appendix provides an explanation of the method used to develop the age profiles and eligible family members.

A. Overview of Approach

The Department replicated and updated the method used in the 2008 Final Rule to ensure consistency with previous estimates. In that approach, the Department used data from the Defense Manpower Database, the Current Population Survey, and the decennial Census of Population to estimate the age distribution of servicemembers; the proportion of servicemembers in each age category with living parents, a spouse, and children (over 18 years of age);[63] and the proportion of those individuals who may be employed by a covered employer. The Department used these estimates to determine the likely number of family members eligible to take leave for a qualifying exigency or to act as a caregiver for a covered veteran.

The first step is to apply the age profile of servicemembers to the estimated number of servicemembers to distribute the number of servicemembers to the age groups. Table A–1 presents the estimated proportion of servicemembers by age range estimated for the 2008 Final rule. The Department aggregated the age groups for this calculation. For example, if the Final Rule was expected to affect 1000 servicemembers then this age profile would estimate that 469 of them would be between the ages of 22 and 30 years old.

TABLE A–1—AGE PROFILE OF SERVICEMEMBERS

General military servicemember age range	Average estimated proportion of military members (percent)
18–21	19.8
22–30	46.9
31–40	24.7
41–50	8.0
51–59	0.6

The next step is to estimate the number of servicemembers in each age group with 0, 1, 2, 3, 4, or 5 eligible family members. Table A–2 presents the estimated percent of servicemembers with the specified number of eligible family members by age range of the servicemember. For example, 44.1 percent of servicemembers aged 31–40 have at least one eligible family member.

TABLE A–2—PROPORTION OF SERVICEMEMBERS WITH "n" ELIGIBLE FAMILY MEMBERS

Age range	Number of eligible family members (in percent)					
	0	1	2	3	4	5
18–21	29.3	49.5	21.0	0.2	0.0	0.0
22–30	27.4	46.5	23.3	2.8	0.0	0.0
31–40	31.1	44.1	21.1	3.6	0.2	0.2
41–50	37.8	40.4	16.9	4.2	0.7	0.1
51–59	45.3	35.4	14.6	3.9	0.7	0.1

Finally, the number of estimated eligible family members for each age group of servicemembers is summed up by multiplying the number of servicemembers in each column by the number of eligible family members. First, the number of servicemembers in each age range is multiplied by the percentage in each cell in that row to determine the number of servicemembers with that number of eligible family members. For example, if there are 1000 servicemembers aged 18–21 then about 293 of them have no eligible family members, about 495 have one eligible family member, about 210 have two eligible family members, and two have three eligible family members.

Next, the number of servicemembers in each category is converted to the total number of eligible family members and summed across the row to determine the total number of family members for that age range. For each row the calculation is (# * 0) + (# * 1) + (# * 2) + (# * 3) + (# * 4) + (# * 5) where # represents the number of service members and the integers zero through five represent the number of eligible family members per servicemembers. The equation is modified slightly for estimating the number of eligible caregivers for military caregiver leave; we assume that each servicemember has at least one eligible caregiver and modify the equation to (# * 1) + (# * 1) + (# * 2) + (# * 3) + (# * 4) + (# * 5) to reflect the fact that servicemembers with no available family members may designate a next of kin to serve as their caregiver.

For example, the number of family members eligible for qualifying exigency leave for 1000 servicemembers aged 18–21 is equal to (293 * 0) + (495 * 1) + (210 * 2) + (2 * 3) + (0 * 4) + (0 * 5); for 1000 servicemembers aged 18—21 there are 921 eligible family members. In this example, the number of eligible caregivers for military caregiver leave is equal to (293 * 1) + (495 * 1) + (210 * 2) + (2 * 3) + (0 * 4) + (0 * 5); for 1000 servicemembers aged 18–21 there are 1,214 eligible caregivers. Finally, the total number of eligible family members or caregivers is summed across the age groups to estimate the total number of eligible family members or caregivers.

The next two tables present summary tables for a sample calculation assuming 5,000 total servicemembers (Table A–3) and veterans (Table A–4).

[63] Under military caregiver leave a designated next of kin may also take leave to care for a covered veteran. We accounted for these individuals by assuming that every covered veteran has at least one caregiver.

TABLE A–3—EXAMPLE CALCULATION OF NUMBER OF ELIGIBLE FAMILY MEMBERS FOR 5000 SERVICEMEMBERS

General military service member age range	Example distribution of service-members	ERG's number of servicemen with n # of eligible family members where n =						Number of family members
		0	1	2	3	4	5	
18–21	992.0	290.8	490.6	208.3	2.3	0.0	0.0	914.2
22–30	2,343.0	641.6	1,090.3	544.9	66.2	0.0	0.0	2,378.5
31–40	1,236.3	384.2	545.2	261.4	44.3	2.2	0.2	1,210.8
41–50	398.8	150.7	161.0	67.2	16.6	2.9	0.4	359.1
51–59	29.9	13.5	10.6	4.4	1.2	0.2	0.0	23.8
Total	5,000	1,480.8	2,297.6	1,086.2	130.6	5.3	0.7	4,886.5

TABLE A–4—EXAMPLE CALCULATION OF NUMBER OF ELIGIBLE FAMILY MEMBERS FOR 5000 VETERANS

General military service member age range	Example distribution of veterans	ERG's number of servicemen with n # of eligible family members where n =						Number of family members
		0	1	2	3	4	5	
18–21	992.0	290.8	490.6	208.3	2.3	0.0	0.0	1,205.0
22–30	2,343.0	641.6	1,090.3	544.9	66.2	0.0	0.0	3,020.1
31–40	1,236.3	384.2	545.2	261.4	44.3	2.2	0.2	1,595.0
41–50	398.8	150.7	161.0	67.2	16.6	2.9	0.4	509.8
51–59	29.9	13.5	10.6	4.4	1.2	0.2	0.0	37.4
Total	5,000	1,480.8	2,297.6	1,086.2	130.6	5.3	0.7	6,367.3

For the NPRM, the Department provided detailed tables illustrating the calculation of the number of eligible family members and caregivers for the Department's estimates of the number of covered servicemembers for qualifying exigency leave, and the number of covered veterans who might seek treatment for a serious injury or illness for military caregiver leave. For the Final Rule, the Department has streamlined the discussion of this method and provides a useful shortcut for developing these estimates.

As long as the distribution of servicemembers with a specified number of eligible family members or caregivers remains the same, *see* Table A–2, then the number of eligible family members or caregivers for any estimated number of servicemembers can be calculated through the use of a ratio instead of performing the full calculation described above. The Department calculated the ratio of eligible family members or caregivers to covered servicemembers by dividing the estimated number of eligible family members by the number of covered servicemembers for qualifying exigency leave, and by dividing the number of eligible caregivers by the number of veterans for military caregiver leave. Per the examples above in Table A–3 and A–4, the ratios are:

- 0.977 eligible family members per covered servicemember for qualifying exigency leave (4.887/5,000).
- 1.273 eligible caregivers per veteran for military caregiver leave (6,367/5,000).

Note, these ratios are primarily provided as a tool for those who wish to replicate the Department's estimates in this economic analysis; over time, the actual distribution of eligible family members per servicemember by age group will fluctuate with changes in the composition of the military, demographic patterns, and employment with covered employers and will necessitate an updated profile.

X. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments as well as on the private sector. Under Section 202(a) of UMRA, the Department must generally prepare a written statement, including a cost-benefit analysis, for proposed and final regulations that ''includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate or by the private sector'' in excess of $100 million in any one year (equivalent to $143 million in 2010 dollars after adjusting for inflation).

State, local, and tribal government entities are within the scope of the regulated community for this regulation. The Department has determined that this rule contains a Federal mandate that is unlikely to result in expenditures of $143 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Total costs to government entities do not exceed $15 million in any single year of the rule. *See* Table 18. Total costs to the private sector do not exceed $50 million in the first, most costly year of the rule. *See* Table 18. The total first year cost of this rule is estimated at $53.9 million to the private and public sectors combined. Thus, the Final Rule is not expected to result in any expenditures of $143 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year.

TABLE 18—COMPLIANCE COSTS BY BUSINESS SIZE

Industry	First year ($ mil.) and percent of total		Recurring ($ mil.) and percent of total		Annualized ($ mil.) and percent of total	
Small:						
Private	$30.2	*56%*	$23.4	*57%*	$24.3	*57%*
Government	$7.9	*15%*	$4.5	*11%*	$5.0	*12%*
Subtotal	$38.1	*71%*	$28.0	*68%*	$29.3	*68%*
Non Small:						
Private	$10.1	*19%*	$9.0	*22%*	$9.1	*21%*
Government	$5.8	*11%*	$4.4	*11%*	$4.6	*11%*
Subtotal	$15.8	*29%*	$13.4	*32%*	$13.7	*32%*
Total:						
Private	$40.2	*75%*	$32.4	*78%*	$33.5	*78%*
Government	$13.7	*25%*	$8.9	*22%*	$9.6	*22%*
Total	$53.9	*100%*	$41.3	*100%*	$43.0	*100%*

XI. Executive Order 13132, Federalism

The rule does not have federalism implications as outlined in E.O. 13132. Although states are covered employers under the FMLA, the rule does not have substantial direct effects on the states, on the relationship between the Federal government and the states, or on the distribution of power and responsibilities among the various levels of government.

XII. Executive Order 13175, Indian Tribal Governments

This rule was reviewed under the terms of E.O. 13175 and determined not to have tribal implications. The rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

XIII. Effects on Families

The undersigned hereby certifies that this rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

XIV. Executive Order 13045, Protection of Children

E.O. 13045 applies to any rule that (1) is determined to be economically significant as defined in E.O. 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This rule is not subject to E.O. 13045 because, although it addresses family and medical leave provisions of the FMLA including the rights of employees to take leave for the birth or adoption of a child and to care for a healthy newborn or adopted child, and to take leave to care for a son or daughter with a serious health condition, it does not concern environmental health or safety risks that may disproportionately affect children.

XV. Environmental Impact Assessment

A review of this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.;* and the Departmental NEPA procedures, 29 CFR part 11, indicates that this rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XVI. Executive Order 13211, Energy Supply

This rule is not subject to E.O. 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

XVII. Executive Order 12630, Constitutionally Protected Property Rights

This rule is not subject to E.O. 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

XVIII. Executive Order 12988, Civil Justice Reform Analysis

This rule was drafted and reviewed in accordance with E.O. 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 30th day of January 2013.

Mary Beth Maxwell

Acting Deputy Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the Department of Labor amends Chapter V of Title 29, by revising part 825 of the Code of Federal Regulations as follows:

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—Coverage Under the Family and Medical Leave Act

Sec.

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825.101 Purpose of the Act.
825.102 Definitions.
825.103 [Reserved]
825.104 Covered employer.
825.105 Counting employees for determining coverage.
825.106 Joint employer coverage.
825.107 Successor in interest coverage.
825.108 Public agency coverage.
825.109 Federal agency coverage.
825.110 Eligible employee.
825.111 Determining whether 50 employees are employed within 75 miles.
825.112 Qualifying reasons for leave, general rule.
825.113 Serious health condition.
825.114 Inpatient care.

825.115 Continuing treatment.
825.116 [Reserved]
825.117 [Reserved]
825.118 [Reserved]
825.119 Leave for treatment of substance abuse.
825.120 Leave for pregnancy or birth.
825.121 Leave for adoption or foster care.
825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member or covered servicemember.
825.125 Definition of health care provider.
825.126 Leave because of a qualifying exigency.
825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

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825.203 Scheduling of intermittent or reduced schedule leave.
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825.205 Increments of FMLA leave for intermittent or reduced schedule leave.
825.206 Interaction with the FLSA.
825.207 Substitution of paid leave.
825.208 [Reserved]
825.209 Maintenance of employee benefits.
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825.212 Employee failure to pay health plan premium payments.
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825.218 Substantial and grievous economic injury.
825.219 Rights of a key employee.
825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—Employee and Employer Rights and Obligations Under the Act

825.300 Employer notice requirements.
825.301 Designation of FMLA leave.
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825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions
825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.
825.309 Certification for leave taken because of a qualifying exigency.
825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).
825.311 Intent to return to work.
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Subpart D—Enforcement Mechanisms

825.400 Enforcement, general rules.
825.401 Filing a complaint with the Federal Government.
825.402 Violations of the posting requirement.
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825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—Recordkeeping Requirements

825.500 Recordkeeping requirements.

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825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
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825.700 Interaction with employer's policies.
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Subpart H—Definitions Special Rules Applicable to Airline Flight Crew Employees

825.800 Definitions. Special rules for airline flight crew employees, general.
825.801 Special rules for airline flight crew employees, hours of service requirement.
825.802 Special rules for airline flight crew employees, calculation of leave.
825.803 Special rules for airline flight crew employees, recordkeeping requirements.

Authority: 29 U.S.C. 2654.

Subpart A—Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993, as amended, (FMLA or Act) allows eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months (*see* § 825.200(b)) because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, because the employee's own serious health condition makes the employee unable to perform the functions of his or her job, or because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty). In addition, eligible employees of a covered employer may take job-protected, unpaid leave, or substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 26 workweeks in a single 12-month period to care for a covered servicemember with a serious injury or illness. In certain cases, FMLA leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, the serious injury or illness of a covered servicemember, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer generally has a right to advance notice from the employee. In

addition, the employer may require an employee to submit certification to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member, due to the serious injury or illness of a covered servicemember, or because of a qualifying exigency. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.312 and 825.313). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health condition, for the care of a covered servicemember with a serious injury or illness, or because of a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty or call to covered active duty status. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 Definitions.

For purposes of this part:

Act or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq., as amended*).

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.,* as amended).

Administrator means the Administrator of the Wage and Hour Division, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

Airline flight crew employee means an airline flight crewmember or flight attendant as those terms are defined in regulations of the Federal Aviation Administration. *See also* § 825.800(a).

Applicable monthly guarantee means:

(1) For an airline flight crew employee who is not on reserve status (line holder), the minimum number of hours for which an employer has agreed to *schedule* such employee for any given month; and

(2) For an airline flight crew employee who is on reserve status, the number of hours for which an employer has agreed to *pay* the employee for any given month. *See also* § 825.801(b)(1).

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended (Pub. L. 99–272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161–1168).

Commerce and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Contingency operation means a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of Title 10 of the United States Code, chapter 15 of Title 10 of the United States Code, or any other provision of law during a war or during a national emergency declared by the President or Congress. *See also* § 825.126(a)(2).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.,* physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(iii) The requirement in paragraphs (i) and (ii) of this definition for treatment by a health care provider means an in-person visit to a health care provider. The first in-person treatment visit must take place within seven days of the first day of incapacity.

(iv) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(v) The term ''extenuating circumstances'' in paragraph (i) means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. *See also* § 825.115(a)(5).

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.,* asthma, diabetes, epilepsy, *etc.*).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Covered active duty or call to covered active duty status means:

(1) In the case of a member of the Regular Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country; and,

(2) In the case of a member of the Reserve components of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B). *See also* § 825.126(a).

Covered servicemember means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

Covered veteran means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* § 825.127(b)(2).

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than seven years before the date of the most recent hiring of the employee, *unless:*

(i) The break in service is occasioned by the fulfillment of the employee's Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.,* covered service obligation (the period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.,* for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has met the hours of service requirement by having been employed for at least 1,250 hours of service with such employer during the previous 12-month period, or for an airline flight crew employee, in the previous 12 months, having worked or been paid for not less than 60 percent of the applicable total monthly guarantee and having worked or been paid for not less than 504 hours, not counting personal commute time, or vacation, medical or sick leave (*see* § 825.801(b)), *except that:*

(i) An employee returning from fulfilling his or her USERRA-covered service obligation shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining whether the employee met the hours of service requirement (accordingly, a person reemployed following absence from work due to or necessitated by USERRA-covered service has the hours that would have been worked for the employer (or, for an airline flight crew employee, would have been worked for or paid by the employer) added to any hours actually worked (or, for an airline

flight crew employee, actually worked or paid) during the previous 12-month period to meet the hours of service requirement); and

(ii) To determine the hours that would have been worked (or, for an airline flight crew employee, would have been worked or paid) during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term *employee* means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, *employee* means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(1) Holds a public elective office of that State, political subdivision, or agency,

(2) Is selected by the holder of such an office to be a member of his personal staff,

(3) Is appointed by such an officeholder to serve on a policymaking level,

(4) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(5) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an employee benefit plan as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. *See also* § 825.209(a).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines health care provider as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is

receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Invitational travel authorization (ITA) or *Invitational travel order* (ITO) are orders issued by the Armed Forces to a family member to join an injured or ill servicemember at his or her bedside. *See also* § 825.310(e).

Key employee means a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite. *See also* § 825.217.

Mental disability: See the definition of *Physical or mental disability* in this section.

Military caregiver leave means leave taken to care for a covered servicemember with a serious injury or illness under the Family and Medical Leave Act of 1993. *See also* § 825.127.

Next of kin of a covered servicemember means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See also* § 825.127(d)(3).

Outpatient status means, with respect to a covered servicemember who is a current member of the Armed Forces, the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient; or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. *See also* § 825.127(b)(1).

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Parent of a covered servicemember means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See also* § 825.127(d)(2).

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR part 1630, issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.,* as amended, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Reserve components of the Armed Forces, for purposes of qualifying exigency leave, include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve, and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation. *See also* § 825.126(a)(2)(i).

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

Serious injury or illness means: (1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the covered servicemember in the line

of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces and that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating; and

(2) In the case of a covered veteran, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. *See also* § 825.127(c).

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Son or daughter of a covered servicemember means a covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See also* § 825.127(d)(1).

Son or daughter on covered active duty or call to covered active duty status means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See also* § 825.126(a)(5).

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

TRICARE is the health care program serving active duty servicemembers, National Guard and Reserve members, retirees, their families, survivors, and certain former spouses worldwide.

§ 825.103 [Reserved]

§ 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. *See* § 825.600.

(b) The terms commerce and industry affecting commerce are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142 (1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the joint employment test discussed in § 825.106, or the integrated employer test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the integrated employer test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An employer includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of employer in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

§ 825.105 Counting employees for determining coverage.

(a) The definition of employ for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g), 29 U.S.C. 203(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law

arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work.'' The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer,'' both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer-employee relationship under the Act; and that determination of the relation cannot be based on isolated factors or upon a single characteristic or technical concepts, but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, *etc.,* are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.,* 2008) calendar year.

§ 825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary placement agency supplies employees to a second employer.

(2) A type of company that is often called a Professional Employer Organization (PEO) contracts with client employers to perform administrative functions such as payroll, benefits, regulatory paperwork, and updating employment policies. The determination of whether a PEO is a joint employer also turns on the economic realities of the situation and must be based upon all the facts and circumstances. A PEO does not enter into a joint employment relationship with the employees of its client companies when it merely performs such administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such rights may lead to a determination that the PEO would be a joint employer with the client employer, depending upon all the facts and circumstances.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary placement agencies, for example, the placement agency most commonly would be the primary employer. Where a PEO is a joint employer, the client employer most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a temporary placement agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer. In those cases in which a PEO is determined to be a joint employer of a client employer's employees, the client employer would only be required to count employees of the PEO (or employees of other clients of the PEO) if the client employer jointly employed those employees.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary placement agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its jointly employed employees, whether or not the secondary employer is covered by FMLA. *See* § 825.220(a). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the work force;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a successor in interest exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a successor in interest, employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours of service with the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 Public agency coverage.

(a) An employer under FMLA includes any public agency, as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines *public agency* as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. *State* is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a public agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.,* is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Whether two agencies of the same State or local government constitute the same public agency can only be determined on a case-by-case basis. One factor that would support a conclusion that two agencies are separate is whether they are treated separately for statistical purposes in the Census of Governments issued by the Bureau of the Census, U.S. Department of Commerce.

(2) The Census Bureau takes a census of governments at five-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries, or online at *http://www.census.gov/govs/www/index.html.* For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St. NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.,* State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by

these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Eligible employee.

(a) An eligible employee is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave (*see* § 825.801 for special hours of service requirements for airline flight crew employees), and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. *See* § 825.105(b) regarding employees who work outside the U.S.

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.,* covered service obligation. The period of absence from work due to or necessitated by USERRA-covered service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the USERRA; or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.,* for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.,* workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as at least 12 months, 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section and in § 825.801 containing the special hours of service requirement for airline flight crew employees, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. *See* 29 CFR part 785. The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, a person reemployed following USERRA-covered service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work schedule can generally be used for calculations. *See* § 825.801(c) for special rules applicable to airline flight crew employees.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.,* bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.102 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave. *See* § 825.801(d) for special rules applicable to airline flight crew employees.

(d) The determination of whether an employee meets the hours of service requirement and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on non-FMLA leave at the time he or she meets the 12-month eligibility requirement, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be FMLA leave. *See* § 825.300(b) for rules governing the content of the eligibility notice given to employees.

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of

employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.,* construction workers, transportation workers (*e.g.,* truck drivers, seamen, pilots), salespersons, *etc.,* the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.,* from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their worksite. The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.,* airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are maintained on the payroll during any portion of the year when school is not in session. *See* § 825.105(c).

§ 825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122);

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123);

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status (*see* §§ 825.122 and 825.126); and

(6) To care for a covered servicemember with a serious injury or illness if the employee is the spouse, son, daughter, parent, or next of kin of the covered servicemember. *See* §§ 825.122 and 825.127.

(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption, or foster care of a child.

(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§ 825.113 Serious health condition.

(a) For purposes of FMLA, *serious health condition* entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term *incapacity* means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.

(c) The term treatment includes (but is not limited to) examinations to

determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.,* an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.,* oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not serious health conditions unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.,* are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of this section are met.

§ 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.,* physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(3) The requirement in paragraphs (a)(1) and (2) of this section for treatment by a health care provider means an in-person visit to a health care provider. The first (or only) in-person treatment visit must take place within seven days of the first day of incapacity.

(4) Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day period shall be determined by the health care provider.

(5) The term *extenuating circumstances* in paragraph (a)(1) of this section means circumstances beyond the employee's control that prevent the follow-up visit from occurring as planned by the health care provider. Whether a given set of circumstances are extenuating depends on the facts. For example, extenuating circumstances exist if a health care provider determines that a second in-person visit is needed within the 30-day period, but the health care provider does not have any available appointments during that time period.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.,* asthma, diabetes, epilepsy, *etc.*).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), or kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.116 [Reserved]

§ 825.117 [Reserved]

§ 825.118 [Reserved]

§ 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for

substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

§ 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.,* bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to FMLA leave for a birth expires at the end of the 12-month period beginning on the date of the birth. If state law allows, or the employer permits, bonding leave to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newborn child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The husband is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. *See* § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. *See* §§ 825.202—825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.121 for rules governing leave for adoption or foster care. *See* § 825.601 for special rules applicable to instructional employees of schools. *See* § 825.802 for special rules applicable to airline flight crew employees.

§ 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.,* whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement. If state law allows, or the employer permits, leave for adoption or foster care to be taken beyond this period, such leave will not qualify as FMLA leave. *See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to

FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a healthy, newly placed child, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and 825.122(d) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* §§ 825.202–825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.120 for general rules governing leave for pregnancy and birth of a child. *See* § 825.601 for special rules applicable to instructional employees of schools. *See* § 825.802 for special rules applicable to airline flight crew employees.

§ 825.122 Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of a covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

(a) Covered servicemember means: (1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

(2) A covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. *See* § 825.127(b)(2).

(b) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(c) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (d) of this section. This term does not include parents ''in law.''

(d) *Son or daughter.* For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) *Incapable of self-care* means that the individual requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living (ADLs) or instrumental activities of daily living (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

(2) *Physical or mental disability* means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.,* define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(e) *Next of kin of a covered servicemember* means the nearest blood relative other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When

no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. *See* § 825.127(d)(3).

(f) *Adoption* means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g.,* whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* § 825.121 for rules governing leave for adoption.

(g) *Foster care* means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* § 825.121 for rules governing leave for foster care.

(h) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age. *See* § 825.126(a)(5).

(i) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. *See* § 825.127(d)(1).

(j) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.'' *See* § 825.127(d)(2).

(k) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.,* but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 *et seq.,* and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. *See* § 825.306.

§ 825.124 Needed to care for a family member or covered servicemember.

(a) The medical certification provision that an employee is needed to care for a family member or covered servicemember encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to substitute for others who normally care for the family member or covered servicemember, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member or covered servicemember.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered servicemember includes not only a situation where the condition of the family member or covered servicemember itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* §§ 825.202–825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.125 Definition of health care provider.

(a) The Act defines *health care provider* as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others capable of providing health care services include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care

provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement;

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase authorized to practice in the State as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

§ 825.126 Leave because of a qualifying exigency.

(a) Eligible employees may take FMLA leave for a qualifying exigency while the employee's spouse, son, daughter, or parent (the military member or member) is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty).

(1) *Covered active duty or call to covered active duty status* in the case of a member of the Regular Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country. The active duty orders of a member of the Regular components of the Armed Forces will generally specify if the member is deployed to a foreign country.

(2) *Covered active duty or call to covered active duty status* in the case of a member of the Reserve components of the Armed Forces means duty during the deployment of the member with the Armed Forces to a foreign country under a Federal call or order to active duty in support of a contingency operation pursuant to: Section 688 of Title 10 of the United States Code, which authorizes ordering to active duty retired members of the Regular Armed Forces and members of the retired Reserve who retired after completing at least 20 years of active service; Section 12301(a) of Title 10 of the United States Code, which authorizes ordering all reserve component members to active duty in the case of war or national emergency; Section 12302 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Ready Reserve to active duty; Section 12304 of Title 10 of the United States Code, which authorizes ordering any unit or unassigned member of the Selected Reserve and certain members of the Individual Ready Reserve to active duty; Section 12305 of Title 10 of the United States Code, which authorizes the suspension of promotion, retirement or separation rules for certain Reserve components; Section 12406 of Title 10 of the United States Code, which authorizes calling the National Guard into Federal service in certain circumstances; chapter 15 of Title 10 of the United States Code, which authorizes calling the National Guard and state military into Federal service in the case of insurrections and national emergencies; or any other provision of law during a war or during a national emergency declared by the President or Congress so long as it is in support of a contingency operation. *See* 10 U.S.C. 101(a)(13)(B).

(i) For purposes of covered active duty or call to covered active duty status, the Reserve components of the Armed Forces include the Army National Guard of the United States, Army Reserve, Navy Reserve, Marine Corps Reserve, Air National Guard of the United States, Air Force Reserve and Coast Guard Reserve, and retired members of the Regular Armed Forces or Reserves who are called up in support of a contingency operation pursuant to one of the provisions of law identified in paragraph (a)(2).

(ii) The active duty orders of a member of the Reserve components will generally specify if the military member is serving in support of a contingency operation by citation to the relevant section of Title 10 of the United States Code and/or by reference to the specific name of the contingency operation and will specify that the deployment is to a foreign country.

(3) *Deployment of the member with the Armed Forces to a foreign country* means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters.

(4) A call to covered active duty for purposes of leave taken because of a qualifying exigency refers to a Federal call to active duty. State calls to active duty are not covered unless under order of the President of the United States pursuant to one of the provisions of law identified in paragraph (a)(2) of this section.

(5) *Son or daughter on covered active duty or call to covered active duty status* means the employee's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the employee stood in loco parentis, who is on covered active duty or call to covered active duty status, and who is of any age.

(b) An eligible employee may take FMLA leave for one or more of the following qualifying exigencies:

(1) *Short-notice deployment.* (i) To address any issue that arises from the fact that the military member is notified of an impending call or order to covered active duty seven or less calendar days prior to the date of deployment;

(ii) Leave taken for this purpose can be used for a period of seven calendar days beginning on the date the military member is notified of an impending call or order to covered active duty;

(2) *Military events and related activities.* (i) To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty or call to covered active duty status of the military member; and

(ii) To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty or call to covered active duty status of the military member;

(3) *Childcare and school activities.* For the purposes of leave for childcare and school activities listed in (i) through (iv) of this paragraph, a child of the military member must be the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative childcare for a child of the military member when the covered active duty or call to covered active duty status of the military member necessitates a change in the existing childcare arrangement;

(ii) To provide childcare for a child of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a school or a daycare facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member;

(4) *Financial and legal arrangements.* (i) To make or update financial or legal arrangements to address the military member's absence while on covered active duty or call to covered active duty status, such as preparing and executing financial and healthcare powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust; and

(ii) To act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the military member is on covered active duty or call to covered active duty status, and for a period of 90 days following the termination of the military member's covered active duty status;

(5) *Counseling.* To attend counseling provided by someone other than a health care provider, for oneself, for the military member, or for the biological, adopted, or foster child, a stepchild, or a legal ward of the military member, or a child for whom the military member stands in loco parentis, who is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence, provided that the need for counseling arises from the covered active duty or call to covered active duty status of the military member;

(6) *Rest and Recuperation.* (i) To spend time with the military member who is on short-term, temporary, Rest and Recuperation leave during the period of deployment;

(ii) Leave taken for this purpose can be used for a period of 15 calendar days beginning on the date the military member commences each instance of Rest and Recuperation leave;

(7) *Post-deployment activities.* (i) To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the military member's covered active duty status; and

(ii) To address issues that arise from the death of the military member while on covered active duty status, such as meeting and recovering the body of the military member, making funeral arrangements, and attending funeral services;

(8) *Parental care.* For purposes of leave for parental care listed in (i) through (iv) of this paragraph, the parent of the military member must be incapable of self-care and must be the military member's biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age. A parent who is incapable of self-care means that the parent requires active assistance or supervision to provide daily self-care in three or more of the activities of daily living or instrumental activities of daily living. Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave.

(i) To arrange for alternative care for a parent of the military member when the parent is incapable of self-care and the covered active duty or call to covered active duty status of the military member necessitates a change in the existing care arrangement for the parent;

(ii) To provide care for a parent of the military member on an urgent, immediate need basis (but not on a routine, regular, or everyday basis) when the parent is incapable of self-care and the need to provide such care arises from the covered active duty or call to covered active duty status of the military member;

(iii) To admit to or transfer to a care facility a parent of the military member when admittance or transfer is necessitated by the covered active duty or call to covered active duty status of the military member; and

(iv) To attend meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent of the military member, when such meetings are necessary due to circumstances arising from the covered active duty or call to covered active duty status of the military member but not for routine or regular meetings;

(9) *Additional activities.* To address other events which arise out of the military member's covered active duty or call to covered active duty status provided that the employer and employee agree that such leave shall qualify as an exigency, and agree to both the timing and duration of such leave.

§ 825.127 Leave to care for a covered servicemember with a serious injury or illness (military caregiver leave).

(a) Eligible employees are entitled to FMLA leave to care for a covered servicemember with a serious illness or injury.

(b) *Covered servicemember* means:

(1) A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status; or is otherwise on the temporary disability retired list, for a serious injury or illness. *Outpatient status* means the status of a member of the Armed Forces assigned to either a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

(2) A covered veteran who is undergoing medical treatment, recuperation or therapy for a serious injury or illness. *Covered veteran* means an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves), and was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service, but the single 12-month period described in paragraph (e)(1) of this section may extend beyond the five-year period.

(i) For an individual who was a member of the Armed Forces (including a member of the National Guard or Reserves) and who was discharged or released under conditions other than dishonorable prior to the effective date of this Final Rule, the period between October 28, 2009 and the effective date of this Final Rule shall not count towards the determination of the five-year period for covered veteran status.

(c) A *serious injury or illness* means:

(1) In the case of a current member of the Armed Forces, including a member of the National Guard or Reserves, means an injury or illness that was incurred by the covered servicemember in the line of duty on active duty in the

Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating; and,

(2) In the case of a covered veteran, means an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(d) In order to care for a covered servicemember, an eligible employee must be the spouse, son, daughter, or parent, or next of kin of a covered servicemember.

(1) *Son or daughter of a covered servicemember* means the covered servicemember's biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age.

(2) *Parent of a covered servicemember* means a covered servicemember's biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the covered servicemember. This term does not include parents ''in law.''

(3) *Next of kin of a covered servicemember* means the nearest blood relative, other than the covered servicemember's spouse, parent, son, or daughter, in the following order of priority: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles, and first cousins, unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver leave under the FMLA. When no such designation is made, and there are multiple family members with the same level of relationship to the covered servicemember, all such family members shall be considered the covered servicemember's next of kin and may take FMLA leave to provide care to the covered servicemember, either consecutively or simultaneously. When such designation has been made, the designated individual shall be deemed to be the covered servicemember's only next of kin. For example, if a covered servicemember has three siblings and has not designated a blood relative to provide care, all three siblings would be considered the covered servicemember's next of kin. Alternatively, where a covered servicemember has a sibling(s) and designates a cousin as his or her next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin. An employer is permitted to require an employee to provide confirmation of covered family relationship to the covered servicemember pursuant to § 825.122(k).

(e) An eligible employee is entitled to 26 workweeks of leave to care for a covered servicemember with a serious injury or illness during a single 12-month period.

(1) The single 12-month period described in paragraph (e) of this section begins on the first day the eligible employee takes FMLA leave to care for a covered servicemember and ends 12 months after that date, regardless of the method used by the employer to determine the employee's 12 workweeks of leave entitlement for other FMLA-qualifying reasons. If an eligible employee does not take all of his or her 26 workweeks of leave entitlement to care for a covered servicemember during this single 12-month period, the remaining part of his or her 26 workweeks of leave entitlement to care for the covered servicemember is forfeited.

(2) The leave entitlement described in paragraph (e) of this section is to be applied on a per-covered-servicemember, per-injury basis such that an eligible employee may be entitled to take more than one period of 26 workweeks of leave if the leave is to care for different covered servicemembers or to care for the same servicemember with a subsequent serious injury or illness, except that no more than 26 workweeks of leave may be taken within any single 12-month period. An eligible employee may take more than one period of 26 workweeks of leave to care for a covered servicemember with more than one serious injury or illness only when the serious injury or illness is a subsequent serious injury or illness. When an eligible employee takes leave to care for more than one covered servicemember or for a subsequent serious injury or illness of the same covered servicemember, and the single 12-month periods corresponding to the different military caregiver leave entitlements overlap, the employee is limited to taking no more than 26 workweeks of leave in each single 12-month period.

(3) An eligible employee is entitled to a combined total of 26 workweeks of leave for any FMLA-qualifying reason during the single 12-month period described in paragraph (e) of this section, provided that the employee is entitled to no more than 12 workweeks of leave for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because of the placement of a son or daughter with the employee for adoption or foster care; in order to care for the spouse, son, daughter, or parent with a serious health condition; because of the employee's own serious health condition; or because of a qualifying exigency. Thus, for example, an eligible employee may, during the single 12-month period, take 16 workweeks of FMLA leave to care for a covered servicemember and 10 workweeks of FMLA leave to care for a newborn child. However, the employee may not take more than 12 weeks of FMLA leave to care for the newborn child during the single 12-month period, even if the employee takes fewer than 14 workweeks of FMLA leave to care for a covered servicemember.

(4) In all circumstances, including for leave taken to care for a covered servicemember, the employer is responsible for designating leave, paid or unpaid, as FMLA-qualifying, and for giving notice of the designation to the employee as provided in § 825.300. In the case of leave that qualifies as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition during the single 12-month

period described in paragraph (e) of this section, the employer must designate such leave as leave to care for a covered servicemember in the first instance. Leave that qualifies as both leave to care for a covered servicemember and leave taken to care for a family member with a serious health condition during the single 12-month period described in paragraph (e) of this section must not be designated and counted as both leave to care for a covered servicemember and leave to care for a family member with a serious health condition. As is the case with leave taken for other qualifying reasons, employers may retroactively designate leave as leave to care for a covered servicemember pursuant to § 825.301(d).

(f) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during the single 12-month period described in paragraph (e) of this section if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, to care for the employee's parent with a serious health condition, or to care for a covered servicemember with a serious injury or illness. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 26 workweeks of FMLA leave.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§ 825.200 Amount of leave.

(a) Except in the case of leave to care for a covered servicemember with a serious injury or illness, an eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition;

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job; and,

(5) Because of any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on covered active duty status (or has been notified of an impending call or order to covered active duty).

(b) An employer is permitted to choose any one of the following methods for determining the 12-month period in which the 12 weeks of leave entitlement described in paragraph (a) of this section occurs:

(1) The calendar year;

(2) Any fixed 12-month leave year, such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave under paragraph (a) begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave as described in paragraph (a).

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2008, four weeks beginning June 1, 2008, and four weeks beginning December 1, 2008, the employee would not be entitled to any additional leave until February 1, 2009. However, beginning on February 1, 2009, the employee would again be eligible to take FMLA leave, recouping the right to take the leave in the same manner and amounts in which it was used in the previous year. Thus, the employee would recoup (and be entitled to use) one additional day of FMLA leave each day for four weeks, commencing February 1, 2009. The employee would also begin to recoup additional days beginning on June 1, 2009, and additional days beginning on December 1, 2009. Accordingly, employers using the rolling 12-month period may need to calculate whether the employee is entitled to take FMLA leave each time that leave is requested, and employees taking FMLA leave on such a basis may fall in and out of FMLA protection based on their FMLA usage in the prior 12 months. For example, in the example above, if the employee needs six weeks of leave for a serious health condition commencing February 1, 2009, only the first four weeks of the leave would be FMLA protected.

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section for the leave entitlements described in paragraph (a) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict with the method chosen by the employer to determine any 12 months for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for the leave entitlements described in paragraph (a) for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period for the leave entitlements described in paragraph (a), the option that provides the most beneficial

outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) An eligible employee's FMLA leave entitlement is limited to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness. An employer shall determine the single 12-month period in which the 26-weeks-of-leave-entitlement described in this paragraph occurs using the 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins. *See* § 825.127(e)(1).

(g) During the single 12-month period described in paragraph (f), an eligible employee's FMLA leave entitlement is limited to a combined total of 26 workweeks of FMLA leave for any qualifying reason. *See* § 825.127(e)(3).

(h) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.,* a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do not count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205. *See* § 825.802 for special calculation of leave rules applicable to airline flight crew employees.

§ 825.201 Leave to care for a parent.

(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* § 825.122(c) for definition of parent.

(b) *Same employer limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the same employer. It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took six weeks of leave to care for a parent, each could use an additional six weeks due to his or her own serious health condition or to care for a child with a serious health condition. *See also* § 825.127(d).

§ 825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. *Intermittent leave* is FMLA leave taken in separate blocks of time due to a single qualifying reason. A *reduced leave schedule* is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule taken because of one's own serious health condition, to care for a spouse, parent, son, or daughter with a serious health condition, or to care for a covered servicemember with a serious injury or illness, there must be a medical need for leave and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition and in the certification of a serious injury or illness, if required by the employer, addresses the medical necessity of intermittent leave or leave on a reduced leave schedule. *See* §§ 825.306, 825.310. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a serious health condition or of a covered servicemember's serious injury or illness, or for recovery from treatment or recovery from a serious health condition or a covered servicemember's serious injury or illness. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition or a covered servicemember with a serious injury or illness.

(1) Intermittent leave may be taken for a serious health condition of a spouse, parent, son, or daughter, for the employee's own serious health condition, or a serious injury or illness of a covered servicemember which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition or a serious injury or illness of a covered servicemember, even if he or she does not receive treatment by a health care provider. *See* §§ 825.113 and 825.127.

(c) *Birth or placement.* When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a

reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

(d) *Qualifying exigency.* Leave due to a qualifying exigency may be taken on an intermittent or reduced leave schedule basis.

§ 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a covered family member or the employee or the serious injury or illness of a covered servicemember. *See* § 825.202. Eligible employees may also take FMLA leave on an intermittent or reduced schedule basis when necessary because of a qualifying exigency. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee, a family member, or a covered servicemember, including during a period of recovery from one's own serious health condition, a serious health condition of a spouse, parent, son, or daughter, or a serious injury or illness of a covered servicemember, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he or she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 Increments of FMLA leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* (1) When an employee takes FMLA leave on an intermittent or reduced leave schedule basis, the employer must account for the leave using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave provided that it is not greater than one hour and provided further that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. An employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. *See also* § 825.205(a)(2) for the physical impossibility exception, §§ 825.600 and 825.601 for special rules applicable to employees of schools, and § 825.802 for special rules applicable to airline flight crew employees. If an employer uses different increments to account for different types of leave, the employer must account for FMLA leave in the smallest increment used to account for any other type of leave. For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, then FMLA leave use must be accounted for using increments no larger than one-half hour. If an employer accounts for use of leave in varying increments at different times of the day or shift, the employer may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Such accounting for FMLA leave will not alter the increment

considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances. In all cases, employees may not be charged FMLA leave for periods during which they are working.

(2) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed ''clean room'' during a certain period of time and no equivalent position is available, the entire period that the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement. The period of the physical impossibility is limited to the period during which the employer is unable to permit the employee to work prior to a period of FMLA leave or return the employee to the same or equivalent position due to the physical impossibility after a period of FMLA leave. *See* § 825.214.

(b) *Calculation of leave.* (1) When an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the employee's leave entitlement. The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off eight hours, the employee would use one-fifth (1/5) of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work eight hour days works four-hour days under a reduced leave schedule, the employee would use one-half (1/2) week of FMLA leave. Where an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. If an employee who would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's 10 hours of leave would constitute one-third (1/3) of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours. An employee does not accrue FMLA-protected leave at any particular hourly rate. An eligible employee is entitled to up to a total of 12 workweeks of leave, or 26 workweeks in the case of military caregiver leave, and the total number of hours contained in those workweeks is necessarily dependent on the specific hours the employee would have worked but for the use of leave. *See also* §§ 825.601 and 825.602, special rules for schools and § 825.802, special rules for airline flight crew employees.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of FMLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) would be used for calculating the employee's leave entitlement.

(c) *Overtime.* If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek, or one-sixth (1/6) of a week of FMLA leave. Voluntary overtime hours that an employee does not work due to an FMLA-qualifying reason may not be counted against the employee's FMLA leave entitlement.

§ 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary, 29 CFR part 541), providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 CFR 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating workweek basis.

(c) This special exception to the salary basis requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be taken from such an employee's salary

for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.,* leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition or serious injury or illness; or for leave which is more generous than provided by FMLA. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an hourly employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute accrued paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term substitute means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of such payment. *See* § 825.300(c). If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement. For example, paid sick leave used for a medical condition which is not a serious health condition or serious injury or illness does not count against the employee's FMLA leave entitlement.

(d) Leave taken pursuant to a disability leave plan would be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria set forth above in §§ 825.112 through 825.115. In such cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee on or off the job. If the employer designates the leave as FMLA leave in accordance with § 825.300(d), the leave counts against the employee's FMLA leave entitlement. Because the workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, where state law permits, to have paid leave supplement workers' compensation benefits, such as in the case where workers' compensation only provides replacement income for two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a light duty job. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See also* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d)(1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. This section of the FLSA limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.

§ 825.208 [Reserved]

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of group health plan is set forth in § 825.800. For purposes of FMLA, the term group health plan shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without

endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.,* must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.,* in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc. See* § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for key employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.,* if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a key employee (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or the FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.,* holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on leave without pay would be followed, provided that such rules do not require prepayment (*i.e.,* prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.,* through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. *See* § 825.300(c).

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on leave without pay.

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use banked hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a group health plan. *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1)–(5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§ 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of either a serious health condition of the employee or the employee's family member, or a serious injury or illness of a covered servicemember, which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of other circumstances beyond the employee's control are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a key employee who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of either a serious health condition of the employee or employee's family member, or a serious injury or illness of a covered servicemember, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition or the covered servicemember's serious injury or illness. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL forms developed for these

purposes. *See* §§ 825.306(b), 825.310(c)–(d). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100 percent of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.,* life insurance, disability insurance, *etc.,* by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have returned to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable premiums as would be calculated under COBRA, excluding the two percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.,* unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, *etc.,* as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used paid vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* Benefits include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional

benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.,* paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.,* one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to de minimis, intangible, or unmeasurable aspects of the job.

§ 825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (key employees, as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness-for-duty certificate to return to work under the conditions described in § 825.312.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, the employee has no right to restoration to another position under the FMLA. The employer's obligations may, however, be governed by the Americans with Disabilities Act (ADA), as amended. *See* § 825.702, state leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

§ 825.217 Key employee, general rule.

(a) A *key employee* is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the

employees employed by the employer within 75 miles of the employee's worksite.

(b) The term *salaried* means paid on a salary basis, as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A key employee must be among the highest paid 10 percent of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.,* stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be key employees.

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause substantial and grievous economic injury to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

(d) FMLA's substantial and grievous economic injury standard is different from and more stringent than the undue hardship test under the ADA. *See also* § 825.702.

§ 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. *See* § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12-month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.,* filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—Employee and Employer Rights and Obligations Under the Act

§ 825.300 Employer notice requirements.

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring. In either case, distribution may be accomplished electronically.

(4) To meet the requirements of paragraph (a)(3) of this section, employers may duplicate the text of the Department's prototype notice (WHD Publication 1420) or may use another format so long as the information provided includes, at a minimum, all of the information contained in that notice. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall provide the general notice in a language in which the employees are literate. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at www.dol.gov/whd. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances. *See* § 825.110 for definition of an eligible employee and § 825.801 for special hours of service eligibility requirements for airline flight crews. Employee eligibility is determined (and notice must be provided) at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period. *See* §§ 825.127(c) and 825.200(b). All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility as to that reason for leave does not change during the applicable 12-month period.

(2) The eligibility notice must state whether the employee is eligible for FMLA leave as defined in § 825.110. If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible, including as applicable the number of months the employee has been employed by the employer, the hours of service with the employer during the 12-month period, and whether the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. Notification of eligibility may be oral or in writing; employers may use optional Form WH–381 (Notice of Eligibility and Rights and Responsibility) to provide such notification to employees. Prototypes are available from the nearest office of the Wage and Hour Division or on the Internet at www.dol.gov/whd. The employer is obligated to translate this

notice in any situation in which it is obligated to do so in § 825.300(a)(4).

(3) If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed (*e.g.,* if the employee has not met the hours of service requirement in the 12 months preceding the commencement of leave for the subsequent qualifying reason or the size of the workforce at the worksite has dropped below 50 employees), the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.

(c) *Rights and responsibilities notice.* (1) Employers shall provide written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. The employer is obligated to translate this notice in any situation in which it is obligated to do so in § 825.300(a)(4). This notice shall be provided to the employee each time the eligibility notice is provided pursuant to paragraph (b) of this section. If leave has already begun, the notice should be mailed to the employee's address of record. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* §§ 825.300(c) and 825.301) and the applicable 12-month period for FMLA entitlement (*see* §§ 825.127(c), 825.200(b), (f), and (g));

(ii) Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of covered active duty or call to covered active duty status, and the consequences of failing to do so (*see* §§ 825.305, 825.309, 825.310, 825.313);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave (*see* § 825.207);

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.,* the circumstances under which coverage may lapse);

(v) The employee's status as a key employee and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vi) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* §§ 825.214 and 825.604); and

(vii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

(2) The notice of rights and responsibilities may include other information—*e.g.,* whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(3) The notice of rights and responsibilities may be accompanied by any required certification form.

(4) If the specific information provided by the notice of rights and responsibilities changes, the employer shall, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(5) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(6) A prototype notice of rights and responsibilities may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* Employers may adapt the prototype notice as appropriate to meet these notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements of this section.

(d) *Designation notice.* (1) The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason (*e.g.,* after receiving a certification), the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances. Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying (*e.g.,* if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted), the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of this designation at the time of designating the FMLA leave.

(2) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, the employer may provide the employee with the designation notice at that time.

(3) If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of such requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position. *See* § 825.312. If the employer handbook or other written documents (if any) describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances (*e.g.,* by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation), the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.

(4) The designation notice must be in writing. A prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to

the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(5) If the information provided by the employer to the employee in the designation notice changes (*e.g.,* the employee exhausts the FMLA leave entitlement), the employer shall provide, within five business days of receipt of the employee's first notice of need for leave subsequent to any change, written notice of the change.

(6) The employer must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If such notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). Such written notice may be in any form, including a notation on the employee's pay stub.

(e) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered *See* § 825.400(c).

§ 825.301 Designation of FMLA leave.

(a) *Employer responsibilities.* The employer's decision to designate leave as FMLA-qualifying must be based only on information received from the employee or the employee's spokesperson (*e.g.,* if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, *etc.,* may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for a FMLA-qualifying reason, the employer must notify the employee as provided in § 825.300(d).

(b) *Employee responsibilities.* An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine whether the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for a FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish a FMLA-qualifying reason for the needed leave so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for a FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.

(c) *Disputes.* If there is a dispute between an employer and an employee as to whether leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) *Retroactive designation.* If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. *See* § 825.400(c). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented him or her from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward his or her FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously ill son or daughter if the leave had been designated timely.

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice.* An employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth,

placement for adoption or foster care, planned medical treatment for a serious health condition of the employee or of a family member, or the planned medical treatment for a serious injury or illness of a covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. For foreseeable leave due to a qualifying exigency notice must be provided as soon as practicable, regardless of how far in advance such leave is foreseeable. Whether FMLA leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee is required to provide at least 30 days notice of foreseeable leave and does not do so, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), and that the requested leave is for one of the reasons listed in § 825.126(b); if the leave is for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave. In all cases, the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave. *See* § 825.305. An employer may also request certification to support the need for leave for a qualifying exigency or for military caregiver leave. *See* §§ 825.309, 825.310). When an employee has been previously certified for leave due to more than one FMLA-qualifying reason, the employer may need to inquire further to determine for which qualifying reason the leave is needed. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy.* An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to comply with the employer's policy that requests for leave should be made by contacting a specific number because on the day the employee needs to provide notice of his or her need for FMLA leave there is no one to answer the call-in number and the voice mail box is full. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. For example, if an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) Intermittent leave or leave on a reduced leave schedule must be medically necessary due to a serious health condition or a serious injury or illness. An employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule for such leave that meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. *See* § 825.304.

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. *See* § 825.303(c). Notice may be given by the employee's spokesperson (*e.g.,* spouse, adult family member, or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty), that the requested leave is for one of the reasons listed in § 825.126(b), and the anticipated duration of the absence; or if the leave is for a family member that the condition renders the family member unable to perform daily activities or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence, if known. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of a FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied.

§ 825.304 Employee failure to provide notice.

(a) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or employee distribution, as required by § 825.300.

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.,* a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) *Waiver of notice.* An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules, absent unusual circumstances, as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

§ 825.305 Certification, general rule.

(a) *General.* An employer may require that an employee's leave to care for the employee's covered family member with a serious health condition, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's family member. An employer may also require that an employee's leave because of a qualifying exigency or to care for a covered servicemember with a serious injury or illness be supported by a certification, as described in §§ 825.309 and 825.310, respectively. An employer must give notice of a requirement for certification each time a certification is required; such notice must be written notice whenever required by § 825.300(c). An employer's oral request to an employee to furnish any subsequent certification is sufficient.

(b) *Timing.* In most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.313. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* §§ 825.306, 825.307, 825.308, and 825.312.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year. Such new medical certifications are subject to the provisions for authentication and clarification set forth in § 825.307, including second and third opinions.

§ 825.306 Content of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *Required information.* When leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed two optional forms (Form WH–380E and Form WH–380F, as revised) for use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. Optional form WH–380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH–380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH–380–E and WH–380–F, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. Prototype forms WH–380–E and WH–380–F may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.*

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. Any information received pursuant to such policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. If the employee fails to provide the information required for receipt of such payments or benefits, such failure will not affect the employee's entitlement to take unpaid FMLA leave. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.307 Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). To make such contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider. For purposes of these regulations, *authentication* means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. *Clarification* means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule (*see* 45 CFR parts 160 and 164), which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.

(b) *Second opinion.* (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise

regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.,* a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion.* If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions.* The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses.* If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad.* In circumstances in which the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country. Where a certification by a foreign health care provider is in a language other than English, the employee must provide the employer with a written translation of the certification upon request.

§ 825.308 Recertifications for leave taken because of an employee's own serious health condition or the serious health condition of a family member.

(a) *30-day rule.* An employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless paragraphs (b) or (c) of this section apply.

(b) *More than 30 days.* If the medical certification indicates that the minimum duration of the condition is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) of this section applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months (*e.g.,* for a lifetime condition), the employer would be permitted to request recertification every six months in connection with an absence.

(c) *Less than 30 days.* An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.,* the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing.* The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* § 825.305(d). As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 Certification for leave taken because of a qualifying exigency.

(a) *Active Duty Orders.* The first time an employee requests leave because of

a qualifying exigency arising out of the covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty)of a military member (*see* § 825.126(a)), an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to covered active duty status, and the dates of the military member's covered active duty service. This information need only be provided to the employer once. A copy of new active duty orders or other documentation issued by the military may be required by the employer if the need for leave because of a qualifying exigency arises out of a different covered active duty or call to covered active duty status (or notification of an impending call or order to covered active duty) of the same or a different military member;

(b) *Required information.* An employer may require that leave for any qualifying exigency specified in § 825.126 be supported by a certification from the employee that sets forth the following information:

(1) A statement or description, signed by the employee, of appropriate facts regarding the qualifying exigency for which FMLA leave is requested. The facts must be sufficient to support the need for leave. Such facts should include information on the type of qualifying exigency for which leave is requested and any available written documentation which supports the request for leave; such documentation, for example, may include a copy of a meeting announcement for informational briefings sponsored by the military, a document confirming an appointment with a counselor or school official, or a copy of a bill for services for the handling of legal or financial affairs;

(2) The approximate date on which the qualifying exigency commenced or will commence;

(3) If an employee requests leave because of a qualifying exigency for a single, continuous period of time, the beginning and end dates for such absence;

(4) If an employee requests leave because of a qualifying exigency on an intermittent or reduced schedule basis, an estimate of the frequency and duration of the qualifying exigency;

(5) If the qualifying exigency involves meeting with a third party, appropriate contact information for the individual or entity with whom the employee is meeting (such as the name, title, organization, address, telephone number, fax number, and email address) and a brief description of the purpose of the meeting; and

(6) If the qualifying exigency involves *Rest and Recuperation* leave, a copy of the military member's Rest and Recuperation orders, or other documentation issued by the military which indicates that the military member has been granted Rest and Recuperation leave, and the dates of the military member's Rest and Recuperation leave.

(c) DOL has developed an optional form (Form WH–384) for employees' use in obtaining a certification that meets FMLA's certification requirements. Form WH–384 may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.dol.gov/whd.* This optional form reflects certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave because of a qualifying exigency. Form WH–384, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section.

(d) *Verification.* If an employee submits a complete and sufficient certification to support his or her request for leave because of a qualifying exigency, the employer may not request additional information from the employee. However, if the qualifying exigency involves meeting with a third party, the employer may contact the individual or entity with whom the employee is meeting for purposes of verifying a meeting or appointment schedule and the nature of the meeting between the employee and the specified individual or entity. The employee's permission is not required in order to verify meetings or appointments with third parties, but no additional information may be requested by the employer. An employer also may contact an appropriate unit of the Department of Defense to request verification that a military member is on covered active duty or call to covered active duty status (or has been notified of an impending call or order to covered active duty); no additional information may be requested and the employee's permission is not required.

§ 825.310 Certification for leave taken to care for a covered servicemember (military caregiver leave).

(a) *Required information from health care provider.* When leave is taken to care for a covered servicemember with a serious injury or illness, an employer may require an employee to obtain a certification completed by an authorized health care provider of the covered servicemember. For purposes of leave taken to care for a covered servicemember, any one of the following health care providers may complete such a certification:

(1) A United States Department of Defense (''DOD'') health care provider;

(2) A United States Department of Veterans Affairs (''VA'') health care provider;

(3) A DOD TRICARE network authorized private health care provider;

(4) A DOD non-network TRICARE authorized private health care provider; or

(5) Any health care provider as defined in § 825.125.

(b) If the authorized health care provider is unable to make certain military-related determinations outlined below, the authorized health care provider may rely on determinations from an authorized DOD representative (such as a DOD Recovery Care Coordinator) or an authorized VA representative. An employer may request that the health care provider provide the following information:

(1) The name, address, and appropriate contact information (telephone number, fax number, and/or email address) of the health care provider, the type of medical practice, the medical specialty, and whether the health care provider is one of the following:

(i) A DOD health care provider;

(ii) A VA health care provider;

(iii) A DOD TRICARE network authorized private health care provider;

(iv) A DOD non-network TRICARE authorized private health care provider; or

(v) A health care provider as defined in § 825.125.

(2) Whether the covered servicemember's injury or illness was incurred in the line of duty on active duty or, if not, whether the covered servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty;

(3) The approximate date on which the serious injury or illness commenced, or was aggravated, and its probable duration;

(4) A statement or description of appropriate medical facts regarding the covered servicemember's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave.

(i) In the case of a current member of the Armed Forces, such medical facts

must include information on whether the injury or illness may render the covered servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating and whether the member is receiving medical treatment, recuperation, or therapy.

(ii) In the case of a covered veteran, such medical facts must include:

(A) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is the continuation of an injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember medically unfit to perform the duties of the servicemember's office, grade, rank, or rating; or

(B) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and that such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(C) Information on whether the veteran is receiving medical treatment, recuperation, or therapy for an injury or illness that is a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(D) Documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

(5) Information sufficient to establish that the covered servicemember is in need of care, as described in § 825.124, and whether the covered servicemember will need care for a single continuous period of time, including any time for treatment and recovery, and an estimate as to the beginning and ending dates for this period of time;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment appointments for the covered servicemember, whether there is a medical necessity for the covered servicemember to have such periodic care and an estimate of the treatment schedule of such appointments;

(7) If an employee requests leave on an intermittent or reduced schedule basis to care for a covered servicemember other than for planned medical treatment (*e.g.,* episodic flare-ups of a medical condition), whether there is a medical necessity for the covered servicemember to have such periodic care, which can include assisting in the covered servicemember's recovery, and an estimate of the frequency and duration of the periodic care.

(c) *Required information from employee and/or covered servicemember.* In addition to the information that may be requested under § 825.310(b), an employer may also request that such certification set forth the following information provided by an employee and/or covered servicemember:

(1) The name and address of the employer of the employee requesting leave to care for a covered servicemember, the name of the employee requesting such leave, and the name of the covered servicemember for whom the employee is requesting leave to care;

(2) The relationship of the employee to the covered servicemember for whom the employee is requesting leave to care;

(3) Whether the covered servicemember is a current member of the Armed Forces, the National Guard or Reserves, and the covered servicemember's military branch, rank, and current unit assignment;

(4) Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

(5) Whether the covered servicemember is on the temporary disability retired list;

(6) Whether the covered servicemember is a veteran, the date of separation from military service, and whether the separation was other than dishonorable. The employer may require the employee to provide documentation issued by the military which indicates that the covered servicemember is a veteran, the date of separation, and that the separation is other than dishonorable. Where an employer requires such documentation, an employee may provide a copy of the veteran's Certificate of Release or Discharge from Active Duty issued by the U.S. Department of Defense (DD Form 214) or other proof of veteran status. *See* § 825.127(c)(2).

(7) A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide the care.

(d) DOL has developed optional forms (WH–385, WH–385–V) for employees' use in obtaining certification that meets FMLA's certification requirements, which may be obtained from local offices of the Wage and Hour Division or on the Internet at www.dol.gov/whd. These optional forms reflect certification requirements so as to permit the employee to furnish appropriate information to support his or her request for leave to care for a covered servicemember with a serious injury or illness. WH–385, WH–385–V, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in this section. In all instances the information on the certification must relate only to the serious injury or illness for which the current need for leave exists. An employer may seek authentication and/or clarification of the certification under § 825.307. Second and third opinions under § 825.307 are not permitted for leave to care for a covered servicemember when the certification has been completed by one of the types of health care providers identified in § 825.310(a)(1)–(4). However, second and third opinions under § 825.307 are permitted when the certification has been completed by a health care provider as defined in § 825.125 that is not one of the types identified in § 825.310(a)(1)–(4). Additionally, recertifications under § 825.308 are not permitted for leave to care for a covered servicemember. An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) of the FMLA.

(e) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification, in lieu of the Department's optional certification forms (WH–385) or an employer's own certification form, invitational travel orders (ITOs) or invitational travel authorizations (ITAs) issued to any family member to join an injured or ill servicemember at his or her bedside. An ITO or ITA is sufficient certification for the duration of time specified in the ITO or ITA. During that time period, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or on an intermittent basis. An eligible employee who provides an ITO or ITA to support his or her request for leave may not be required to provide any additional or separate certification

that leave taken on an intermittent basis during the period of time specified in the ITO or ITA is medically necessary. An ITO or ITA is sufficient certification for an employee entitled to take FMLA leave to care for a covered servicemember regardless of whether the employee is named in the order or authorization.

(1) If an employee will need leave to care for a covered servicemember beyond the expiration date specified in an ITO or ITA, an employer may request that the employee have one of the authorized health care providers listed under § 825.310(a) complete the DOL optional certification form (WH–385) or an employer's own form, as requisite certification for the remainder of the employee's necessary leave period.

(2) An employer may seek authentication and clarification of the ITO or ITA under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 during the period of time in which leave is supported by an ITO or ITA.

(3) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of an ITO or ITA.

(f) An employer requiring an employee to submit a certification for leave to care for a covered servicemember must accept as sufficient certification of the servicemember's serious injury or illness documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Such documentation is sufficient certification of the servicemember's serious injury or illness to support the employee's request for military caregiver leave regardless of whether the employee is the named caregiver in the enrollment documentation.

(1) An employer may seek authentication and clarification of the documentation indicating the servicemember's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers under § 825.307. An employer may not utilize the second or third opinion process outlined in § 825.307 or the recertification process under § 825.308 when the servicemember's serious injury or illness is shown by documentation of enrollment in this program.

(2) An employer may require an employee to provide confirmation of covered family relationship to the seriously injured or ill servicemember pursuant to § 825.122(k) when an employee supports his or her request for FMLA leave with a copy of such enrollment documentation. An employer may also require an employee to provide documentation, such as a veteran's Form DD–214, showing that the discharge was other than dishonorable and the date of the veteran's discharge.

(g) Where medical certification is requested by an employer, an employee may not be held liable for administrative delays in the issuance of military documents, despite the employee's diligent, good-faith efforts to obtain such documents. *See* § 825.305(b). In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.311 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.,* within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.312 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* § 825.305(d).

(b) An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require such a certification, an employer must provide an employee with a list of the essential functions of the employee's job no later than with the designation notice required by § 825.300(d), and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions. If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.

(c) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for

the time or travel costs spent in acquiring the certification.

(d) The designation notice required in § 825.300(d) shall advise the employee if the employer will require a fitness-for-duty certification to return to work and whether that fitness-for-duty certification must address the employee's ability to perform the essential functions of the employee's job.

(e) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (d) of this section. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* § 825.313(d).

(f) An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. If an employer chooses to require a fitness-for-duty certification under such circumstances, the employer shall inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification as long as it does not exceed once every 30 days and as long as the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. *Reasonable safety concerns* means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.

(g) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.

(h) Requirements under the Americans with Disabilities Act (ADA), as amended, apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his or her job or to his/her impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

§ 825.313 Failure to provide certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.312(a)) if the employer has provided the required notice (*see* § 825.300(e)); the employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

Subpart D—Enforcement Mechanisms

§ 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing

care, up to a sum equal to 26 weeks of wages for the employee in a case involving leave to care for a covered servicemember or 12 weeks of wages for the employee in a case involving leave for any other FMLA qualifying reason. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's Web site.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.,* and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—Recordkeeping Requirements

§ 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund, or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of FMLA exists or the Department is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.,* available from time records, requests for leave, *etc.,* if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all written notices given to employees as required under FMLA and these regulations *See* § 825.300(b)-(c). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.,* not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (*see* 29 CFR 1635.9), which permit such information to be disclosed consistent with the requirements of FMLA. If the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

(h) Special rules regarding recordkeeping apply to employers of airline flight crew employees. *See* § 825.803.

Subpart F—Special Rules Applicable to Employees of Schools

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of local educational agencies, including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be eligible do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. *Instructional employees* are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member with a serious health condition, to care for a covered servicemember, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. *Periods of a particular duration* means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if —

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave during the five-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave during the three-week period before the end of a term because of the birth of a son or daughter; the placement of a son or daughter for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; or to care for a covered servicemember. The employer may require the employee to continue taking leave until the end of the term if the leave will last more than five working days.

(b) For purposes of these provisions, *academic term* means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for periods of a particular duration in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to an equivalent position.

The determination of how an employee is to be restored to an equivalent position upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to an equivalent position must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

§ 825.700 Interaction with employer's policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.,* provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

§ 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee needing leave due to his or her own serious health condition would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits

maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(4) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. *See* Subpart F of this part.

(b) [Reserved]

§ 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.,* Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990 [as amended] or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired. *Laffey* v. *Northwest Airlines, Inc.,* 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied,* 434 U.S. 1086 (1978).

(b) If an employee is a qualified individual with a disability within the meaning of the ADA, the employer must make reasonable accommodations, *etc.,* barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period due to their own serious health condition, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an eligible employee entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee

in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a light duty position. If the employer offers such a position, the employee is permitted but not required to accept the position. *See* § 825.220(d). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an eligible employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, *et seq.,* veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning servicemember would be eligible for FMLA leave if the months and hours that he or she would have worked (or, for airline flight crew employees, would have worked or been paid) for the civilian employer during the period of absence due to or necessitated by USERRA-covered service, combined with the months employed and the hours actually worked (or, for airline flight crew employees, actually worked or paid), meet the FMLA eligibility threshold of 12 months of employment and the hours of service requirement. *See* §§ 825.110(b)(2)(i) and (c)(2) and 825802(c).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Special Rules Applicable to Airline Flight Crew Employees

§ 825.800 Special rules for airline flight crew employees, general.

(a) Certain special rules apply only to airline flight crew employees as defined in § 825.102. These special rules affect the hours of service requirement for determining the eligibility of airline flight crew employees, the calculation of leave for those employees, and the recordkeeping requirements for employers of those employees, and are issued pursuant to the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111–119.

(b) Except as otherwise provided in this subpart, FMLA leave for airline flight crew employees is subject to the requirements of the FMLA as set forth in Part 825, Subparts A through E, and G.

§ 825.801 Special rules for airline flight crew employees, hours of service requirement.

(a) An airline flight crew employee's eligibility for FMLA leave is to be determined in accordance with § 825.110 except that whether an airline flight crew employee meets the hours of service requirement is to be determined as provided below.

(b) Except as provided in paragraph (c) of this section, whether an airline flight crew employee meets the hours of service requirement is determined by assessing the number of hours the employee has worked or been paid over the previous 12 months. An airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours.

(1) The *applicable monthly guarantee* for an airline flight crew employee who is not on reserve status is the minimum number of hours for which an employer has agreed to schedule such employee for any given month. The *applicable monthly guarantee* for an airline flight crew employee who is on reserve status is the number of hours for which an employer has agreed to pay the employee for any given month.

(2) The hours an airline flight crew employee has worked for purposes of the hours of service requirement is the employee's duty hours during the previous 12-month period. The hours an airline flight crew employee has been paid is the number of hours for which an employee received wages during the previous 12-month period. The 504 hours do not include personal commute time or time spent on vacation, medical, or sick leave.

(c) An airline flight crew employee returning from USERRA-covered service shall be credited with the hours of service that would have been performed but for the period of absence from work due to or necessitated by USERRA-covered service in determining the employee's eligibility for FMLA-qualifying leave. Accordingly, an airline flight crew employee re-employed following USERRA-covered service has the hours that would have been worked for or paid by the employer added to any hours actually worked or paid during the previous 12-month period to meet the hours of service requirement. In order to determine the hours that would have been worked or paid during the period of absence from work due to or necessitated by USERRA-covered service, the employee's pre-service work

schedule can generally be used for calculations.

(d) In the event an employer of airline flight crew employees does not maintain an accurate record of hours worked or hours paid, the employer has the burden of showing that the employee has not worked or been paid for the requisite hours. Specifically, an employer must be able to clearly demonstrate that an airline flight crew employee has not worked or been paid for 60 percent of his or her applicable monthly guarantee or for 504 hours during the previous 12 months in order to claim that the airline flight crew employee is not eligible for FMLA leave.

§ 825.802 Special rules for airline flight crew employees, calculation of leave.

(a) *Amount of leave.* (1) An eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period for one, or more, of the FMLA-qualifying reasons set forth in §§ 825.112(a)(1)–(5). This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 12-workweek entitlement for FMLA leave. For example, if an employee took six weeks of leave for an FMLA-qualifying reason, the employee would use 36 days (6 days × 6 weeks) of the employee's 72-day entitlement.

(2) An eligible airline flight crew employee is entitled to 156 days of military caregiver leave during a single 12-month period to care for a covered servicemember with a serious injury or illness under § 825.112(a)(6). This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 26-workweek entitlement for military caregiver leave.

(b) *Increments of FMLA leave for intermittent or reduced schedule leave.* When an airline flight crew employee takes FMLA leave on an intermittent or reduced schedule basis, the employer must account for the leave using an increment no greater than one day. For example, if an airline flight crew employee needs to take FMLA leave for a two-hour physical therapy appointment, the employer may require the employee to use a full day of FMLA leave. The entire amount of leave actually taken (in this example, one day) is designated as FMLA leave and counts against the employee's FMLA entitlement.

(c) *Application of § 825.205.* The rules governing calculation of intermittent or reduced schedule FMLA leave set forth in § 825.205 do not apply to airline flight crew employees except that airline flight crew employees are subject to § 825.205(a)(2), the physical impossibility provision.

§ 825.803 Special rules for airline flight crew employees, recordkeeping requirements.

(a) Employers of eligible airline flight crew employees shall make, keep, and preserve records in accordance with the requirements of Subpart E of this Part (§ 825.500).

(b) Covered employers of airline flight crew employees are required to maintain certain additional records ''on file with the Secretary.'' To comply with this requirement, those employers shall maintain:

(1) Records and documents containing information specifying the applicable monthly guarantee with respect to each category of employee to whom such guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents; and

(2) Records of hours worked and hours paid, as those terms are defined in § 825.801(b)(2).

[FR Doc. 2013–02383 Filed 2–5–13; 8:45 am]

BILLING CODE 4510–27–P

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Part VI

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Title 3—

The President

Proclamation 8932 of February 1, 2013

100th Anniversary of the Birth of Rosa Parks

By the President of the United States of America

A Proclamation

On December 1, 1955, our Nation was forever transformed when an African-American seamstress in Montgomery, Alabama, refused to give up her seat on a city bus to a white passenger. Just wanting to get home after a long day at work, Rosa Parks may not have been planning to make history, but her defiance spurred a movement that advanced our journey toward justice and equality for all.

Though Rosa Parks was not the first to confront the injustice of segregation laws, her courageous act of civil disobedience sparked the Montgomery Bus Boycott—381 days of peaceful protest when ordinary men, women, and children sent the extraordinary message that second-class citizenship was unacceptable. Rather than ride in the back of buses, families and friends walked. Neighborhoods and churches formed carpools. Their actions stirred the conscience of Americans of every background, and their resilience in the face of fierce violence and intimidation ultimately led to the desegregation of public transportation systems across our country.

Rosa Parks's story did not end with the boycott she inspired. A lifelong champion of civil rights, she continued to give voice to the poor and the marginalized among us until her passing on October 24, 2005.

As we mark the 100th anniversary of Rosa Parks's birth, we celebrate the life of a genuine American hero and remind ourselves that although the principle of equality has always been self-evident, it has never been self-executing. It has taken acts of courage from generations of fearless and hopeful Americans to make our country more just. As heirs to the progress won by those who came before us, let us pledge not only to honor their legacy, but also to take up their cause of perfecting our Union.

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 February 4, 2013, as the 100th Anniversary of the Birth of Rosa Parks. I call upon all Americans to observe this day with appropriate service, community, and education programs to honor Rosa Parks's enduring legacy.

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

[FR Doc. 2013–02854
Filed 2–5–13; 11:15 am]
Billing code 3295–F3

Presidential Documents

Memorandum of February 1, 2013

Designation of Officers of the Pension Benefit Guaranty Corporation To Act as Director of the Pension Benefit Guaranty Corporation

Memorandum for the Director of the Pension Benefit Guaranty Corporation

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* (the ''Act''), it is hereby ordered that:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officials of the Pension Benefit Guaranty Corporation, in the order listed, shall act as and perform the functions and duties of the office of Director of the Pension Benefit Guaranty Corporation (Director) during any period in which the Director has died, resigned, or is otherwise unable to perform the functions and duties of the office of Director:

(a) Chief Management Officer;

(b) Chief Operating Officer;

(c) Chief Financial Officer; and

(d) General Counsel.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 of this memorandum in an acting capacity, by virtue of so serving, shall act as the Director pursuant to this memorandum.

(b) No individual listed in section 1 of this memorandum shall act as Director unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Director.

Sec. 3. *Prior Memorandum Superseded.* This memorandum supersedes the President's Memorandum of December 9, 2008 (Designation of Officers of the Pension Benefit Guaranty Corporation to Act as Director of the Pension Benefit Guaranty Corporation).

Sec. 4. *Judicial Review.* This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 5. *Publication.* You are authorized and directed to publish this memorandum in the *Federal Register.*

THE WHITE HOUSE,
Washington, February 1, 2013.

[FR Doc. 2013–02855
Filed 2–5–13; 11:15 am]
Billing code 7709–01

Presidential Documents

Notice of February 4, 2013

Continuation of the National Emergency With Respect to the Situation in or in Relation to Côte d'Ivoire

On February 7, 2006, by Executive Order 13396, the President declared a national emergency, pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States constituted by the situation in or in relation to Côte d'Ivoire and ordered related measures blocking the property of certain persons contributing to the conflict in Côte d'Ivoire. The situation in or in relation to Côte d'Ivoire, which has been addressed by the United Nations Security Council in Resolution 1572 of November 15, 2004, and subsequent resolutions, has resulted in the massacre of large numbers of civilians, widespread human rights abuses, significant political violence and unrest, and fatal attacks against international peacekeeping forces.

Since the inauguration of President Alassane Ouattara in May 2011, the Government of Côte d'Ivoire has made progress in advancing democratic freedoms and economic development. While the Government of Côte d'Ivoire and its people continue to make progress towards peace and prosperity, the situation in or in relation to Côte d'Ivoire continues to pose an unusual and extraordinary threat to the national security and foreign policy of the United States. For this reason, the national emergency declared on February 7, 2006, and the measures adopted on that date to deal with that emergency, must continue in effect beyond February 7, 2013. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing for 1 year the national emergency declared in Executive Order 13396.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
Washington, February 4, 2013.

[FR Doc. 2013–02857
Filed 2–5–13; 11:15 am]
Billing code 3295–F3

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Making supplemental appropriations for the fiscal year ending September 30, 2013, to improve and streamline disaster assistance for Hurricane Sandy, and for other purposes. (Jan. 29, 2013; 127 Stat. 4)

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