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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 600

[Docket No. FDA–2013–N–0011]

Change of Address; Biologics License Applications; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending its regulations to update the address for applicants to submit biologics license applications (BLAs) and BLA amendments and supplements regulated by the Center for Drug Evaluation and Research (CDER). This action is being taken to ensure accuracy and clarity in the Agency's regulations.

DATES: This rule is effective April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Scott E. Zeiss, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, rm. 1120, Silver Spring, MD 20993–0002, 301–796–0639.

SUPPLEMENTARY INFORMATION: FDA is amending 21 CFR 600.2(b) to update the address for applicants to submit BLAs and BLA amendments and supplements regulated by CDER. The new address for all these submissions is CDER Central Document Room, Center for Drug Evaluation and Research, Food and Drug Administration, 5901B Ammendale Rd., Beltsville, MD 20705. This action is being taken to ensure accuracy and clarity in the Agency's regulations.

Publication of this document constitutes final action on these changes under the Administrative Procedure Act (5 U.S.C. 553). FDA has determined that notice and public comment are unnecessary because this amendment to the regulations provides only technical changes to update an address for the submission of BLAs and BLA amendments and supplements.

List of Subjects for 21 CFR Part 600

Biologics, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 600 is amended as follows:

PART 600—BIOLOGICAL PRODUCTS: GENERAL

■ 1. The authority citation for 21 CFR part 600 continues to read as follows:

Authority: 21 U.S.C. 321, 351, 352, 353, 355, 360, 360i, 371, 374; 42 U.S.C. 216, 262, 263, 263a, 264, 300aa–25.

§ 600.2 [Amended]

■ 2. Section 600.2 is amended in the first sentence of paragraph (b) by removing ''CDER Therapeutic Biological Products Document Room'' and adding in its place ''CDER Central Document Room'', and by removing ''12229 Wilkins Ave., Rockville, MD 20852'' and adding in its place ''5901B Ammendale Rd., Beltsville, MD 20705''.

Dated: March 27, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07578 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0142]

Drawbridge Operation Regulations; China Basin, San Francisco, CA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulation.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the Third Street Drawbridge across the China Basin, mile 0.0, at San Francisco, CA. The deviation is necessary to allow the public to cross the bridge to participate in the scheduled CycleSF, a community event. This deviation allows the bridge to remain in the closed-to-navigation position during the deviation period.

DATES: This deviation is effective from 6 a.m. until 10 a.m. on April 28, 2013.

ADDRESSES: The docket for this deviation, [USCG–2013–0142], is available at *http://www.regulations.gov*. Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email David H. Sulouff, Chief, Bridge Section, Eleventh Coast Guard District; telephone 510–437–3516, email *David.H.Sulouff@uscg.mil*. If you have questions on viewing the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The City of San Francisco requested a temporary change to the operation of the Third Street Drawbridge, mile 0.0, over China Basin, at San Francisco, CA. The Third Street Drawbridge navigation span provides a vertical clearance of 7 feet above Mean High Water in the closed-to-navigation position. The draw opens on signal if at least one hour notice is given as required by 33 CFR 117.149. Navigation on the waterway is recreational.

The drawspan will be secured in the closed-to-navigation position 6 a.m. until 10 a.m. on April 28, 2013, to allow participants in the CycleSF to cross the bridge during the event. This temporary deviation has been coordinated with the waterway users. No objections to the proposed temporary deviation were raised. The drawspan can be operated upon one hour advance notice for emergencies requiring the passage of waterway traffic.

Vessels that can transit the bridge, while in the closed-to-navigation position, may continue to do so at any time. In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: March 21, 2013.

D.H. Sulouff,

Bridge Section Chief, Eleventh Coast Guard District.

[FR Doc. 2013–07572 Filed 4–1–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AO01

Grants for Transportation of Veterans in Highly Rural Areas

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) amends its regulations to establish a new program to provide grants to eligible entities to assist veterans in highly rural areas through innovative transportation services to travel to VA medical centers, and to otherwise assist in providing transportation services in connection with the provision of VA medical care to these veterans, in compliance with section 307 of title III of the Caregivers and Veterans Omnibus Health Services Act of 2010. This final rule establishes procedures for evaluating grant applications under the new grant program, and otherwise administering the new grant program.

DATES: *Effective date:* This rule is effective May 2, 2013.

FOR FURTHER INFORMATION CONTACT: David Riley, Director, Veterans Transportation Service, Chief Business Office (10NB), Veterans Health Administration, Department of Veterans Affairs, 2957 Clairmont Road, Atlanta, GA 30329, (404) 828–5601. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On December 30, 2011, VA published in the **Federal Register** (76 FR 82212) a proposal to amend VA regulations to establish a grant program to provide innovative transportation options to veterans in highly rural areas, to comply with section 307 of title III of the Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law 111–163. Subsection (a) of section 307 mandates that VA award grants to only State veterans service agencies (SVSAs) and Veterans Service Organization (VSOs) to assist veterans in highly rural areas to travel to VA medical centers, and to otherwise assist in providing transportation in connection with the provision of VA medical care to these veterans. This final rule establishes the grant program in accordance with subsection (a) of section 307, and establishes procedures for evaluating grant applications and otherwise administering the grant program in accordance with subsection (b) of section 307.

Interested persons were invited to submit comments to the proposed rule on or before February 28, 2012, and we received 17 comments. All of the issues raised by the commenters can be grouped together by similar topic, and we have organized our discussion of the comments accordingly. For the reasons set forth in the proposed rule and below, we are adopting the proposed rule as final, with changes to §§ 17.701, 17.703, 17.705, 17.715, and 17.725 and the authority citations following the regulations in this rulemaking.

Comments Regarding the Limitation on Entities That Are Eligible To Receive Grants

Multiple commenters objected to the proposed rule's limitation that only VSOs and SVSAs may receive grants. These commenters contended that this limitation would block many existing transportation providers from receiving grants to expand current veterans' transportation services, to the detriment of veterans generally. Commenters asserted that making grants available to any existing transportation provider would ensure that grants would be used more effectively because VSOs and SVSAs that receive grants would only be duplicating transportation services already offered to veterans by existing providers, and because VSOs and SVSAs do not have the expertise of existing transportation providers to access a particular area or transport that area's veterans. We make no changes to the rule based on these comments, because grantees are limited by section 307 to VSOs and SVSAs. Subsection (a)(2) of section 307 identifies as eligible grant recipients ''State veterans service agencies'' and ''Veterans service organizations.'' Subsection (a)(3) of section 307 further states that ''[a] State veterans service agency or veterans service organization'' may use grant funds for specified purposes. We interpret this statutory language to bar VA from awarding grants to any entity other than a VSO or SVSA.

To more specifically address commenter concerns regarding duplicated services and lack of grantee expertise, we note that most commenters seemed to assume that VSOs and SVSAs that receive grants would not themselves be existing transportation providers. However, we know of several VSOs and SVSAs that provide transportation services. Moreover, the rule contains scoring criteria to reward coordination between grantees and other transportation providers (including existing providers that may not qualify to receive grants), and rewarding this type of coordination assists in addressing the general concerns of duplicated services and lack of grantee expertise. See § 17.705(a)(3). Discussion of these coordination criteria, as well as discussion of why VSOs and SVSAs would not merely be duplicating existing transportation services, are provided in greater detail in the next section of this document. Generally, grantees may use grants to expand or augment the transportation services offered by transportation providers that may not qualify as grantees under the rule, or otherwise may use such entities to provide the transportation assistance that is established in a grantee's program, as long as all other criteria of the rule are met.

One commenter specifically asserted that section 307 could be interpreted in an ''innovative'' manner to allow a grant award to an organization such as a county-level agency within a State that is delegated responsibilities to serve veterans by an SVSA, based on the following language from section 307: ''The Secretary of Veterans Affairs shall establish a grant program to provide innovative transportation options to veterans in highly rural areas.'' Public Law 111–163, sec. 307(a)(1). We interpret the term ''innovative'' in section 307(a)(1), however, only as a modifier to describe the types of transportation options that may be provided to veterans in highly rural areas. We do not interpret the term as having any effect regarding the two defined eligible entities that may receive grants under section 307. The plain meaning of a ''State veterans service agency'' considers only State-level entities, and not a county agency within a State. However, under the same rationale provided above, this rule does not prevent an SVSA from using grant funds to administer transportation assistance through a county-level agency to carry out the objectives of the SVSA's grant application.

One commenter additionally stated that the rule should specifically permit non-profit organizations to apply for and receive grants. We reiterate that only VSOs and SVSAs may apply for and receive grants under section 307, but note that a majority of VSOs function as non-profit entities.

Comments Regarding Permitting Grantee Coordination With Entities That Are Not Eligible To Receive Grants

In conjunction with the comments objecting to limiting the grant recipients to VSOs and SVSAs, several commenters stated that the rule should permit, or even mandate, grantee coordination with entities that are not eligible to receive grants, primarily coordination with existing community transportation providers. Commenters argued that such coordination would prevent duplication of transportation services and ensure that experienced existing providers would be utilized, thereby maximizing the efficient provision of transportation services to veterans. As discussed above, nothing in the rule prevents a grantee from coordinating services with entities that are not eligible to receive grants, including other transportation providers. Generally, grantees may use grants to expand or augment the transportation services offered by entities that do not qualify as grantees under the rule, or otherwise may use such entities to provide the transportation assistance that is established in a grantee's program, as long as all other criteria of the rule are met. In fact, scoring criteria in § 17.705(a)(3) encourage and reward coordination with existing transportation providers, by permitting up to 20 additional points to be awarded for an application that shows such coordination.

Although the proposed rule did not prohibit grantees from using grant funds to administer grant programs through other entity types, we recognize that several commenters seemed to misunderstand this point. Therefore, we make clarifying changes to §§ 17.701, 17.703, 17.705, and 17.715. First, we are adding to § 17.701 a definition of ''subrecipient'' to refer to ''an entity that receives grant funds from a grantee to perform work for the grantee in the administration of all or part of the grantee's program.'' We believe ''subrecipient'' clearly covers all entity types that are not eligible to receive grants but that nonetheless may receive grant funds from grantees to administer all or part of the grantees' programs. One commenter noted that this rule should permit ''subcontracting'' relationships to achieve this same end; the revision to include consideration of ''subrecipient'' relationships covers subcontracted relationships between grantees and other entities.

Second, §§ 17.703, 17.705, and 17.715 are revised to clarify that subrecipients as defined in § 17.701 may receive grant funds from grantees; to ensure that subrecipients are identified in grant applications and grant agreements as applicable for application scoring and grant award purposes; and to make any identified subrecipients subject to the same standards as a grantee under this rule. We note that under applicable regulations that control grant agreements between VA and other entities, subrecipients of grant funds may be subject to certain standards under 38 CFR parts 43 and 49. See 38 CFR 43.37 and 38 CFR 49.5. A new paragraph (d) is added to § 17.703 as proposed to permit grantees to provide grant funds to other entities, if such entities are identified as subrecipients in grant applications to perform work for grantees in the administration of all or part of grantees' programs. The language ''or identified subrecipient'' is added to paragraphs (a)(1)(i), (c)(1)(i), (c)(1)(ii), and (c)(2)(i) of § 17.705, related to grant application scoring and grant selection procedures. Paragraph (a)(2) of § 17.715 as proposed is redesignated to paragraph (a)(3), and a new paragraph (a)(2) is added to § 17.715 as proposed to ensure that if a subrecipient is identified in the grant application, such subrecipient must operate the program in accordance with the provisions of this section and the grant application. The language ''or identified subrecipient'' is added to § 17.715(a)(3)(i) and (ii), related to specific requirements when grant funds are used to procure or operate vehicles. The language ''and identified subrecipients'' is added to paragraphs (b), (b)(1), and (b)(2) of § 17.715 as proposed, related to additional requirements for VA grants.

Comments Regarding Mandating Grantee Coordination With Entities That Are Not Eligible To Receive Grants

We generally agree with commenters that asserted that coordination between grantees and other transportation providers may create more efficient programs. For instance, a grantee partnering with an existing transportation provider to augment or expand the services of that provider could allow for the relatively small amount of funds issued per grant to be used as effectively as possible. As an example, such partnering may preclude the need for a grantee to acquire a fleet of vehicles. Additionally, grantee coordination with existing transportation providers may assist grantees in developing relevant expertise in the provision of transportation services to a particular area and for that area's veterans, if grantees do not already have such experience. However, we do not believe the rule should mandate grantee coordination with any other transportation provider because such a mandate could also ultimately restrict grantees in the planning and administration of their own programs in accordance with the criteria of section 307. For instance, grantee programs under section 307 must be focused on the provision of transportation assistance to veterans in connection with the receipt of medical care, and forced coordination between a grantee and an existing transportation provider could divert grant resources to the transportation of non-veterans or for purposes other than the receipt of medical care. For example, some of the existing transportation providers described by commenters regularly provide transportation services in a broader context and to a broader population of participants than permitted under section 307.

A primary reason put forth by commenters in support of mandatory coordination was that VSOs and SVSAs might use grant funds to duplicate services that already exist, and mandatory coordination would maximize efficiency of such existing programs instead of creating new, potentially redundant programs. We believe this assertion as advanced by commenters assumes that all VSOs and SVSAs seeking grant funds would not themselves already be transportation providers. However, as stated above, we know of several VSOs and SVSAs that offer transportation services, so mandatory coordination with other transportation providers would not be necessary for these grantees. In addition, commenters' insistence on mandatory coordination could apply only in areas that already receive transportation services. The rule's very restrictive population requirement for ''highly rural areas,'' however, ensures that only the most sparsely populated areas may receive grants. By virtue of their lower population rate, these areas tend to have the least developed community resources, and therefore are not likely serviced by existing transportation providers. To this point, commenters who offered examples of existing

transportation services that would be duplicated by VSOs and SVSAs did not assert that such duplication would occur in areas consisting of a county or counties with less than seven people per square mile, as required by section 307 and this rule. Instead, commenters offered many examples of merely rural but not ''highly'' rural areas where duplication would occur if VSOs and SVSAs were to provide additional transportation services via grants awarded under this rule.

It should also not be assumed that VSOs and SVSAs will merely duplicate the services of existing transportation providers because VSOs and SVSAs will be required to provide transportation for the specific, restricted purpose of increasing veteran access to medical care, and not for the more general purpose of improving the access of a community at large to services that may include medical care. Indeed, commenters who asserted that existing transportation services would be duplicated by VSOs and SVSAs did not also assert that these existing services were only for veterans and only in connection with the provision of VA medical care; rather, these commenters provided examples of existing transportation providers that transported non-veterans as well as veterans, and for purposes other than to receive medical care.

Some commenters argued that grantee coordination with existing transportation groups should be mandatory because such coordination is required under Executive Order 13330, Human Service Transportation Coordination. Executive Order 13330 mandates coordination efforts between certain Federal agencies, including VA, and community transportation systems ''to enhance access to transportation to improve mobility, employment opportunities, and access to community services for persons who are transportation-disadvantaged.'' 69 FR 9185 (Feb. 26, 2004). One commenter provided a copy of a VA Information Letter 10–2007–006, dated March 2, 2007, which states that pursuant to Executive Order 13330, VA, as part of a Federal Interagency Transportation Coordinating Council on Access and Mobility, adopted a policy statement that resolved as follows:

> Federally-assisted grantees that have significant involvement in providing resources and engage in transportation delivery should participate in a local coordinated human services transportation planning process and develop plans to achieve the objectives to reduce duplication, increase service efficiency and expand access for the transportation-disadvantaged populations as stated in Executive Order 13330.

Although we recognize the enforceability of an Executive Order as law, as well as VA's resolution to follow Executive Order 13330 as referenced above, this rulemaking is controlled by section 307, which is a separate legislative mandate to which Executive Order 13330, which establishes an interagency coordinating council on transportation issues, does not apply. Additionally, the purposes of Executive Order 13330 and section 307 are so dissimilar that Executive Order 13330 should not be interpreted as relevant to the implementation of section 307. For instance, Executive Order 13330 seeks to ''improve mobility, employment opportunities, and access to community services'' for certain persons, which is a much different scope for transportation services than to provide transportation assistance for veterans living in highly rural areas to receive VA medical care, as authorized by section 307. See Public Law 111–163, § 307(a)(3) (setting forth that grant funds are to be used to ''assist veterans in highly rural areas to travel to Department of Veterans Affairs medical centers'' and ''otherwise assist in providing transportation in connection with the provision of medical care to veterans in highly rural areas''). The population of individuals to be assisted by Executive Order 13330 is also different than the specific veteran population intended to be assisted by section 307, as Executive Order 13330 mandates coordination to support ''persons who qualify for Federally conducted or Federally assisted transportation-related programs or services due to disability, income, or advanced age.'' 69 FR 9185 (Feb. 26, 2004). Assuming for the sake of argument the applicability of Executive Order 13330 to this grant program, the Executive Order could be read to apply irrelevant criteria, requiring veteran participants to have a disability, have a lower income, or be of an advanced age. Nothing in section 307 imposes any such requirements on veteran-participants. For these reasons, we do not find Executive Order 13330 relevant to this rulemaking and do not make any changes based on these comments.

Comments Regarding Use of Grants Exclusively To Augment or Expand Existing Transportation Services

Multiple commenters noted that grant funds would be best used if they were only permitted to supplement or augment the services offered by existing transportation providers, and that grant funds should not be used to create any new transportation services. We reiterate that while coordination with existing transportation providers is encouraged, grants may only be awarded to VSOs and SVSAs, and the rule will not restrict any grantee from using grant funds to initiate transportation services in accordance with the rule's criteria.

In particular, one commenter stated that grant funds would be best used to increase the use of technology to make existing transportation services more easily accessible for veterans, and to ensure these services were provided as efficiently as possible. One example of such technology as provided by the commenter was using grant funds to establish a ''one call'' center to centralize transportation requests and dispatch transportation services of existing providers. We make no changes based on this comment. Grants may be used to supplement or expand existing technology or create new technology that assists with the delivery of transportation services, versus actually transporting veterans. We reiterate from the proposed rule that section 307 supports awarding grants for programs that may not directly transport veterans, as subsections (a)(3)(A) and (a)(3)(B) of section 307 make clear that an eligible entity may use grant funds to ''assist'' veterans to travel to obtain VA medical care, or to otherwise ''assist'' in providing transportation in connection with the provision of care to a veteran. Accordingly, the rule defines ''transportation services'' to mean ''the direct provision of transportation, or assistance with providing transportation, to travel to VA medical centers and other VA or non-VA facilities in connection with the provision of VA medical care.''

A few commenters asserted that the money that is authorized to be appropriated in subsection (d) of section 307 for VA to administer this grant program should be utilized instead to supplement or expand existing VA transportation programs. Specifically, one commenter stated that no data existed to support using funds for this grant program rather than supplementing other existing VA programs, and called on VA to use funds designated in subsection (d) of section 307 to increase fleet vehicles and staffing levels in the Veterans Transportation Service (VTS), and to supplement monetary benefits certain veterans may receive under the VA Beneficiary Travel Program. We make no changes based on these comments, as the grant program objectives have been defined by Congress and VA is not an authorized recipient of grant funds

under section 307. In response to another commenter, it is for this same reason that VA may not use funds to be appropriated under section 307 to expand transportation-specific needs in non-transportation VA programs, such as VA transitional housing programs.

Comments in Support of Using Vehicles Purchased With Grant Funds To Transport Non-veterans, or for Purposes Other Than in Connection With Receiving Medical Care.

One commenter stated that the rule should permit vehicles purchased with grant funds to be used to transport individuals, including non-veterans, in connection with activities other than receiving medical care, during the vehicle's idle time or when the vehicle has unused capacity. This commenter contended that such use of vehicles purchased with grant funds would maximize vehicle effectiveness for the benefit of a highly rural area's community at large, and further was required by Executive Order 13330.

As noted above, Executive Order 13330 does not—and should not—control our implementation of section 307. We also note, however, that under applicable regulations that govern grant agreements between VA and other entities, grantees may be required to make equipment procured with grant funds available for use on other projects. See 38 CFR 43.32(c)(2) and 38 CFR 49.34(d) (requiring grantees to make equipment acquired under a grant available for use on other projects or programs supported by the Federal government, provided such use will not interfere with the project or program for which the equipment was originally acquired). This rule already mandates this alternate use requirement for grantees, and subjects SVSAs and VSOs to all other applicable provisions in 38 CFR parts 43 and 49, in § 17.715(b)(1) and (b)(2). See § 17.715(b)(1)–(b)(2) (applying administrative grant requirements under 38 CFR part 43 to SVSAs, and requirements under 38 CFR part 49 to VSOs). The opportunity for grantees to use vehicles procured with grant funds for other programs, in line with these other controlling regulations regarding grant agreements, is therefore covered in the rule and no changes are necessary pursuant to this comment.

Although we note that other applicable regulations may permit the use of certain grantee vehicles for other programs, section 307 is clear that grant funds are to be used to ''assist veterans in highly rural areas to travel to Department of Veterans Affairs medical centers'' and ''otherwise assist in providing transportation in connection with the provision of medical care to veterans in highly rural areas.'' Public Law 111–163, sec. 307(a)(3). However, unlike Executive Order 13330, 38 CFR parts 43 and 49 are directly applicable to the grant program mandated by section 307, and as such the rule makes grantees subject to these applicable regulations.

In addition to the general comment concerning vehicles procured with grant funds, one commenter stated that the rule should specifically permit grant funds to be used to transport veterans in connection with employment activities (e.g., job seeking, commuting). We make no changes to the rule based on this comment, but reiterate that 38 CFR parts 43 and 49 permit certain equipment purchased with grants funds to be used to support other Federal programs, in line with the criteria in these other applicable regulations. To the extent such other Federal programs may be related to veteran employment activities, it is possible that vehicles procured with grants under this rule may be used as the commenter suggested, in accordance with 38 CFR parts 43 and 49.

Comment Regarding Transporting Non-veterans

In addition to comments that requested that grants be used to support existing transportation programs for the benefit of communities at large and comments related to the use of vehicles specifically for the community at large, one commenter specifically requested clarification on whether the rule permits a grantee to transport a non-veteran. We reiterate our discussion above that while we generally do not believe Congress intended these funds to be used to transport non-veterans, there may be instances where certain vehicles procured with grant funds could be used to support other Federal programs, potentially to transport non-veterans. This particular comment highlighted the fact that there is no definition of ''veteran'' in the rule. We therefore amend § 17.701 to include a definition of ''veteran'' to mean ''a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.'' This definition is consistent with 38 U.S.C. 101(2) and other VA regulations, and we believe it is commonly understood among VSOs, SVSAs, and veterans who would be seeking transportation. We also amend § 17.701 to clarify that the definitions therein apply to all of the sections establishing this grant program.

Comments Regarding the Rule's Criteria for a ''Highly Rural Area''

Multiple commenters contended that the rule's criteria regarding a ''highly rural area'' failed to account for all areas in need of transportation services, or the extent to which such areas may need transportation services. Commenters asserted that these criteria should be revised, and we address below specific suggestions for revisions. Generally, we make no changes based on these comments, as many of the suggested revisions are contrary to section 307.

A majority of commenters argued that the definition of a ''highly rural area'' was too restrictive because factors other than population density can contribute to veterans' difficulty obtaining transportation, or can create a greater need for such transportation. The factors cited by commenters included areas in which there is widespread low economic status or financial need; high concentrations of residing veterans; older age or other characteristics, such as physical disabilities, which can make accessing transportation difficult; and geographic barriers to transportation such as land formations or bodies of water. Although we do not disagree that these factors may create a need for transportation services in an area that does not meet the highly rural definition in the rule, under section 307 Congress mandated that only areas that consist of a county or counties having a population of less than seven persons per square mile may be serviced by grantees. See Public Law 111–163, sec. 307(c)(1).

Other commenters did not necessarily contend that the rule should permit VA to award grants to service areas that do not meet the definition of ''highly rural,'' but maintained that the rule's criteria did not assess the need for transportation services even among communities that meet the regulatory definition of a highly rural area. These commenters urged that certain factors such as the number of veterans in any given highly rural area, and such veterans' actual need for VA medical care, should be determinative for purposes of application scoring and awarding of grants. We interpret these comments to argue that greater weight should be given to these factors so that grants could be maximized for only those areas where the most veterans actually reside, and for those areas where the most medical need exists. We make no changes based on these comments. First, nothing in the plain language or legislative history of section 307 compels VA to prioritize awarding grants in this manner. Although it may

be argued that the most efficient use of government resources would be to focus grant awards to areas with the most concentrated need, we believe that the language of section 307 that specifically defines ''highly rural'' as fewer than seven persons per square mile seeks to ensure that any veteran in any highly rural area can receive transportation assistance to receive VA medical care, without regard to how many other veterans may be residing in the area, or the relative medical need of any other veteran. The restrictive population requirement of less than seven persons per square mile indicates that section 307 was not intended to require devotion of grant resources to areas with a high concentration of people, or a high concentration of veterans. Additionally, although section 307 requires that veterans be transported in connection with the provision of medical care, it does not specify any medical need-based criteria. Therefore, we implement section 307 in a manner that will increase access to VA medical care for any veteran in a highly rural area, without regard to that veteran's proximity to other veterans or medical need in relation to the needs of other veterans.

One commenter argued that the rule should consider the relative difficulty of establishing transportation services or transportation programs in certain highly rural areas, and factor such difficulty into the scoring criteria and the amount of grant funds awarded. The commenter stated that the current scoring criteria favored those areas where transportation services can be planned and delivered more ''easily,'' and that certain highly rural areas that are more remote or more difficult to access should be given additional scoring considerations and should receive greater funding. To the extent that the commenter believes that any highly rural area as defined in the rule is easily accessible for purposes of planning or establishing transportation services, we disagree. We believe the narrow definition of a highly rural area creates a presumption that no such qualified area is necessarily easily accessible, because the extremely sparse population requirement likely means that such an area does not have well-developed community resources, to include transportation services. In essence, we believe many of these highly rural areas will be in equivalent standing with regards to accessibility, because many of these areas do not have well-developed transportation services, and in turn are generally not easily accessible by transportation thoroughfares.

However, if certain highly rural areas may be more remote or more difficult to access than others, we believe that the rule considers such relative difficulty with planning and delivering transportation services in § 17.705(a)(4). For instance, § 17.705(a)(4) provides for up to 10 points to be awarded on a grantee application based on the innovative aspects of a program, such as the grantee's use of alternative transportation resources. This particular scoring criterion would be advantageous to any grantee that may in fact need to use non-conventional and alternative transportation methods, specifically because of an area's remoteness or difficulty to access. For instance, taking from examples provided by this commenter, if certain highly rural areas could only be accessed by planes or boats, the need for these non-conventional transportation methods (non-conventional in the context of public transportation), as stated in the application, would allow the grantee to actually score additional points over those areas that may be considered more ''easily'' accessible (i.e., already accessible by transportation thoroughfares).

The current scoring criteria do not give an undue advantage to any highly rural area over another, because any program that is well planned and proposes to provide transportation services effectively will score well. To address the portion of the comment related to the amount of grant funding an area should receive relative to how ''easily'' transportation services may be established, we assume that grantees will be requesting varying amounts up to and including the maximum $50,000 amount based on their individual program's needs. VA will not be administering $50,000 as a blanket amount for all grants. The grant application requests a detailed explanation of the program's budget and how the requested amount of funds will be sufficient to completely implement the program, as required under § 17.705(a)(1)(ii) in this rule. We do not make any changes based on this comment.

Comments Regarding the Types of Facilities to Which Veterans May Be Transported in Connection With the Receipt of Medical Care

A few commenters stated that the rule should not limit transportation services only to or from VA facilities, but should permit transportation to and from non-VA facilities that provide care for which VA contracts. We agree with commenters that necessary and preapproved care that is furnished in non-VA facilities may be essential for some veterans in certain rural areas where the nearest VA facility is inaccessible. The definition of ''transportation services'' in the rule does not limit transportation only to VA facilities, but rather indicates that the care to be received must be VA medical care. See § 17.701. However, we only referred to ''VA facilities'' in the explanatory portion of the proposed rulemaking, and we understand how this could lead the public to conclude that transportation services may be provided only to VA facilities. To clarify, our intent is to include medical care that is authorized by VA, regardless of whether it is furnished in a VA facility. Accordingly, we clarify the definition of ''transportation services'' in § 17.701 to mean ''the direct provision of transportation, or assistance with providing transportation, to travel to VA medical centers and other VA or non-VA facilities in connection with the provision of VA medical care.'' We additionally clarify that under the rule, transportation may be provided to and from any VA health care facility (such as a VA Community Based Outpatient Clinic) and is not limited to VA medical centers. Further, such facilities need not be within the same state that a veteran resides, as there is nothing in section 307 that could be interpreted to restrict transportation in this way.

We agree with the commenter that the rule can more clearly state that for purposes of this rule ''VA'' medical care includes not only that which VA provides directly but also that which VA authorizes to be furnished in non-VA facilities. Therefore, we revise the definition of the phrase ''[p]rovision of VA medical care'' in § 17.701 to include reference to sections 1703 and 8153 of title 38, United States Code, which are the statutes that permit VA to contract to furnish specified care to eligible veterans at non-VA facilities. The revision will read as follows: ''[p]rovision of VA medical care means the provision of hospital or medical services authorized under sections 1710, 1703, and 8153 of title 38, United States Code.''

One commenter requested clarification on whether grantees may provide vouchers for veterans to travel to the ''nearest health care center,'' and provided examples of VA and non-VA facilities as the nearest health care centers. We interpret this comment to be asking both about the types of facilities to which veterans may be transported, and also whether grants may be used to

administer transportation programs that provide vouchers or other types of payment directly to veterans. To address the portion of the comment related to the types of facilities to which veterans may be transported, we (1) clarified the definition of ''transportation services'' in § 17.701 to provide that under the rule medical care that VA authorizes to be furnished in non-VA facilities is also considered to be ''VA'' medical care, and (2) underscore that grantees should only provide transportation in connection with VA medical care as defined in this rule. To address the portion of the comment related to whether grants may be used to provide vouchers or other types of payment directly to veterans to pay for transportation, we make no changes to the rule, as we believe direct payment to veterans through vouchers to obtain transportation is not the intent of section 307. Vouchers or other forms of direct payment to veterans to obtain transportation services in highly rural areas would require that adequate transportation services already exist in such areas to accept payment, which we reiterate is not likely due to the very sparse population requirement imposed by section 307. Additionally, providing vouchers or other direct payment to veterans to obtain transportation would be basing transportation assistance on a veteran's relative ability to pay for transportation services generally, although section 307 does not contain any criteria related to a veteran's ability to pay for transportation—for instance, there is no income requirement in section 307.

Section 307 instead bases transportation assistance on the relative remoteness of a geographic area, and consequently assumes due to this remoteness that veterans will need assistance accessing medical care. Finally, we note that VA already assists eligible veterans with the cost of transportation associated with their obtaining VA care under VA's Beneficiary Travel Program. See 38 CFR part 70. We recognize that not all veterans are eligible for beneficiary travel benefits. However, we still make no changes to the rule because the use of grant funds for monetary travel assistance would be duplicative of existing VA programs.

We also received a comment regarding whether transportation assistance under this rule is only available to ''low-income people.'' We clarify that transportation assistance is not limited to veterans with a low income. Although we note that this rule specifically prevents a veteran from being charged for transportation assistance provided by grantees, the prohibition on veterans being charged is not based on a veteran's relative ability to pay for transportation, but rather ensures that veterans can have as much access to services provided by grantees as feasible regardless of their ability to pay. We make no changes based on this comment.

Comments Regarding the Need To Monitor Grantees and the Use of Grant Funds

Multiple commenters expressed concern that the rule must provide a means to monitor the use of grant funds and allow recoupment of such funds, as well as a means to monitor the efficacy of grantee programs, to ensure that funds are used appropriately and that veterans have adequate access to transportation services. We agree, and the rule prescribes multiple oversight mechanisms to ensure grant funds are used effectively to transport veterans in accordance with section 307. Section 17.725 as proposed required grantees to provide VA with quarterly fiscal reports on grant funds usage, and annual reports on program efficiency. These reports would provide VA with information necessary to analyze the performance of a grantee's program, and to ensure that grant funds are used appropriately and as specified in the grant agreement. VA's receipt of this and other information required to be reported in § 17.725 would indicate deficient and ineffective use of grant funds. Section 17.725(d) allows VA to request additional information, which would allow VA to conduct additional monitoring as necessary.

In response to commenters' concerns regarding the insufficiency of the monitoring criteria, however, we have revised § 17.725 to require quarterly, in addition to annual, reports to VA related to program efficacy to ensure more stringent monitoring of program efficacy and appropriate use of grant funds. We also revise the heading in § 17.725(a) so that it clearly refers to ''program efficacy reports,'' versus only an ''annual report.'' These revisions will assist VA in monitoring program effectiveness more consistently to ensure the efficient and effective use of grant funds so that veterans have access to and are satisfied with transportation services provided under this rule.

In the event that grant funds are not used in accordance with the requirements of the rule and as stated in grant agreements, § 17.730 allows VA to recover grant funds, and further prevents a grantee that misused funds from being issued a grant in the future. We believe the reporting requirements in § 17.725, in conjunction with VA's authority to recover grant funds and prevent the future awards of grants in § 17.730, create a means of monitoring grantees that ensures grant funds will be used effectively to provide veterans with access to transportation services.

One commenter objected that the proposed rule did not set forth the yearly funding limitations for this grant program as indicated in subsection (d) of section 307, and expressed concern that this lack of information in the rule was suspect, and created a risk of excess expenditures to the detriment of the program. The omission of funding limitations from the regulation text was intentional. These restrictions have no bearing on the actual amounts that are authorized to be appropriated for this program under subsection (d) of section 307. See Public Law 111–163, sec. 307(d). As stated in the proposed rule, not including the funding limitation or the limited funding years prevents this rule from appearing to be restricted or ceased beyond fiscal year 2014. Section 307 is not designated by Congress to be a pilot program, and the law does not otherwise contain a provision that it will cease to have effect after a specific date unless extended. If funding is not available to extend the program beyond 2014, we will not publish a subsequent Notice of Fund Availability in the **Federal Register** for that following fiscal year, and we will amend our regulations to remove the rule from the Code of Federal Regulations if it is clear that additional grant funds will not be provided at any future date.

Comments Regarding the Award of Only One Grant per Highly Rural Area, per Fiscal Year

One commenter objected to the criterion in § 17.702(a) that only one grant may be awarded per highly rural area to be serviced by a grantee. This commenter stated that allowing only one grantee to service a highly rural area essentially permits a grantee to monopolize the transportation services for veterans in that area, and that this creates the potential for the delivery of substandard services. We disagree, as we believe the reporting requirements and ability to recover grant funds that are authorized by §§ 17.725 and 17.730 would prevent any grantee from continuously providing poor service. We reiterate from the proposed rule that we instituted the limitation to one grant per highly rural area to ensure that as many areas are serviced as possible, for the benefit of all veterans that live in these areas across the country.

One commenter contended that grants should be awarded for more than one

year at a time, although this commenter did not provide a reason for expanding individual grants beyond a one-year duration. In response we restate from the proposed rule that grants are funded for one year to ensure that grant funds are awarded only as funding is available, in accordance with subsection (d) of section 307. See Public Law 111–163, sec. 307(d) (indicating that there is authorized to be appropriated only a limited amount of funds per fiscal year). Provided funding is available, grantees may reapply for grant funds under § 17.705(c) and (d), which permit renewal grant applications and selections for grantees to provide transportation services to veterans continuously in successive years.

Comments Related to Grantee Compliance With the Americans With Disabilities Act and Department of Transportation Regulations

One commenter noted that the rule failed to articulate the responsibilities of grantees under the Americans with Disabilities Act (ADA) and implementing Department of Transportation (DOT) regulations. We recognize that grantees and subrecipients may be subject to DOT regulations that implement certain transit requirements under the ADA, and agree with the commenter that this rule should articulate the applicability of these requirements. We revise § 17.715(a)(3), which addresses the specific responsibilities of grantees who procure or operate vehicles with grant funds, to add a new clause (v) to mandate that such vehicles be operated in accordance with applicable DOT regulations concerning transit requirements under the ADA. We note that although VA has no authority to enforce compliance with these other laws and regulations, this revision will permit VA to take action against a grantee for noncompliance with a grant agreement.

Revisions to Correct Inconsistent Use of Paragraph Headings

Paragraph (a)(2) in § 17.715 as proposed was designated by the heading ''[p]rocurement and operation of vehicles.'' A descriptive heading such as this may be used in paragraphs within regulations to emphasize or organize information, but should be used consistently to ensure clarity for the reader. However, paragraph (a)(1) of § 17.715 as proposed did not contain such a heading. Therefore, to ensure consistent use of paragraph headings in § 17.715(a), we amend § 17.715(a)(2) as proposed to remove the heading ''[p]rocurement and operation of vehicles.'' We restate that § 17.715(a)(2) as proposed is also redesignated as paragraph (a)(3) because we have added a new paragraph (a)(2) to address subrecipients. Removing the heading from § 17.715(a)(2) as proposed does not substantively affect the obligation of grantees to ensure certain conditions are met if funds are used to procure or operate vehicles. Additionally, because redesigated paragraph (a)(3) retains the phrase ''procure or operate vehicles,'' it remains very clear what type of information is contained in the paragraph.

Paragraphs (a), (b), and (c) of § 17.725 as proposed were all designated by headings; however, paragraph (d) was not so designated. Under the same rationale expressed above, we amend § 17.725(d) as proposed to add the heading ''Additional reporting.''

Revisions To Correct Non-parallel Structure

In order to establish a parallel structure between paragraphs (a)(1), (a)(2), and (a)(3) in § 17.715, we have removed the phrase ''the grantee agrees to'' in the last sentence of paragraph (a) which leads into paragraphs (a)(1), (a)(2), and (a)(3). The removal of the phrase ''the grantee agrees to'' in § 17.715(a) will have no substantive effect on any of the further obligations under the proceeding paragraphs under § 17.715(a). We also revise the beginning of paragraph (a)(1) in § 17.715 as proposed to add the phrase ''[t]he grantee must,'' so that the subject of § 17.715(a)(1) remains the grantee.

Paragraphs (a)(1) through (a)(2) of § 17.715 as proposed were intended to be items in a series, in the same part of speech or the same type of phrase, and therefore should have been drafted in parallel structure. To reiterate, proposed § 17.715(a)(2) is redesignated in this rule as § 17.715(a)(3). To maintain parallel structure in the rule, we revise redesignated § 17.715(a)(3) to make sense with revised § 17.715(a), and to be parallel with new § 17.715(a)(2), so that it is clear that each paragraph under § 17.715(a) consistently and clearly refers to obligations of a grantee or subrecipient. Redesignated § 17.715(a)(3) will require that ''[i]f a grantee's application identified that funds will be used to procure or operate vehicles to directly provide transportation services,'' certain specified requirements must be met. The listed requirements are set forth in § 17.715(a)(3)(i) through (v). To maintain parallel structure, we also revise paragraphs (ii) and (iv) of redesignated § 17.715(a)(3) to consistently use the word ''must'' instead of the words ''shall'' and ''will,'' respectively.

Non-significant Changes to §§ 17.700, 17.701, and 17.703

Section 17.700 as proposed stated that ''[t]his section establishes the Grants for Veterans Service Organizations for Transportation of Veterans in Highly Rural Areas program,'' which misidentified VSOs as the only entities for which grants would be administered. We revise § 17.700 to remove the phrase ''for Veterans Service Organizations.'' This is not a significant change because the proposed rule was clear that grants could be administered to both VSOs and SVSAs in accordance with section 307.

Sections 17.701 and 17.703 mistakenly pluralized VSOs and SVSAs when describing them within the meaning of the singular subject ''eligible entity.'' We revise §§ 17.701 and 17.703 to refer to ''[a] Veterans Service Organization'' and ''[a] State veterans service agency'' with no substantive change. We note that more than one single VSO and one single SVSA may receive a grant under this program per year, as contemplated in and consistent with the proposed rule.

We also clarified the authority citations for the regulations in this rulemaking by specifying section 307 of Public Law 111–163.

For all the reasons noted above, VA is adopting the rule as final with changes as noted to §§ 17.701, 17.703, 17.705, 17.715, and 17.725.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. According to the 1995 amendments to the Paperwork Reduction Act, 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.

This final rule will impose new information collection requirements in the form of an application to receive grant funds, and reporting requirements to retain grant funds to include surveys for completion by veteran participants. On December 30, 2011, in a proposed rule published in the **Federal Register**, we requested public comments on the new collections of information. We received one comment in response to this notice, which advocated that VA should enforce more stringent monitoring of program efficacy and appropriate use of grant funds. The response, as also stated in the preamble to this final rule, is that we agree and have increased the frequency of efficacy reporting requirements in § 17.725(a) to be quarterly, as well as annually. As required by the Paperwork Reduction Act of 1995, VA has submitted these information collections to OMB for its review. OMB approved these new information collection requirements associated with the final rule and assigned OMB control numbers 2900–0790, and 2900–0770

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. We do not believe that many small entities such as independently owned taxi cab services or other small transportation businesses frequently or routinely access highly rural areas as defined in the rule, or that such access is often for the express purpose of transporting veterans to VA medical centers or transporting veterans in connection with receiving VA medical care. We believe that veterans in these highly rural areas who must pay for transportation services to receive medical care would seek more conveniently located non-VA care, versus VA care that may require traveling greater distances. There will be no economic impact on any of the eligible entities, as they are not required to provide matching funds to obtain a grant as stated in section 307. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a ''significant regulatory action'' requiring review by OMB as ''any regulatory action that is 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 this Executive Order.''

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.009, Veterans Medical Care Benefits; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; and 64.035, Veterans Transportation Program.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on January 28, 2013, for publication.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Medical devices, Mental health programs, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: March 28, 2013.

Robert C. McFetridge,

Director of Regulations Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, VA amends 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

■ 2. Amend part 17 by adding the undesignated center heading ''GRANTS FOR TRANSPORTATION OF VETERANS IN HIGHLY RURAL AREAS'' and §§ 17.700 through 17.730 to read as follows:

GRANTS FOR TRANSPORTATION OF VETERANS IN HIGHLY RURAL AREAS

Sec.
17.700 Purpose and scope.
17.701 Definitions.
17.702 Grants—general.
17.703 Eligibility and application.
17.705 Scoring criteria and selection.
17.710 Notice of Fund Availability.
17.715 Grant agreements.
17.720 Payments under the grant.
17.725 Grantee reporting requirements.
§ 17.730 Recovery of funds by VA.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501 and as noted in specific sections)

§ 17.700 Purpose and scope.

This section establishes the Grants for Transportation of Veterans in Highly Rural Areas program. Under this program, the Department of Veterans Affairs (VA) provides grants to eligible entities to assist veterans in highly rural areas through innovative transportation services to travel to VA medical centers,

and to otherwise assist in providing transportation services in connection with the provision of VA medical care to these veterans.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.701 Definitions.

For the purposes of §§ 17.700–17.730 and any Notice of Fund Availability issued pursuant to such sections:

Applicant means an eligible entity that submits an application for a grant announced in a Notice of Fund Availability.

Eligible entity means:

(1) A Veterans Service Organization, or

(2) A State veterans service agency.

Grantee means an applicant that is awarded a grant under this section.

Highly rural area means an area consisting of a county or counties having a population of less than seven persons per square mile.

Notice of Fund Availability means a Notice of Fund Availability published in the **Federal Register** in accordance with § 17.710.

Participant means a veteran in a highly rural area who is receiving transportation services from a grantee.

Provision of VA medical care means the provision of hospital or medical services authorized under sections 1710, 1703, and 8153 of title 38, United States Code.

State veterans service agency means the element of a State government that has responsibility for programs and activities of that government relating to veterans benefits.

Subrecipient means an entity that receives grant funds from a grantee to perform work for the grantee in the administration of all or part of the grantee's program.

Transportation services means the direct provision of transportation, or assistance with providing transportation, to travel to VA medical centers and other VA or non-VA facilities in connection with the provision of VA medical care.

Veteran means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

Veterans Service Organization means an organization recognized by the Secretary of Veterans Affairs for the representation of veterans under section 5902 of title 38, United States Code.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.702 Grants—general.

(a) *One grant per highly rural area.* VA may award one grant per fiscal year to a grantee for each highly rural area in which the grantee provides transportation services. Transportation services may not be simultaneously provided by more than one grantee in any single highly rural area.

(b) *Maximum amount.* Grant amounts will be specified in the Notice of Funding Availability, but no grant will exceed $50,000.

(c) *No matching requirement.* A grantee will not be required to provide matching funds as a condition of receiving such grant.

(d) *Veterans will not be charged.* Transportation services provided to veterans through utilization of a grant will be free of charge.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.703 Eligibility and application.

(a) *Eligible entity.* The following may be awarded a grant:

(1) A Veterans Service Organization.

(2) A State veterans service agency.

(b) *Initial application.* To apply for an initial grant, an applicant must submit to VA a complete grant application package, as described in the Notice of Fund Availability.

(c) *Renewal application.* Grantees may apply for one renewal grant per fiscal year, after receiving an initial grant, if the grantee's program will remain substantially the same. The grantee must submit to VA a complete renewal application as described in the Notice of Fund Availability.

(d) *Subrecipients.* Grantees may provide grant funds to other entities, if such entities are identified as subrecipients in grant applications to perform work for grantees in the administration of all or part of grantees' programs.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

(The Office of Management and Budget has approved the information collection requirement in this section under control number 2900–0790)

§ 17.705 Scoring criteria and selection.

(a) *Initial grant scoring.* Applications will be scored using the following selection criteria:

(1) VA will award up to 40 points based on the program's plan for successful implementation, as demonstrated by the following:

(i) Program scope is defined, and applicant has specifically indicated the mode(s) or method(s) of transportation services to be provided by the applicant or identified subrecipient.

(ii) Program budget is defined, and applicant has indicated that grant funds will be sufficient to completely implement the program.

(iii) Program staffing plan is defined, and applicant has indicated that there will be adequate staffing for delivery of transportation services according to the program's scope.

(iv) Program timeframe for implementation is defined, and applicant has indicated that the delivery of transportation services will be timely.

(2) VA will award up to 30 points based on the program's evaluation plan, as demonstrated by the following:

(i) Measurable goals for determining the success of delivery of transportation services.

(ii) Ongoing assessment of paragraph (a)(2)(i), with a means of adjusting the program as required.

(3) VA will award up to 20 points based on the applicant's community relationships in the areas to receive transportation services, as demonstrated by the following:

(i) Applicant has existing relationships with state or local agencies or private entities, or will develop such relationships, and has shown these relationships will enhance the program's effectiveness.

(ii) Applicant has established past working relationships with state or local agencies or private entities which have provided transportation services similar to those offered by the program.

(4) VA will award up to 10 points based on the innovative aspects of the program, as demonstrated by the following:

(i) How program will identify and serve veterans who otherwise would be unable to obtain VA medical care through conventional transportation resources.

(ii) How program will use new or alternative transportation resources.

(b) *Initial grant selection.* VA will use the following process to award initial grants:

(1) VA will rank those applications that receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability. The applications will be ranked in order from highest to lowest scores.

(2) VA will use the applications' ranking as the basis for awarding grants. VA will award grants for the highest ranked applications for which funding is available.

(c) *Renewal grant scoring.* Renewal applications will be scored using the following selection criteria:

(1) VA will award up to 55 points based on the success of the grantee's program, as demonstrated by the following:

(i) Application shows that the grantee or identified subrecipient provided transportation services which allowed participants to be provided medical care timely and as scheduled.

(ii) Application shows that participants were satisfied with the transportation services provided by the grantee or identified subrecipient, as described in the Notice of Fund Availability.

(2) VA will award up to 35 points based on the cost effectiveness of the program, as demonstrated by the following:

(i) The grantee or identified subrecipient administered the program on budget.

(ii) Grant funds were utilized in a sensible manner, as interpreted by information provided by the grantee to VA under § 17.725(a)(1) through (a)(7).

(3) VA will award up to 15 points based on the extent to which the program complied with:

(i) The grant agreement.

(ii) Applicable laws and regulations.

(d) *Renewal grant selection.* VA will use the following process to award renewal grants:

(1) VA will rank those applications that receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability. The applications will be ranked in order from highest to lowest scores.

(2) VA will use the applications' ranking as the basis for awarding grants. VA will award grants for the highest ranked applications for which funding is available.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.710 Notice of Fund Availability.

When funds are available for grants, VA will publish a Notice of Fund Availability in the **Federal Register**. The notice will identify:

(a) The location for obtaining grant applications;

(b) The date, time, and place for submitting completed grant applications;

(c) The estimated amount and type of grant funding available;

(d) The length of term for the grant award;

(e) The minimum number of total points and points per category that an applicant or grantee must receive in order for a supportive grant to be funded;

(f) The timeframes and manner for payments under the grant; and

(g) Those areas identified by VA to be the ''highly rural areas'' in which grantees may provide transportation services funded under this rule.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.715 Grant agreements.

(a) *General.* After a grantee is awarded a grant in accordance with § 17.705(b) or § 17.705(d), VA will draft a grant agreement to be executed by VA and the grantee. Upon execution of the grant agreement, VA will obligate the approved amount to the grantee. The grant agreement will provide that:

(1) The grantee must operate the program in accordance with the provisions of this section and the grant application.

(2) If a grantee's application identified a subrecipient, such subrecipient must operate the program in accordance with the provisions of this section and the grant application.

(3) If a grantee's application identified that funds will be used to procure or operate vehicles to directly provide transportation services, the following requirements must be met:

(i) Title to the vehicles must vest solely in the grantee or identified subrecipient, or with leased vehicles in an identified lender.

(ii) The grantee or identified subrecipient must, at a minimum, provide motor vehicle liability insurance for the vehicles to the same extent they would insure vehicles procured with their own funds.

(iii) All vehicle operators must be licensed in a U.S. State or Territory to operate such vehicles.

(iv) Vehicles must be safe and maintained in accordance with the manufacturer's recommendations.

(v) Vehicles must be operated in accordance with applicable Department of Transportation regulations concerning transit requirements under the Americans with Disabilities Act.

(b) *Additional requirements.* Grantees and identified subrecipients are subject to the following additional requirements:

(1) State veterans service agencies and identified subrecipients in the grant agreement are subject to the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments under 38 CFR part 43, as well as to OMB Circular A–87, Cost Principles for State, Local, and Indian Tribal Governments, and 2 CFR parts 25 and 170, if applicable.

(2) Veterans Service Organizations and identified subrecipients in the grant agreement are subject to the Uniform Administrative Requirements for Grants and Agreements With Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations under 38 CFR part 49, as well as to OMB Circular A–122, Cost Principles for Non-Profit Organizations, codified at 2 CFR part 230, and 2 CFR parts 25 and 170, if applicable.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.720 Payments under the grant.

Grantees are to be paid in accordance with the timeframes and manner set forth in the Notice of Fund Availability.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

§ 17.725 Grantee reporting requirements.

(a) *Program efficacy.* All grantees who receive either an initial or renewed grant must submit to VA quarterly and annual reports which indicate the following information:

(1) Record of time expended assisting with the provision of transportation services.

(2) Record of grant funds expended assisting with the provision of transportation services.

(3) Trips completed.

(4) Total distance covered.

(5) Veterans served.

(6) Locations which received transportation services.

(7) Results of veteran satisfaction survey.

(b) *Quarterly fiscal report.* All grantees who receive either an initial or renewal grant must submit to VA a quarterly report which identifies the expenditures of the funds which VA authorized and obligated.

(c) *Program variations.* Any changes in a grantee's program activities which result in deviations from the grant agreement must be reported to VA.

(d) *Additional reporting.* Additional reporting requirements may be requested by VA to allow VA to fully assess program effectiveness.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

(The Office of Management and Budget has approved the information collection requirements in this section under control numbers 2900–0709 and 2900–0770)

§ 17.730 Recovery of funds by VA.

(a) *Recovery of funds.* VA may recover from the grantee any funds that are not used in accordance with a grant agreement. If VA decides to recover funds, VA will issue to the grantee a notice of intent to recover grant funds, and grantee will then have 30 days to submit documentation demonstrating why the grant funds should not be recovered. After review of all submitted documentation, VA will determine whether action will be taken to recover the grant funds.

(b) *Prohibition of further grants.* When VA determines action will be taken to recover grant funds from the grantee, the grantee is then prohibited from receipt of any further grant funds.

(Authority: Sec. 307, Pub. L. 111–163; 38 U.S.C. 501)

[FR Doc. 2013–07636 Filed 4–1–13; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2012–0639; FRL–9795–4]

Approval and Promulgation of Air Quality Implementation Plans; Arkansas; Prevention of Significant Deterioration; Greenhouse Gas Tailoring Rule Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is taking final action to approve two revisions to the Arkansas State Implementation Plan (SIP) submitted by the Arkansas Department of Environmental Quality (ADEQ) to EPA on February 17, 2010, and November 6, 2012. The February 17, 2010, SIP revision to the Arkansas New Source Review (NSR) Prevention of Significant Deterioration (PSD) program updates the Arkansas SIP to incorporate by reference (IBR) requirements for the federal PSD permitting program under EPA's November 29, 2005 Phase 2 8-hour Ozone Implementation rule. The November 6, 2012, SIP revision to the Arkansas NSR PSD program provides the state of Arkansas with the authority to issue PSD permits governing greenhouse gas (GHG) emissions and establishes appropriate emission thresholds for determining which new stationary sources and modifications to existing stationary sources become subject to Arkansas's PSD permitting requirements for their GHG emissions. The November 6, 2012 SIP revision also defers until July 21, 2014, application of the PSD permitting requirements to biogenic carbon dioxide emissions from bioenergy and other biogenic stationary sources. EPA is approving the February 17, 2010, and November 6, 2012, SIP revisions to the Arkansas NSR PSD permitting program as consistent with federal requirements for PSD permitting. As a result of this approval, EPA is rescinding the GHG PSD Federal Implementation Plan (FIP) for Arkansas that was put in place on December 30, 2010, to ensure the availability of a permitting authority for GHG permitting in Arkansas. EPA is finalizing this action under section 110 and part C of the Act.

DATES: This final rule will be effective May 2, 2013.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2012–0639. All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. A 15 cent per page fee will be charged for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area on the seventh floor at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

The State submittals related to this SIP revision, and which are part of the EPA docket, are also available for public inspection at the Local Air Agency listed below during official business hours by appointment: Arkansas Department of Environmental Quality, 5301 Northshore Drive, North Little Rock, Arkansas 72118–5317.

FOR FURTHER INFORMATION CONTACT: Mr. Mike Miller (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–7550. Mr. Miller can also be reached via electronic mail at *miller.michael@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA.

Table of Contents

I. What is the background for this action?
II. What final action is EPA taking?
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I. What is the background for this action?

The background for today's final rule and the EPA's national actions pertaining to GHGs is discussed in detail in our January 11, 2013 proposal (see 78 FR 2354). The comment period was open for thirty days and no comments were received.

II. What final action is EPA taking?

We are approving Arkansas's February 17, 2010 SIP submittal, which updates the Arkansas SIP to incorporate by reference (IBR) requirements for the federal PSD permitting program under EPA's November 29, 2005 Phase 2 8-hour Ozone Implementation rule.

We are also approving Arkansas's November 6, 2012, SIP submittal, relating to PSD permitting requirements for GHG-emitting sources in Arkansas. Specifically, the SIP revision provides the state of Arkansas with the authority to issue PSD permits governing greenhouse gas (GHG) emissions and establishes appropriate emission thresholds for determining which new stationary sources and modifications to existing stationary sources become subject to Arkansas's PSD permitting requirements for their GHG emissions. The November 6, 2012, SIP revision also defers until July 21, 2014, application of the PSD permitting requirements to biogenic carbon dioxide emissions from bioenergy and other biogenic stationary sources.

EPA has made the determination that the February 17, 2010, and November 6, 2012, revisions to the Arkansas SIP for PSD permitting are approvable because the revisions were adopted and submitted as SIP revisions in accordance with the CAA and EPA regulations regarding PSD permitting for 8-hour ozone and GHGs. We are taking this final action today under section 110 and part C of the Act.

As explained in our January 11, 2013 proposal (see 78 FR 2354), as a result of today's action we are also rescinding the GHG PSD FIP for Arkansas at 40 CFR 52.37(b)(2). Therefore, as of the effective date of this final rule, the EPA will no longer be the PSD permitting authority for GHG-emitting sources in Arkansas.

III. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of

Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 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.* because this SIP approval and FIP rescission under section 110 and part C of the Clean Air Act will not in-and-of itself create any new information collection burdens but simply transfers the permitting authority from EPA to the State. Burden is defined at 5 CFR 1320.3(b). Because this final action does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

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

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.

This rule will transfer the permitting responsibility of GHG emissions from EPA to the State of Arkansas. This final rule will lead to permitting requirements for certain sources of GHG emissions; however these sources are large emitters of GHGs and tend to be large sources. Further, this rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and part C of the Clean Air Act do not create any new requirements but simply approve requirements that the States are already imposing. After considering the economic impacts of this rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities.

D. Unfunded Mandates Reform Act

This action contains no Federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for State, local, or tribal governments or the private sector. This action imposes no enforceable duty on any State, local or tribal governments or the private sector. Therefore, this action is not subject to the requirements of sections 202 or 205 of the UMRA.

This action 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 action transfers permitting responsibility of GHG emissions from EPA to the State of Arkansas. Small governments are not impacted.

E. Executive Order 13132—Federalism

This action does not have federalism implications. It will not have substantial direct effects on Arkansas, on the relationship between the national government and the State of Arkansas, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The CAA specifies conditions under which states may request, and EPA may approve state implementation of CAA requirements. This rulemaking approves PSD permitting provisions in the state of Arkansas for GHG emissions, and as a consequence of the SIP approval, simultaneously rescinds federal PSD permitting responsibility for GHG emissions in Arkansas. This rulemaking is pursuant to the SIP approval and requirements of the CAA. As such, this final rule does not change the balance of power between Arkansas and EPA as provided for in the CAA. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicited comment on the proposed action from State and local officials. EPA received no comments from state or local governments on this rulemaking.

F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). In this action, EPA is not addressing any Tribal Implementation Plans. This action is limited to Arkansas's PSD SIP. Thus, Executive Order 13175 does not apply to this action.

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

EPA interprets EO 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 EO has the potential to influence the regulation. This action is not subject to EO 13045 because EPA is approving revisions to the Arkansas PSD SIP for permitting of GHG emissions, as authorized by the CAA.

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 involved technical 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 (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high

and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final 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 requires the State of Arkansas to assume the responibiity for permitting GHG emissions subject to PSD requirements. This final rule approves the Arkansas SIP as meeting Federal requirements for GHG PSD permitting and imposes no additional requirements beyond those imposed by Arkansas law.

K. Congressional Review Act

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

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 3, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: March 22, 2013.

Bob Perciasepe,

Acting Administrator.

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart A—General Provisions

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

Subpart E—Arkansas

■ 3. Section 52.170(c) is amended by revising the entries for Sections 19.902, 19.903, and 19.904 under the first table titled ''EPA-Approved Regulations in the Arkansas SIP''.

The revisions read as follows:

§ 52.170 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED REGULATIONS IN THE ARKANSAS SIP

State citation	Title/subject	State submittal/effective date	EPA approval date	Explanation
Regulation No. 19: Regulations of the Arkansas Plan of Implementation for Air Pollution Control				
*	*	*	*	*
Chapter 9: Prevention of Significant Deterioration				
*	*	*	*	*
Reg 19.902	Purposes	1/25/2009	4/2/13 [Insert FR page number where document begins].	
Reg 19.903	Definitions	1/25/2009	4/2/13 [Insert FR page number where document begins].	
Reg 19.904	Adoption of Regulations	11/18/2012	4/2/13 [Insert FR page number where document begins].	
*	*	*	*	*

[FR Doc. 2013–07391 Filed 4–1–13; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2012–0100; FRL–9795–3]

Approval and Promulgation of Implementation Plans; Texas; Reasonably Available Control Technology for the 1997 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is finalizing its proposal to approve revisions to the Texas State Implementation Plan (SIP) for the Houston/Galveston/Brazoria (HGB) 1997 8-Hour ozone nonattainment Area (Area). The HGB Area consists of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller counties. Specifically, we are finalizing our proposed approval of portions of two revisions to the Texas SIP submitted by the Texas Commission on Environmental Quality (TCEQ) as meeting certain Reasonably Available Control Technology (RACT) requirements for Volatile Organic Compounds (VOC), and Oxides of Nitrogen (NO_X) in the HGB Area. We are also finalizing our proposal to approve the 2007 Voluntary Mobile Emission Reduction Program (VMEP) commitments for the HGB Area. This action is in accordance with section 110 of the federal Clean Air Act (the Act, CAA).

DATES: This rule will be effective on May 2, 2013.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–R06–OAR–2012–0100. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30am and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a 15 cent per page fee for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone (214) 665–6691, fax (214) 665–7263, email address *shar.alan@epa.gov.*

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

Outline

I. Background
A. What actions are we approving?
1. The June 13, 2007 submittal
2. The April 6, 2010 submittal
B. When did the public comment period expire?
II. Evaluation
A. What are the public comments and EPA's response to them?
B. What is TCEQ's approach and analysis to RACT in the June 13, 2007 submittal?
C. What CTG source categories are we addressing in this action?
D. Does the revision to 30 TAC Chapter 115 of the June 13, 2007 submittal meet RACT for liquid storage sources in the HGB Area?
E. Is Texas' approach to major Non-CTG sources for RACT determination in the HGB Area acceptable?
F. Is Texas' approach to RACT determination for CTG source categories based on the June 13, 2007 and April 6, 2010 submittals acceptable?
G. Is Texas' approach to RACT determination for NO_X sources based on the June 13, 2007 and April 6, 2010 submittals acceptable?
H. Is Texas' approach to RACT determination for VOC and NO_X sources based on the June 13, 2007 and April 6, 2010 submittals acceptable?
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

A. What actions are we approving?

In EPA's September 19, 2012 (77 FR 58063) rulemaking action we proposed to approve portions of revisions to the Texas SIP submitted to EPA in two separate letters dated June 13, 2007 and April 6, 2010 from TCEQ. We are finalizing our proposed approval as described below.

1. The June 13, 2007 Submittal

We are finalizing our proposal to approve the June 13, 2007 submittal, sent to EPA from TCEQ, which in part, included the Voluntary Mobile Emission Reduction Program (VMEP) commitments as strategies to complement existing regulatory programs through voluntary, non-regulatory changes in local transportation activities or changes in in-use vehicle and engine composition. Economic incentive provisions are also available in sections 182 and 108 of the Act. Credits generated through VMEP can be counted toward attainment and maintenance of the NAAQS. Due to the voluntary nature of this program, only up to 3% of the total future year emissions reductions required to attain an appropriate NAAQS may be claimed under the VMEP policy guidance.

In addition, the June 13, 2007 submittal included an analysis intended to demonstrate RACT was being implemented in the HGB Area as required by the CAA (Appendix D of the submittal).

2. The April 6, 2010 Submittal

Texas supplemented the RACT analysis contained in the June 13, 2007 submittal as a part of the April 6, 2010 revision to the Texas SIP. We are finalizing the proposal to find, based on the analysis in Appendix D of the April 6, 2010 submittal, in conjunction with the June 13, 2007 submission, that Texas has met certain RACT requirements under section 182(b). Appendix D of the April 6, 2010 submittal is titled ''Reasonably Available Control Technology Analysis.'' See section B of the September 19, 2012 (77 FR 58063) proposal for more information on RACT evaluation for the HGB Area.

B. When did the public comment period expire?

The public comment period for the 77 FR 58063 proposed approval ended on October 19, 2012, and we received relevant comments from TCEQ and the 8-Hour Ozone SIP Coalition (the Coalition) on this rulemaking action during its comment period. See section II below.

II. Evaluation

A. What are the public comments and EPA's response to them?

Comment: TCEQ and the Coalition both expressed their support for the September 19, 2012 (77 FR 58063) rulemaking action. TCEQ stated that

EPA should expedite approval of RACT SIP for other CTG categories not included in the proposal.

Response: The EPA appreciates the commenters' support of our proposed approval. The EPA is cognizant of other VOC CTG categories in the HGB Area. As stated in the proposal, EPA intends to act upon other VOC CTG categories (including the negative declarations) separately in a different rulemaking action.

Comment: TCEQ requested that the EPA provide clarification on how long the VMEP measures submitted on June 13, 2007 must remain in place. TCEQ interprets this time period to be through the year 2009.

Response: The basic framework for ensuring SIP credit for VMEPs is spelled out in guidance issued under a memorandum from Richard D. Wilson, Acting Assistant Administrator for Air and Radiation, dated October 24, 1997, entitled ''Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs).'' (the Policy). For VMEP credits to be approvable they should be quantifiable, surplus, enforceable, permanent, and adequately supported. The Policy states that ''emission reductions produced by the VMEP must continue at least for as long as the time period in which they are used by applicable SIP demonstrations. The VMEP need not continue forever to generate permanent emissions reductions, but must specify an appropriate period of implementation in the SIP.'' See page 19 of the Policy. In addition, ''the voluntary program should be permanent unless it is replaced by another measure (through a SIP revision) or the State demonstrates in a SIP revision that the emission reductions from the voluntary program are no longer needed.'' See page 5 of the Policy. The VMEP for an area can be revised by a SIP revision that substitutes or adds other VMEP measures, if needed. The 2007 VMEP measures are considered permanent and remain part of Texas SIP until the states revises its SIP, or demonstrates in a SIP revision that the emission reductions (for example; the 2.82 tons per day of NO_X reductions) from the voluntary program are no longer needed. In 2010, Texas revised the 2007 VMEP measures as a part of the HGB Area attainment demonstration plan. See section 4.6.2.2: Voluntary Mobile Emission Reduction Program (VMEP) and Appendix H of the 2010 submittal. Based on above Policy statements and the supporting record/documentation, the 2010 VMEP measures, submitted with the 2010 HGB Area attainment demonstration plan, supersede and replace the 2007 VMEP measures. We will be taking action on the 2010 VMEP measures in a different rulemaking. In short, EPA interprets the 2007 VMEP measures remain in place through the year 2009 (that is until the year 2010) when the State updated its HGB Area attainment demonstration plan.

This concludes our response to the comments received on the September 19, 2012 (77 FR 58063) proposal during comment period. As a result of comments received no changes were made to the proposed approval action.

B. What is TCEQ's approach and analysis to RACT in the June 13, 2007 submittal?

Under sections 182(b)(2)(A) and (B), states must insure RACT is in place for each source category for which EPA issued a CTG. As a part of its June 13, 2007 submittal TCEQ conducted a RACT analysis to demonstrate that the RACT requirements for CTG sources in the HGB 8-Hour ozone nonattainment Area have been fulfilled. The TCEQ revised and supplemented this analysis in the April 6, 2010 submittal. For information on how TCEQ conducted its RACT analysis see section E of the September 19, 2012 (77 FR 58065) proposal. We are finalizing our proposal finding that TCEQ has properly conducted its analysis, and their approach to control requirements are in agreement with the CAA RACT requirements for VOC sources in the HGB Area listed in Table 1 below.

C. What CTG source categories are we addressing in this action?

Table 1 below contains a list of VOC CTG source categories, and their corresponding sections of 30 TAC Chapter 115 that fulfill the applicable RACT requirements.

TABLE 1—CTG SOURCE CATEGORIES AND THEIR CORRESPONDING TEXAS VOC RACT RULES

Source category in HGB area	Fulfilling RACT requirement, 30 TAC Chapter 115
Bulk Gasoline Plants	§ 115.211–219
Natural Gas/Gasoline Processing	§ 115.352–359
Synthetic Organic Chemical Manufacturing Industry–Polymer & Resin Manufacturing	§ 115.352–359
Gasoline Tank Trucks & Vapor Collection Systems	§ 115.211–219 and § 115.234–239
Refineries—Leaks from Equipment	§ 115.352–359
Synthetic Organic Chemical Manufacturing Industry—High Density Resins	§ 115.120–129
Synthetic Organic Chemical Manufacturing Industry—Synthesized Pharmaceutical Products	§ 115.531–539
Petroleum Liquid Storage—External Floating Roof Tanks	§ 115.112–119
Refineries—Vacuum Producing Systems, Wastewater Separators, Unit Turnarounds	§ 115.311–319 and § 115.131–139
Synthetic Organic Chemical Manufacturing Industry—Air Oxidation Processes	§ 115.120–129
Synthetic Organic Chemical Manufacturing Industry—Reactor Processes & Distillation Operations	§ 115.120–129
Shipbuilding and Ship Repair	§ 115.420–429
Solvent Metal Cleaning	§ 115.412–419 and § 115.420–429
Gasoline Service Stations	§ 115.221–229
Petroleum Liquid Storage—Fixed Roof Tanks	§ 115.112–119
Tank Trucks—Gasoline Loading Terminals	§ 115.211–219 or § 115.221–229

In addition, Texas declared that there are no existing major sources of rubber tire manufacturing, identified with the Standard Industrial Classification (SIC) 3011, in the HGB Area. As such, TCEQ does not have to adopt VOC regulations for this source category at this time for the HGB Area. We are also finalizing our proposed approval of Texas' negative declaration for this source category.

D. Does the revision to 30 TAC Chapter 115 of the June 13, 2007 submittal meet RACT for liquid storage sources in the HGB Area?

On March 29, 2010 (75 FR 15348) we approved revisions to 30 TAC, Chapter 115 Control of Air Pollution from Volatile Organic Compounds. On September 19, 2012 (77 FR 58063), we proposed approval of these revisions as satisfying RACT requirements for liquid storage sources in the HGB Area. We are now finalizing our proposed approval of these revisions and finding that by implementing these measures Texas is meeting the VOC RACT for liquid storage sources in the HGB Area.

E. Is Texas' approach to major Non-CTG sources for RACT determination in the HGB Area acceptable?

Under section 182(b)(2)(C), states must assure that major sources not covered by a CTG have RACT in place. Texas has identified a list, in its Appendix D of the April 6, 2010 submittal, of major VOC sources in the HGB Area to determine if any do not have RACT level controls in place and do not fall into the identified sectors for which EPA has issued a CTG. For information on how TCEQ reviewed the point source emissions inventory and title V databases to identify all major sources of VOC emissions see section I of the September 19, 2012 (77 FR 58063). As a part of our approval of the 1-Hour ozone attainment demonstration plan for the HGB Area at 70 FR 58136, October 5, 2005, and 71 FR 52676, September 6, 2006, we stated that Texas has met RACT for VOC and NO_X sources. In its April 06, 2010, submittal to EPA Texas identified major Non-CTG sources, certified that it has RACT in place, and we proposed approval of their determination at September 19, 2012 (77 FR 58063). We are finalizing our proposed approval finding that the Texas SIP meets the RACT requirements for the major Non-CTG sources of VOC in the HGB Area under the 1997 8-Hour ozone NAAQS.

F. Is Texas' approach to RACT determination for CTG source categories based on the June 13, 2007 and April 6, 2010 submittals acceptable?

As a part of our action on the 1-Hour ozone attainment demonstration plan for the HGB Area at 70 FR 58136, October 5, 2005; and 71 FR 52676, September 6, 2006, we stated that Texas has met RACT for VOC and NO_X sources. In its submittals to EPA, TCEQ stated that it has reviewed the HGB VOC rules, certified that they satisfy RACT requirements for the 8-Hour ozone standard by the application of control technology that is reasonably available considering technological and economic feasibility, and we proposed approval of their determination on September 19, 2012 (77 FR 58063). For more information see section J of the September 19, 2012 (77 FR 58063). We are finalizing the proposed approval that VOC control measures in Chapter 115 meet RACT requirements for CTG sources of VOC in the HGB Area under the 1997 8-Hour ozone NAAQS. By implementing these control requirements (Chapter 115), Texas is satisfying the RACT requirements for CTG source categories identified in Table 1 of this document in the HGB Area under the 1997 8-Hour ozone standard.

G. Is Texas' approach to RACT determination for NO_X sources based on the June 13, 2007 and April 6, 2010 submittals acceptable?

As a part of our approval of the 1-Hour ozone attainment demonstration plan for the HGB Area at 70 FR 58136, October 5, 2005; and 71 FR 52676, September 6, 2006, we stated that Texas has met RACT for VOC and NO_X sources. In its submittals to EPA, TCEQ stated that it has reviewed the HGB NO_X rules, certified that they satisfy RACT requirements for the 8-Hour ozone standard by the application of control technology that is reasonably available considering technological and economic feasibility, and we proposed approval of their determination on September 19, 2012 (77 FR 58063). For more information see section L of the September 19, 2012 (77 FR 58063). We are finalizing the proposed approval that NO_X control measures in Chapter 117 meet RACT requirements for major sources of NO_X in the HGB Area under the 1997 8-Hour ozone NAAQS. By implementing these control requirements (Chapter 117), Texas is satisfying the RACT requirements for NO_X source in the HGB Area under the 1997 8-Hour ozone standard.

H. Is Texas' approach to RACT determination for VOC and NO_X sources based on the June 13, 2007 and April 6, 2010 submittals acceptable?

The purpose of 30 TAC Chapter 115 and 117 rules for the HGB Area is to establish reasonable controls on the emissions of ozone precursors. Texas reviewed its VOC and NO_X rules and certified that its rules satisfy RACT requirements, and we proposed approval of their determination at September 19, 2012 (77 FR 58063). For more information see sections K and L of the September 19, 2012 (77 FR 58063). As such, and based upon the above 3 sections (sections E, F, and G), we are finalizing our proposed approval finding that, for major sources of NO_X, CTG VOC categories identified in Table 1, and Non-CTG VOC sources, Texas has RACT-level controls in place for the HGB Area under the 1997 8-Hour ozone standard.

III. Final Action

Today, we are finalizing our proposal to find that for VOC CTG categories identified in Table 1 and all major Non-CTG VOC sources, and for NO_X, Texas has RACT-level controls in place for the HGB Area under the 1997 8-Hour ozone standard. The EPA had previously approved RACT for VOC and NO_X into Texas' SIP under the 1-Hour ozone standard. We are also finalizing our proposal to approve the 2007 VMEP into Texas SIP.

IV. Statutory and Executive Order Reviews:

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely 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;

• 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); and

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 3, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: March 20, 2013.

Ron Curry,

Regional Administrator, Region 6.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart SS—Texas

■ 2. In Section 52.2270, the second table in paragraph (e) entitled ''EPA-Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' is amended by adding three new entries at the end.

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
*	*	*	*	*
Voluntary Mobile Emission Reduction Program (VMEP).	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller Counties, TX.	June 13, 2007	4/2/13, [Insert FR page number where document begins].	
NO_X RACT finding for the 1997 8-hour ozone NAAQS.	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller Counties, TX.	April 6, 2010	4/2/13, [Insert FR page number where document begins].	
VOC RACT finding for the 1997 8-hour ozone NAAQS.	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller Counties, TX.	April 6, 2010	4/2/13, [Insert FR page number where document begins].	For selected categories.

[FR Doc. 2013–07388 Filed 4–1–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2012–0749; FRL–9795–2]

Approval and Promulgation of Implementation Plans and Operating Permits Program; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve a revision to the State Implementation Plan (SIP) and Operating Permits Program to amend the definitions provisions of the rules. This SIP revision and revision to the Missouri operating permits program add the compounds propylene carbonate and dimethyl carbonate to the list of compounds which are excluded from the definition of Volatile Organic Compound (VOC) for consistency with the Federal definition of VOC. The SIP revision also corrects two asbestos method subpart references. This revision also approves Missouri's request to amend the SIP to meet the 2008 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards implementation requirements of the May 16, 2008, New Source Review (NSR) $PM_{2.5}$ Rule. In this SIP revision, Missouri adopted rule revisions to establish the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; and significant emission rates for direct $PM_{2.5}$ and precursor pollutants (sulfur dioxide (SO_2) and nitrogen dioxide (NO_X)).

DATES: This direct final rule will be effective June 3, 2013, without further notice, unless EPA receives adverse comment by May 2, 2013. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2012–0749, by one of the following methods:

1. *www.regulations.gov.* Follow the on-line instructions for submitting comments.
2. *Email: bernstein.craig@epa.gov.*
3. *Mail or Hand Delivery:* Craig Bernstein, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2012–0749. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through *www.regulations.gov* or email information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219. The Regional Office's official hours of business are Monday through Friday, 8:00 to 4:30 excluding Federal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Craig Bernstein at (913) 551–7688, or by email at *bernstein.craig@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document ''we,'' ''us,'' or ''our'' refer to EPA. This section provides additional information by addressing the following questions:

I. Why is EPA using a direct final rule?
II. What is being addressed in this document?
III. Have the requirements for approval of a SIP revision and a part 70 revision been met?
IV. What action is EPA taking?

I. Why is EPA using a direct final rule?

EPA is publishing this rule without a prior proposed rule because we view this as a noncontroversial action and anticipate no adverse comment because the revisions are largely administrative and consistent with Federal regulations. The revisions will improve the clarity of the rule and do not have an adverse affect on air quality or the stringency of the SIP and operating permits program. However, in the ''Proposed Rules'' section of today's **Federal Register**, we are publishing a separate document that will serve as the proposed rule to approve the SIP revision if adverse comments are received on this direct final rule. We will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. For further information about commenting on this rule, see the **ADDRESSES** section of this document.

If EPA receives adverse comment, we will publish a timely withdrawal in the **Federal Register** informing the public that this direct final rule will not take effect. We would address all public comments in any subsequent final rule based on the proposed rule.

II. What is being addressed in this document?

EPA is approving revisions to the Missouri SIP and operating permits program. The first revision adds the compounds propylene carbonate and dimethyl carbonate to the list of compounds which are excluded from the definition of Volatile Organic Compound (VOC) in 10 CSR 10–6.020(v). This action is consistent with the EPA definition of VOC. These compounds can be found in the EPA definition of VOC at 40 CFR 52.100 (s)(1).

Revisions were made to the Table of compounds not considered VOCs because of their known lack of participation in the atmospheric reactions to produce ozone. Revisions include deletions, corrections and additions which are consistent with EPA regulations and do not adversely affect the stringency of the SIP or the operating permits program.

Next, definitions in 40 CSR 10–6.020(c) for Category I nonfriable asbestos containing material (ACM), and Category II nonfriable ACM are being updated to correct the method subpart reference. The correct method subpart references are consistent with the EPA rules found at 40 CFR part 763, subpart E, appendix E, section 1. The state has incorporated the EPA method subpart references in 10 CSR 10–6.020 Definitions and Common Reference Tables (2)(C)3 and (2)(C)4 dated November 30, 2010. Although asbestos is not regulated under the SIP, the EPA asbestos regulations (NESHAPS) are applicable requirements for purposes of Missouri's operating permit program and are approved for this purpose.

Finally, the de minimis emissions table is being updated for consistency with 40 CFR 52.21, specifically related to a portion of the NSR implementation rule for $PM_{2.5}$ (75 FR 28321, May 16, 2008) which established the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants and promulgated significant emissions rates for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_X). This revision can be found in Table 1, subsection (3)(A) of 10 CSR 10–6.020 Definitions and Common Reference Tables. The revised Missouri rule includes the following emission rates: $PM_{2.5}$ at an emission rate of 10.0 tons per year; SO_2 ($PM_{2.5}$ precursor) at an emission rate of 40.0 tons per year; and NO_X($PM_{2.5}$ precursor) at an emission rate of 40.0 tons per year.

III. Have the requirements for approval of a SIP revision and a part 70 revision been met?

The state submittal has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submittal also satisfied the completeness criteria of 40 CFR part 51, appendix V. The substantive requirements of Title V of the 1990 CAA Amendments and 40 CFR part 70 have been met as well.

IV. What action is EPA taking?

We are taking direct final action to approve the amendments to the Missouri SIP and operating permits program. This revision will amend the definitions provisions of the rules as described above for VOCs and asbestos, as well as update the de minimis emissions table found in Missouri's rule ''Definitions and Common Reference Tables'' to be consistent with 40 CFR part 52.21.

Statutory and Executive Order Reviews

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 under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). 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). This action merely approves state law as 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.*). Because this rule approves 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).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). 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). Thus Executive Order 13132 does not apply to this action. This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. 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 approves a state rule implementing a Federal standard.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. 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 CAA. 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. This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Burden is defined at 5 CFR 1320.3(b).

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 3, 2013. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the final rulemaking. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 70

Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Dated: March 20, 2013.

Karl Brooks,

Regional Administrator, Region 7.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart AA—Missouri

■ 2. In § 52.1320 the table in paragraph (c) is amended by revising the entry for 10–6.020 as follows:

§ 52.1320 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
* * *	* * *	* * *		
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
* * *	* * *	* * *		
10–6.020	Definitions and Common Reference Tables.	12/30/10	4/2/13 [*insert **Federal Register** page number where the document begins*].	

* * * * *

PART 70—[AMENDED]

■ 3. The authority citation for part 70 continues to read as follows:

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

■ 4. Appendix A to part 70 is amended by adding paragraph (aa) under Missouri to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Missouri

* * * * *

(aa) The Missouri Department of Natural Resources submitted revisions to Missouri rule 10 CSR 10–6.020, ''Definitions and Common Reference Tables'' on December 15, 2010. The state effective date is December 30, 2010. This revision is effective June 3, 2013.

* * * * *

[FR Doc. 2013–07405 Filed 4–1–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2011–0417; FRL–9796–9]

Greenhouse Gas Reporting Rule: Revision to Best Available Monitoring Method Request Submission Deadline for Petroleum and Natural Gas Systems Source Category (Withdrawal of Direct Final Rule)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: EPA published a direct final rule, *Greenhouse Gas Reporting Rule: Revision to Best Available Monitoring Method Request Submission Deadline for Petroleum and Natural Gas Systems Source Category,* on February 19, 2013. That direct final rule amended the deadline by which owners or operators of facilities subject to the petroleum and natural gas systems source category of the Greenhouse Gas Reporting Rule are required to submit requests for use of best available monitoring methods (BAMM) to the Administrator. Because EPA received potentially adverse comments on the amendments in that direct final rule, we are issuing this notice to withdraw the direct final rule.

DATES: Effective April 2, 2013, the EPA withdraws the direct final rule published at 78 FR 11585 on February 19, 2013.

FOR FURTHER INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; email address: *GHGReportingRule@epa.gov.*

SUPPLEMENTARY INFORMATION: Because EPA received potentially adverse comments, EPA is withdrawing the direct final rule, *Greenhouse Gas Reporting Rule: Revision to Best Available Monitoring Method Request Submission Deadline for Petroleum and Natural Gas Systems Source Category,* published at 78 FR 11585 on February 19, 2013. We stated in that direct final rule that if we received adverse comment by March 21, 2013, we would publish a timely withdrawal in the **Federal Register** to inform the public that this direct final rule will not take effect. We subsequently received potentially adverse comments on that direct final rule, so we are withdrawing the direct final rule in this notice. We are addressing the potentially adverse comments in a final action based on the proposal also published on February 19, 2013 (78 FR 11619). As stated in the direct final rule and the parallel proposed rule, we are not instituting a second comment period on this action.

List of Subjects in 40 CFR Part 98

Environmental Protection, Administrative practice and procedures, Air pollution control, Greenhouse gases, Monitoring, Reporting and recordkeeping requirements.

Dated: March 26, 2013.

Gina McCarthy,

Assistant Administrator, Office of Air and Radiation.

Accordingly, the amendments to the rule published on February 19, 2013 (78 FR 11585) are withdrawn as of April 2, 2013.

[FR Doc. 2013–07536 Filed 4–1–13; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 78, No. 63
Tuesday, April 2, 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 ENERGY

10 CFR Parts 429 and 430

[Docket No. EERE–2010–BT–TP–0010]

RIN 1904–AC21

Energy Conservation Program for Consumer Products: Test Procedures for Residential Furnace Fans

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The U.S. Department of Energy (DOE) proposes to establish test procedures for electrically-powered devices used in residential heating, ventilation, and air-conditioning (HVAC) products to circulate air through ductwork, hereafter referred to as ''furnace fans.'' DOE proposes a test procedure that would be applicable to furnace fans that are used in weatherized and non-weatherized gas, oil and electric furnaces and modular blowers, even though DOE interprets its authority as encompassing more than just circulation fans used in furnaces. This notice proposes to establish a test method for measuring the electrical consumption of the furnace fans used in these products. Concurrently, DOE is undertaking an energy conservation standards rulemaking to address the electrical energy used by these products for circulating air. Once these energy conservation standards are promulgated, the adopted test procedures would be used to determine compliance with the standards. DOE is also requesting written comments on issues presented in this test procedure rulemaking. DOE does not plan to hold a public meeting to discuss the modified proposals of this supplemental notice.

DATES: *Comments:* DOE will accept comments, data, and information regarding this supplemental notice of proposed rulemaking (SNOPR) no later than May 2, 2013. For details, see section V, ''Public Participation,'' of this SNOPR.

ADDRESSES: Any comments submitted must identify the SNOPR on Test Procedures for Residential Furnace Fans, and provide docket number EERE–2010–BT–TP–0010 and/or regulatory information number (RIN) number 1904–AC21. Comments may be submitted using any of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov*. Follow the instructions for submitting comments.
2. *Email: FurnFans-2010-TP-0010@ee.doe.gov*. Include docket number EERE–2010–BT–TP–0010 and RIN 1904–AC21 in the subject line of the message.
3. *Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies.
4. *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, 950 L'Enfant Plaza SW., Suite 600, Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

No telefacsimilies (faxes) will be accepted. See section V, ''Public Participation,'' for detailed instructions on submitting comments and additional information on the rulemaking process.

Docket: The docket is available for review at *www.regulations.gov,* including **Federal Register** notices, public meeting attendee lists and transcripts, comments, and other supporting documents/materials. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

A link to the docket Web page can be found at: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/42*. This Web page contains a link to the docket for this notice on the *www.regulations.gov* site. The *www.regulations.gov* Web page contains simple instructions on how to access all documents, including public comments, in the docket. See section V, ''Public Participation,'' for information on how to submit comments through *www.regulations.gov*.

For further information on how to submit a comment, review other public comments and the docket, or participate in the public meeting, contact Ms. Brenda Edwards at (202) 586–2945 or by email: *Brenda.Edwards@ee.doe.gov*.

FOR FURTHER INFORMATION CONTACT: The residential furnace fans rulemaking electronic mailbox, Email: *Residential_furnace_fans@ee.doe.gov*.

Mr. Ari Altman, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–6307. Email: *Ari.Altman@hq.doe.gov*.

For information on how to submit or review public comments, contact Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2945. Email: *Brenda.Edwards@ee.doe.gov*.

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I. Authority and Background

Title III, Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) sets forth a variety of provisions designed to improve energy efficiency and established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances.[2] These covered appliances include products that use electricity for the purposes of circulating air through ductwork, hereinafter referred to as ''furnace fans,'' the subject of today's notice.[3] (42 U.S.C. 6295(f)(4)(D))

Under the Act, this energy conservation program consists essentially of four parts: (1) Testing; (2) labeling; (3) Federal energy conservation standards; and (4) certification and enforcement procedures. The testing requirements consist of test procedures that manufacturers of covered products must use as the basis for certifying to DOE that their products comply with the applicable energy conservation standards adopted pursuant to EPCA and for making representations about the efficiency of those products. (42 U.S.C. 6293(c); 42 U.S.C. 6295(s)) Any representation made after September 30, 2013 for energy consumption of residential furnace fans must be based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for residential furnace fans, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required. Similarly, DOE must use these test procedures in any enforcement action to determine whether covered products comply with these energy conservation standards. (42 U.S.C. 6295(s))

General Test Procedure Rulemaking Process

Under 42 U.S.C. 6293, EPCA sets forth the criteria and procedures DOE must follow when prescribing or amending test procedures for covered products. Under EPCA, ''[a]ny test procedures prescribed or amended under this section shall be reasonably designed to produce test results which measure energy efficiency, energy use, or estimated annual operating cost of a covered product during a representative average use cycle or period of use * * * and shall not be unduly burdensome to conduct.'' (42 U.S.C. 6293(b)(3)) In addition, if DOE determines that a test procedure amendment is warranted, it must publish proposed test procedures and offer the public an opportunity to present oral and written comments on them. (42 U.S.C. 6293(b)(2)) In any rulemaking to amend a test procedure, DOE must determine to what extent, if any, the proposed test procedure would alter the measured energy efficiency of a covered product as determined under the existing test procedure. (42 U.S.C. 6293(e)(1)) If DOE determines that the amended test procedure would alter the measured efficiency of a covered product, DOE must amend the applicable energy conservation standard accordingly. (42 U.S.C. 6293(e)(2))

Energy Conservation Standards and Test Procedures for Furnace Fans

Pursuant to EPCA under 42 U.S.C. 6295(f)(4)(D), DOE is currently conducting a rulemaking to consider new energy conservation standards for furnace fans. EPCA directs DOE to establish test procedures in conjunction with new energy conservation standards, including furnace fans. (42 U.S.C. 6295(o)(3)(A)) DOE does not currently have a test procedure for furnace fans. Hence, to fulfill the statutory requirements, DOE initiated a test procedure rulemaking for furnace fans simultaneously to the energy conservation standards rulemaking for furnace fans. DOE intends for the test procedure to include an energy consumption metric and the methods necessary to measure the energy performance of the covered products. The proposed energy consumption metric does not account for the electrical energy consumption in standby mode and off mode because consumption in those modes is already accounted for in the DOE rulemakings for furnaces and central air conditioners (CAC) and heat pumps. 77 FR 76831, December 31, 2012; 76 FR 65616 (Oct. 24, 2011). Manufacturers would be required to use the proposed energy consumption metric, sampling plans, and testing methods developed during this rulemaking to verify compliance with the new energy conservation standards when they take effect and for making representations about the energy consumption of furnace fans.

On June 3, 2010, DOE published a Notice of Public Meeting and Availability of the Framework Document (the June 2010 Framework Document) to initiate the energy conservation standard rulemaking for furnace fans. 75 FR 31323. In the June 2010 Framework Document, DOE requested feedback from interested parties on many issues related to test methods for evaluating the electrical energy consumption of furnace fans. DOE held the framework public meeting on June 18, 2010. DOE originally scheduled the framework comment period to close on July 6, 2010. However, due to the large number and broad scope of questions and issues raised regarding the June 2010 Framework Document in writing and during the public meeting, DOE published a notice in the **Federal Register** reopening the comment period from July 15, 2010, until July 27, 2010, to allow additional time for interested parties to submit comments. 75 FR 41102 (July 15, 2010).

On May 15, 2012, DOE published a notice of proposed rulemaking in the **Federal Register** to initiate the test procedure rulemaking for furnace fans. 77 FR 28674. In the NOPR, DOE proposed a rating metric, fan efficiency rating (FER) and proposed methods to measure the performance of covered products based on FER. DOE held a public meeting on the test procedure NOPR on June 15, 2012. The test procedure NOPR comment period closed on September 10, 2012.

In response to the NOPR, many interested parties commented that the proposed test procedure was unduly burdensome. The Air-Conditioning, Heating and Refrigeration Institute (AHRI), with support from Goodman Global, Inc. (''Goodman''), Ingersoll Rand, Lennox International, Inc. (''Lennox''), and Morrison Products, Inc. (''Morrison''), proposed an alternative

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] All references to EPCA in this rulemaking refer to the statute as amended through the Energy Independence and Security Act of 2007, Public Law 110–140.

[3] DOE interprets its authority as encompassing more than just circulation fans used in residential furnaces. At the present time, however, DOE is only proposing a test procedure that would cover those fans that are used in weatherized and non-weatherized gas, oil, and electric furnaces, and modular blowers.

test method that it argues would result in accurate and repeatable FER values that are comparable to the FER values resulting from the test procedure proposed in the NOPR, but are obtained at a significantly reduced test burden. (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3.) A detailed discussion of AHRI's proposed alternative method and interested parties' comments regarding the burden of the test procedure proposed in the NOPR is provided in section III.B of this notice.

DOE agrees that the key concept embodied in the alternative method suggested by AHRI and manufacturers (using the AFUE test set up and temperature rise to determine airflow) may provide accurate and repeatable FER values at a significantly reduced burden to manufacturers. In this supplemental notice of proposed rulemaking (SNOPR), DOE proposes to adopt a modified version of the test method presented by AHRI as the furnace fan test procedure. DOE also explains the changes reflected in the test procedure proposed herein compared to the test procedure proposed in the NOPR. This notice also provides interested parties with an opportunity to comment on the revised proposed test method.

In this SNOPR, DOE addresses only the changes to the test procedure it proposed in the NOPR and those comments received on the NOPR that are relevant to the proposed changes. All other comments received on the test procedure NOPR will be addressed in the test procedure final rule.

II. Summary of the Supplemental Notice of Proposed Rulemaking

Pursuant to EPCA, DOE is required to establish these test procedures in order to allow for the development of energy conservation standards to address the electrical consumption of the products covered under this rulemaking. (42 U.S.C. 6295(o)(3)(A)) The proposed test procedure would be applicable to electrically-powered devices used in central HVAC systems for the purposes of circulating air through ductwork (*referred to collectively as* furnace fans in this rulemaking). Furnace fans covered in the scope of the proposed test procedure include circulation fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers. DOE's proposed definition of modular blowers is provided in section III.C. The proposed test procedure would not be applicable to any non-ducted products, such as whole-house ventilation systems without ductwork, central air-conditioning (CAC) condensing unit fans, room fans, and furnace draft inducer fans.

DOE proposes to adopt a modified version of the alternative test method recommended by AHRI and other furnace fan manufacturers to rate the electrical consumption of furnace fans. The AHRI-proposed method provides a framework for accurate and repeatable determinations of FER that is comparable to the test method previously proposed by DOE, but at a significantly reduced test burden. In general, the AHRI proposal reduces the test burden because it: (1) Does not require airflow to be measured directly; (2) avoids the need to make multiple determinations in each airflow-control setting because outlet restrictions to achieve the specified reference system external static pressure (ESP) would be set in the maximum airflow-control setting and maintained for measurements in subsequent airflow-control settings; and (3) can be conducted using the test set up currently required to rate furnace AFUE for compliance with furnace standards.

DOE proposes to align the proposed furnace fan test procedure with the DOE test procedure for furnaces by incorporating by reference specific provisions from an industry standard incorporated by reference in its test procedure for furnaces. DOE's test procedure for furnaces is codified in appendix N of subpart B of part 430 of the code of federal regulations (CFR). The DOE furnace test procedure incorporates by reference American National Standards Institute (ANSI)/American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) 103–1993, *Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers* (ASHRAE 103). DOE proposes to incorporate by reference the definitions, test setup and equipment, and procedures for measuring steady state combustion efficiency provisions of the 2007 version of ASHRAE 103. In addition to these provisions, DOE proposes additional provisions for apparatuses and procedures for measuring throughput temperature, external static pressure, and furnace fan electrical input power. DOE also proposes calculations to derive FER based on the results of testing for each basic model.

DOE proposes to use the same definition for the fan efficiency rating (FER) metric as proposed in the NOPR, but to modify the title and calculation. In the NOPR, DOE proposed to define FER as the estimated annual electrical energy consumption of the furnace fan normalized by: (a) The estimated total number of annual fan operating hours (1,870); and (b) the airflow in the maximum airflow-control setting. DOE is aware that referring to the FER rating metric as the ''fan efficiency rating,'' as was done in the NOPR, is a misnomer because it is not a function of the output energy of the furnace fan, which is typical of an efficiency metric. FER is a function of fan energy consumption and as a result, DOE believes it is more appropriately categorized as an energy consumption metric. Thus DOE proposes to refer to FER as the ''fan energy rating.'' The estimated annual electrical energy consumption, as proposed, is a weighted average of the furnace fan electrical input power (in Watts) measured separately for multiple airflow-control settings at different external static pressures (ESPs). These ESPs are determined by a reference system that represents national average ductwork system characteristics. Table II.1 includes the proposed reference system ESP values by installation type. The reference system ESP values proposed in the NOPR included a value for ''heating-only'' installation types. Interested parties recommended that DOE eliminate this installation type because they are unaware of products that could be categorized as such. DOE agrees with interested parties and proposes to eliminate the heating-only designation for this SNOPR. Section III.F provides a detailed discussion of this issue.

TABLE II.1—PROPOSED REFERENCE SYSTEM ESP VALUES BY FURNACE FAN INSTALLATION TYPE

Installation type	Weighted average ESP (in. w.c.)
Units with an internal evaporator coil	0.50
Units designed to be paired with an evaporator coil	0.65
Units installed in a Manufactured homes [4]	0.30

The proposed rated airflow-control settings correspond to operation in cooling mode (which DOE finds is predominantly associated with the maximum airflow-control setting), heating mode, and constant-circulation mode. Table II.2 illustrates the airflow-

[4] Manufactured home external static pressure is much smaller because there is no return air ductwork in manufactured homes. Also, the United States Department of Housing and Urban Development (HUD) requirements for manufactured homes stipulate that the ductwork for cooling should be set at 0.3 in. w.c.

control settings that would be rated for various product types. The NOPR included proposed rated airflow control settings for heating-only installations. As discussed above, DOE proposes to eliminate the heating-only designation for the reasons outlined in section III.F.

TABLE II.2—PROPOSED RATED AIRFLOW-CONTROL SETTINGS BY PRODUCT TYPE

Product type	Rated airflow-control setting 1	Rated airflow-control setting 2	Rated airflow-control setting 3
Single-stage Heating	Default constant-circulation	Default heat	Absolute maximum.
Multi-stage or Modulating Heating	Default constant-circulation	Default low heat	Absolute maximum.

As shown in Table II.2., for products with single-stage heating, the three proposed rating airflow-control settings are the default constant-circulation setting, the default heating setting, and the absolute maximum setting. For products with multi-stage heating or modulating heating, the proposed rating airflow-control settings are the default constant-circulation setting, the default low heating setting, and the absolute maximum setting. The absolute lowest default airflow-control setting is used to represent constant circulation if a default constant-circulation setting is not specified. DOE's proposes to define ''default airflow-control settings'' as the airflow-control settings specified for installed use by the manufacturer in the product literature shipped with the product in which the furnace fan is integrated. Manufacturers typically provide detailed instructions for setting the default heating airflow control-setting to ensure that the product in which the furnace fan is integrated operates safely. Manufacturer installation guides also provide detailed instructions regarding compatible thermostats and how to wire them to achieve the specified default settings.

DOE proposes to weight the Watt measurements using designated annual operating hours for each function (*i.e.,* cooling, heating, and constant circulation) that are intended to represent national average operation. Table II.3 shows the proposed estimated national average operating hours for each function to be used to calculate FER, which are the same as those proposed in the NOPR.

TABLE II.3—ESTIMATED NATIONAL AVERAGE OPERATING HOUR VALUES FOR CALCULATING FER

Operating mode	Variable	Single-stage (hours)	Multi-stage or modulating (hours)
Heating	HH	830	830/HCR
Cooling	CH	640	640
Constant Circulation	CCH	400	400

The specified operating hours for the heating mode for multi-stage heating or modulating heating products are divided by the heat capacity ratio (HCR) to account for variation in time spent in this mode associated with turndown of heating output. The HCR is the ratio of the reduced heat output capacity to maximum heat output capacity. In the NOPR, DOE proposed to incorporate HCR to adjust the heating operating hours in both the numerator (*i.e.* estimated annual energy consumption) and denominator (*i.e.* normalization factor of total operating hours times airflow in the maximum airflow-control setting). 77 FR at 28701 (May 15, 2012). In this SNOPR, DOE proposes to incorporate HCR in the numerator, and eliminate it from the denominator in the revised proposed FER equation. DOE finds that this modification results in FER values that more accurately reflect the relative efficiency of multi-stage and modulating units compared to single-stage units. The revised proposed FER equation is:

$$FER = \frac{(CH \times E_{Max}) + (HH \times E_{Heat}) + (CCH \times E_{Circ})}{(CH + 830 + CCH) \times Q_{Max}} \times 1000$$

III. SNOPR Discussion

A. Scope of Coverage

EPCA grants DOE authority to ''consider and prescribe energy conservation standards or energy use standards for electricity used for purposes of circulating air through ductwork.'' (42 U.S.C. 6295(f)(4)(D)) In the June 2010 Framework Document, DOE tentatively interpreted this EPCA language to allow DOE to cover any electrically-powered device used in a central HVAC system for the purpose of circulating air through ductwork. DOE sought comment on including the air circulation fans used in gas furnaces, oil furnaces, electric furnaces, CAC air handlers, and modular blowers in the scope of coverage. DOE also sought comment on excluding draft inducer fans, exhaust fans, heat recovery ventilators (HRV), and energy recovery ventilators (ERV) from the scope of coverage. DOE also requested comment on whether other products, such as small-duct, high-velocity (SDHV) and through-the-wall systems should be included in the scope of coverage of this rulemaking.

In the test procedure NOPR, DOE proposed a scope of applicability for the test procedure that was sufficiently broad to cover the products under consideration for the scope of coverage for the energy conservation standards. The NOPR test procedure's proposed scope of applicability included single-phase, electrically-powered devices that circulate air through ductwork in HVAC systems with heating input capacities less than 225,000 Btu per hour, cooling capacities less than 65,000 Btu per hour, and airflow capacities less than 3,000 cfm. These heating and cooling capacity limits are identical to those in the DOE definitions for residential ''furnace'' and ''central air conditioner'' (10 CFR

430.2), and the airflow typically required to provide these levels of heating and cooling. DOE proposed to exclude from the scope of applicability of the test procedure any non-ducted products such as whole-house ventilation systems without ductwork, CAC condensing unit fans, room fans, and furnace draft inducer fans because these products do not circulate air through ductwork.

In their comments on the test procedure NOPR, many interested parties commented that the scope of coverage should be limited to circulation fans used in residential furnaces. AHRI stated its view that DOE had misinterpreted the relevant provision of EPCA. According to AHRI, the heading of 42 U.S.C. 6295(f) entitled, ''standards for furnaces and boilers'' and subsections 1 through 4 under that section apply only to residential furnaces and boilers, as defined by EPCA. 10 CFR 430.2 AHRI suggested that this clear, consistent format strongly indicates that the scope of this requirement includes only the motor and blower combinations provided in residential warm air furnaces. AHRI added that there is nothing within section 42 U.S.C. 6295(f) that suggests that the provisions of that section apply to any other products that may be used to heat a residence. AHRI contended that if the intent of this change had been to include circulation fans used in residential air conditioners and heat pumps, then Congress would have added a corresponding paragraph to 42 U S C. 6295(d)—the section covering central air conditioners and heat pumps. (AHRI, No. 16 at pp. 1–2.) First Company (''First Co.''), Morrison, and Lennox echoed AHRI's arguments. (First Co., No. 9 at p. 1; Morrison, Public Meeting Transcript, No. 23 at p. 26; Lennox, No. 12 at p. 2.)

First Co. added that, although subsection (f)(4)(D) refers in more general terms to ''standards for electricity used for purposes of circulating air through ductwork,'' it is a well-established rule of statutory construction that, ''[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'' *Circuit City Stores, Inc.* v. *Adams,* 532 U.S. 105, 114–15, 121 S.Ct. 1302, 1308–09 (2001) (applying the statutory canon of ejusdem generis); *Air Conditioning and Refrigeration Inst.* v. *Energy Res. Conservation and Dev. Comm'n,* 410 F.3d 492,501 (9th Cir. 2005) (applying same statutory canon to interpretation of EPCA). According to First Co., the general language of subsection (f)(4)(D) is preceded in subsections (A), (B), and (C) by specific and repeated references to standards for furnaces. First Co. argues that applying the rules of statutory construction, the provisions of subsection (f)(4)(D) must be interpreted to apply to furnaces, and not to a broader category of products. (First Co., No. 10 at p. 1) DOE disagrees with this reading of the cases cited above, as the Supreme Court was in fact considering a ''residual phrase'' within the same sentence, finding it to be controlled by the specificity of the words that preceded it. With regard to the case of separate statutory provisions, the Supreme Court's opinion is silent. DOE provides a general response to the issue of authority under 42 U.S.C. 6295(f)(4)(D) later in this section.

AHRI, First Co., Ingersoll Rand, Morrison, Mortex Products, Inc., Goodman, and Lennox commented that CAC and heat pump products like split-system packaged central air conditioners and heat pump air handlers should be excluded because the electrical consumption of their circulation fans is already addressed in the seasonal energy efficiency ratio (SEER) and heating seasonal performance factor (HSPF) descriptors. (AHRI, Public Meeting Transcript, No. 23 at p. 74; First Co., No. 10 at p. 2; Ingersoll Rand, Public Meeting Transcript, No. 23 at p. 98; Morrison, No. 21 at p. 2; Mortex, No. 18 at p. 1; Goodman, No. 17 at p. 1; Lennox, No. 12 at p. 2). First Co. points out that in the NOPR, DOE proposed not to adopt additional test procedure provisions for standby and off mode electrical energy consumption of furnace fans used in furnaces and CAC and heat pumps given that consumption in these modes either has been or is in the process of being fully addressed in other rulemakings. Applying the same principle, First Co. states that there is no need for DOE to adopt additional test procedures for furnace fans in central air conditioners in this rulemaking because their energy usage is addressed by the SEER descriptor under the standard.

First Co. also commented that EPCA allows for the development of more than one standard for products that serve more than one major function, but limits DOE's authority to setting one standard for each major function. 42 U.S.C. 6295(o)(5) According to First Co., to the extent that DOE has the authority to regulate the energy efficiency of ''furnace fans,'' it does not have authority to require manufacturers of central air conditioners to meet a separate standard for a component of the system already tested and rated under the SEER standard. (First Co., No. 10 at p.2.) Ingersoll Rand echoed First Co.'s sentiments, stating that further testing of air handlers would be redundant and add regulatory burden with no benefit because all air handlers are currently tested as part of a CAC or HP system with the fan power included in the SEER, EER, and HSPF descriptors. Ingersoll Rand added that consumer confusion is a likely unintended consequence. (Ingersoll Rand, No. 14 at p. 2.) Goodman submitted that cooling hours and energy consumption should be removed from the metric for all covered products to eliminate duplicate regulations. (Goodman, No. 17 at p. 4.)

AHRI, Ingersoll Rand, and Morrison commented that modular blowers and hydronic air handlers should not be covered in this test procedure because they are beyond the authority provided by EPCA and are not currently regulated product classes. (AHRI, No. 16 at p. 2; Ingersoll Rand, No. 14 at p. 2; Morrison, Public Meeting Transcript, No. 23 at p. 88.)

Several interested parties commented that the test procedure should address operation of furnace fans as installed in the products in which they are sold rather than separately. DOE acknowledges that its NOPR may not have been clear in indicating that the test procedure proposal would apply to operation of fans while installed in these products. Consequently, some interested parties recommend that DOE consider the air handler (*i.e.* the entire HVAC product) and not just the furnace fan by testing furnace fans in-situ. The American Council for an Energy-Efficient Economy (ACEEE) commented that limiting the scope of the rule to a narrow box around the sheet metal, fan motor, impeller and shroud is inappropriate because a large fraction of the electricity consumption of these devices has to do with the aerodynamics of the air handler cabinet, as shown in previous DOE work conducted by Ian Walker of Lawrence Berkley National Lab (LBNL). (ACEEE, Public Meeting Transcript, No. 23 at p. 16.) Adjuvant Consulting (''Adjuvant''), the Northwest Power and Conservation Council (NPCC), and the Northwest Energy Efficiency Alliance (NEEA) agree with ACEEE that air handlers should be the covered product in this rulemaking. (Adjuvant, Public Meeting Transcript, No. 23 at pp. 29, 30; NPCC/NEEA, No. 22 at p. 3.) As mentioned above, the test procedure proposed in the NOPR and the test procedure proposed herein would apply to the energy use for air circulation of the furnace fan as factory-

installed in the HVAC product, rather than stand-alone performance.

During the comment period of the test procedure NOPR, DOE published a Notice of Public Meeting and Availability of Preliminary Analysis Support Document for the furnace fans energy conservation standard rulemaking on July 10, 2012. 77 FR 40530. For the preliminary analysis, DOE decided that, although the title of the statutory section refers to ''furnaces and boilers,'' the provision governing the products at issue in this rulemaking was written using notably broader language than the other provisions within the same section, referring to ''electricity used for purposes of circulating air through ductwork.'' [5] (42 U.S.C. 6295(f)) Consequently, DOE maintained its interpretation that its authority is not limited to circulation fans used in furnaces. DOE explained that it proposed to address in the current energy conservation standard rulemaking those products for which DOE has sufficient data and information to develop credible analyses, and that it may consider covering air circulation fans used in other HVAC products in a future rulemaking as data become available. DOE's preliminary analysis addressed furnace fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, modular blowers, and hydronic air handlers. Many comments on DOE's preliminary analysis that address scope of coverage are discussed in this section because they provide additional commentary regarding the scope of applicability of the test procedure. The comments referenced below are available in docket number EERE–2010–BT–STD–0010 per the instructions provided in the **ADDRESSES** section of this SNOPR.

Efficiency advocates expressed concern at the exclusion of furnace fans used in split-system CAC and heat pump products and requested that they be added to the scope. (Appliance Standards Awareness Project (ASAP), Preliminary Analysis, No. 43 at p. 17; Adjuvant, Preliminary Analysis, No. 43 at p. 39.) Specifically, efficiency advocates commented that although the fan energy use is incorporated as part of the efficiency metrics—SEER and HSPF—prescribed by DOE for these products (10 CFR part 430, subpart B, appendix M), the external static pressures (ESPs) used to determine the SEER and HSPF do not reflect as-installed conditions, in which ESP is generally significantly higher. (ASAP, Preliminary Analysis, No. 43 at p. 38; Earthjustice, Preliminary Analysis, No. 49 at p. 1.) In a joint comment from ACEEE, ASAP, the National Consumer Law Center (NCLC), NEEA, and the Natural Resources Defense Council (NRDC), hereinafter referred to as ACEEE, *et al.,* in addition to a comment from the California investor-owned utilities (CA IOU), efficiency advocates stated that the reference ESP of 0.1 to 0.2 in. w.c. was too low when compared to the average field ESP of 0.73 in. w.c. as identified in the TSD. (ACEEE, *et al.,* Preliminary Analysis, No. 55 at p. 1; CA IOU, Preliminary Analysis, No. 56 at p. 2.) ACEEE, *et al.* also noted that SEER and HSPF do not account for continuous circulation operation, which is expected to increase as stricter building codes call for tighter building envelopes. (ACEEE, *et al.,* Preliminary Analysis, No. 55 at p. 2; CA IOU, Preliminary Analysis, No. 56 at p. 3.) By excluding these products from the analysis, ACEEE, *et al.* believes that DOE is ignoring a significant fraction of the furnace fan market. (ACEEE, *et al.,* Preliminary Analysis, No. 55 at p. 1.)

Manufacturers' comments in response to the preliminary analysis regarding the scope of coverage were similar to their comments on the test procedure NOPR. In contrast to efficiency advocates and utilities, many manufacturers believe that the scope of coverage presented in the preliminary analysis exceeds the authority granted to DOE by EPCA and should not include any non-furnace products such as central air conditioners, heat pumps, or condensing unit-blower-coil combinations. (First Co., Preliminary Analysis, No. 53 at p. 1.)

DOE notes that, although the title of this statutory section refers to ''furnaces and boilers,'' the applicable provision at 42 U.S.C. 6295(f)(4)(D) was written using broader language than the other provisions within 42 U.S.C. 6295(f). Specifically, that statutory provision directs DOE to ''consider and prescribe energy conservation standards or energy use standards for electricity used for purposes of circulating air through ductwork.'' Such language could be interpreted as encompassing electrically-powered devices used in any residential HVAC product to circulate air through ductwork, not just furnaces, and DOE has received numerous comments on both sides of this issue. At the present time, however, DOE is only proposing test procedures for those circulation fans that are used in residential furnaces and modular blowers. As a result, DOE is not addressing public comments that pertain to fans in other types of HVAC products. The following list describes the furnace fans which DOE proposes to address as well as those not addressed in this rulemaking.

- *Products addressed in this rulemaking:* furnace fans used in weatherized and non-weatherized gas furnaces, oil furnaces, electric furnaces, and modular blowers.
- *Products not addressed in this rulemaking:* furnace fans used in other products, such as split-system CAC and heat pump air handlers, through-the-wall air handlers, SDHV air handlers, ERVs, HRVs, draft inducer fans, exhaust fans, or hydronic air handlers.

DOE is using the term ''modular blower'' to refer to HVAC products powered by single-phase electricity that comprise an encased circulation blower that is intended to be the principal air circulation source for the living space of a residence. A modular blower is not contained within the same cabinet as a residential furnace, CAC, or heat pump. Instead, modular blowers are designed to be paired with separate residential HVAC products that provide heating and cooling, typically a separate CAC/HP coil-only unit. DOE finds that modular blowers and electric furnaces are very similar in design. In many cases, the only difference between a modular blower and electric furnace is the presence of an electric resistance heating kit. DOE is aware that some modular blower manufacturers offer electric resistance heating kits to be installed in their modular blower models so that the modular blowers can be converted to stand-alone electric furnaces. In addition, FER values for modular blowers can be easily calculated using the proposed test procedure. DOE proposes to address the furnace fans used in modular blowers in this rulemaking for these reasons. The proposed definition for ''modular blower'' is provided in section III.C.

This proposed furnace fan test procedure would adopt a significant number of provisions from the DOE furnace test procedure and would not result in significant capital expenditures for manufacturers because they would not have to acquire or use any test equipment beyond the equipment that they already use to conduct the test method specified in the DOE furnace test procedure (i.e. the AFUE test setup). DOE also finds that the time to conduct a single furnace fan test according to its proposed furnace fan test procedure would be less than 3 hours and cost less than one percent of the manufacturer selling price of the product in which the

[5] Please refer to Chapter 2 of the furnace fans preliminary analysis technical support document (TSD). The furnace fans preliminary analysis TSD is available on the DOE Web site: *http://www1.eere.energy.gov/buildings/appliance_standards/product.aspx/productid/42.*

furnace fan is integrated. Section IV.B of this notice includes a more detailed discussion of manufacturer test burden. Consequently, DOE does not find that testing furnace fans according to this proposed test procedure would be unduly burdensome.

After considering available information and public comments regarding the test procedure being applicable to fan operation in cooling mode, DOE maintains its proposal to account for the electrical consumption of furnace fans while performing all active mode functions (*i.e.,* heating, cooling, and constant circulation). DOE recognizes that furnace fans are used not just for circulating air through ductwork during heating operation, but also for circulating air during cooling and constant-circulation operation. DOE anticipates that higher airflow-control settings are factory set for cooling operation. Therefore, DOE expects that the electrical energy consumption of a furnace fan is generally higher while performing the cooling function. Additionally, the design of the fan as well as its typical operating characteristics (*i.e.,* ESP levels during operation in different modes) is directly related to the performance requirements in cooling mode. DOE is also concerned that excluding some functions from consideration in rating furnace fan performance would incentivize manufacturers to design fans that are optimized to perform efficiently at the selected rating airflow-control settings but that are not efficient over the broad range of field operating conditions. In DOE's view, in order to obtain a complete assessment of overall performance and a metric that reflects the product's electrical energy consumption during a representative average use cycle, the test procedure must account for electrical consumption in a set of airflow-control settings that spans all active mode functions. This would ensure a more accurate accounting of the benefits of improved furnace fans.

DOE is aware that electrical consumption of the fan is accounted for in the SEER and HSPF metrics that DOE uses for CAC and heat pump products. However, DOE does not agree with First Co.'s interpretation that the EPCA language limits DOE's authority to setting one standard for each major product function and precludes DOE from rating furnace fan consumption in operating modes that are accounted for by these metrics. (42 U.S.C. 6295(o)(5)) EPCA's language in section 6295(o)(5) is phrased in the permissive, rather than the restrictive.[6] In DOE's view, this permissive language does not impose a limitation on DOE's authority to regulate fan electrical consumption for these products across all operating modes. Furthermore, it is inapposite in this situation, where two different products are being regulated, one the CAC or heat pump product, and one the separate furnace fan product, which may or may not be incorporated into a CAC or heat pump. SEER and HSPF are used to test cooling and heating performance of a CAC or heat pump product, whereas FER rates airflow performance of a furnace fan product. While furnace fan airflow performance contributes to cooling and heating performance, manufacturers can improve SEER and HSPF without improving fan performance. In short, SEER- and HSPF-based standards do not directly target the efficiency of furnace fans. DOE recognizes that the energy savings in cooling mode from higher-efficiency furnace fans used in some higher efficiency CAC and heat pumps is already accounted for in the analysis of standards on those products as a result. DOE conducted its preliminary analysis to avoid double-counting these benefits by excluding furnace fan electricity savings that were already included in DOE's analysis for CAC and heat pump products. Section 2.7 of chapter 2 and chapter 8 of the preliminary analysis TSD provide a discussion of this issue.

B. AHRI Test Method

In the NOPR in response to comments on the June 2010 Framework Document, DOE proposed to incorporate by reference ANSI/AMCA 210–07, citing comments that manufacturers currently use ANSI/AMCA 210–07 to measure furnace fan performance. The NOPR provides a more detailed discussion of DOE's consideration of ANSI/AMCA 210–07 and alternative reference standards. 77 FR at 28677 (May 15, 2012). Commenting on the NOPR, manufacturers recommended that DOE incorporate provisions from ASHRAE 37 instead of ANSI/AMCA 210–07. Ingersoll Rand commented that fan performance data from a DOE test procedure that references ANSI/AMCA 210–07 would not be consistent with existing data, which is generated using ASHRAE 37. (Ingersoll Rand, Public Meeting Transcript, No. 23 at p. 30) Lennox asserted that if DOE uses a test procedure that specifies an airflow calculation, then ANSI/AMCA 210 is not the appropriate standard. According to Lennox, ASHRAE 37 would be more appropriate if DOE specifies airflow calculations. (Lennox, No. 12 at p. 4.) Goodman stated that its airflow measurements for furnaces are currently performed using ASHRAE 37 setups and calculations. Further, Goodman pointed out that DOE test procedures to measure airflow and power input for central air conditioners and heat pumps as defined in Appendix M to Subpart B of 10 CFR part 430 require that furnace fan performance be measured per ASHRAE 37 for use in determining ratings for SEER and HSPF. Therefore, according to Goodman, DOE's proposal to use ANSI/AMCA 210–07 would require manufacturers to test the same product with two different test methods to rate furnace fans. Goodman believes that such an outcome is contrary to Congressional intent and the consumers' best interests. (Goodman, No. 17 at p. 4.) Morrison added that ANSI/AMCA 210–07 is designed to test stand-alone fans, while ASHRAE 37 is more appropriate for testing fans as part of appliances. (Morrison, Public Meeting Transcript, No. 23 at p. 38.) Interested parties commented that *in-situ* testing (*i.e.* installed in the HVAC product) is more appropriate than testing the furnace fan removed from the product in which it is integrated. In a joint comment, ASAP, ACEEE, NRDC, and NCLC, hereinafter referred to as the ''Joint Commenters,'' supported DOE's decision to test the furnace fan as factory-installed in an HVAC product, which would more accurately account for as-deployed energy consumption. (Joint Commenters, No. 13 at p. 2.) ACEEE explained that the impacts of the aerodynamics of the HVAC product cabinet on fan performance cannot be measured by testing the fan removed from the cabinet. Unico, Inc. (''Unico'') and Ingersoll Rand echoed these sentiments, stating that the furnace fan should be tested as part of the appliance because the appliance components dictate fan performance. (Unico, Public Meeting Transcript, No. 23 at p. 94; Ingersoll Rand, Public Meeting Transcript, No. 23 at p. 97.) Adjuvant stated that testing air handlers is more difficult than DOE's proposal depicts because of the necessity to specify appurtenances and other issues like cabinet leakage. (Adjuvant, Public Meeting Transcript, No. 23 at pp. 29, 30, 47.)

DOE agrees with interested parties that furnace fans should be tested in a laboratory and as factory-installed in the HVAC product with which it is

[6] Section 6295(o)(5) provides as follows: ''The Secretary may set more than 1 energy conservation standard for products that serve more than 1 major function by setting 1 energy conservation standard for each major function.''

integrated (*i.e., in-situ*) to account for the impacts of airflow path design on furnace fan performance. In the NOPR, DOE included language in the proposed regulatory text that specified that furnace fans be tested in-situ. 77 FR at 28699 (May 15, 2012). DOE recognizes that the preamble language of the NOPR may not have been clear in this regard. In this notice, DOE proposes to specify that furnace fans be tested in-situ.

In written comments, AHRI (with support from Goodman, Ingersoll Rand, Lennox, and Morrison) proposed an alternative test method that they argue would result in accurate and repeatable FER values that are comparable to the FER values resulting from the test procedure proposed in the NOPR, but at significantly reduced test burden. (AHRI, No. 16 at p. 3; Goodman, No. 17 at p. 4; Ingersoll Rand, No. 14 at p. 1; Morrison, No. 21 at p. 3.) AHRI recommends that DOE specify the following procedures to generate the measurements used to rate furnace fan performance (AHRI, No. 16 at p. 3):

- The furnace should be set up on the test stand that is used to measure AFUE.
- Initially, the furnace should be operated in the maximum airflow-control setting having adjusted the duct restrictions to achieve the external static pressure (ESP) proposed in the NOPR while in the heating mode (*i.e.,* firing the burner). Fuel input, temperature rise and power should be measured.
- Subsequently, power should be measured while operating the furnace in the heating airflow-control setting and again while operating the furnace in the constant circulation airflow-control setting, both without changing the initial duct restrictions in any way and without firing the furnace.
- The maximum airflow used to normalize the FER metric should be calculated (instead of measured directly) based on the measured temperature rise, measured fuel input, AFUE, and the known heat capacity of air.
- Measurements should be taken at nominal voltage and no voltage adjustments should be allowed.
- FER should be calculated using the annual operating hours that DOE proposed in the NOPR.

AHRI estimates an approximate 80–90% reduction in testing burden through the adoption of its proposed test method. AHRI stated that this reduction is due, in part, to manufacturers not having to acquire or use any test equipment beyond the equipment that is already used to conduct the testing specified in the DOE furnace test procedure (*i.e.,* the AFUE test setup). (AHRI, No. 16 at p. 3.) Most of the products to which this procedure applies are furnaces subject to the DOE furnace test procedure. Rheem Manufacturing Company (''Rheem''), Morrison, and Lennox also identified using the same test stand for FER and AFUE testing as an opportunity to minimize burden on manufacturers. (Rheem, No. 25 at p. 4; Morrison, No. 21 at p. 7; Lennox, No. 12 at p. 4.) Lennox stated that by requiring an additional setup and test process far outside the AFUE testing requirements, the burden on the engineering and documentation side of the proposed procedure is significant. (Lennox, No. 12 at p. 4.) Mortex, a small manufacturer, requested that furnace fan testing have a minimum burden on industry and be within the economic capabilities of the small manufacturers that would be impacted. Mortex explained that small manufacturers are low production volume, high product mix manufacturers and only build products when they are ordered. (Mortex, No. 18 at p. 2.) Goodman echoed Mortex's sentiments, stating that the cost to initiate and perform tests using the certified test facility required by ANSI/AMCA 210 as proposed in the NOPR is disproportionally burdensome to small manufacturers that produce 100 to 200 made-to-order units each needing individual certification. (Mortex, Public Meeting Transcript, No. 23 at p. 21, 232; Goodman, No. 17 at p. 2.) According to Mortex, capturing the airflow and electrical input power at a few additional airflow-control settings as part of testing for AFUE and $E_{ae,}$ as suggested by AHRI, would be relatively inexpensive. Mortex added that this simplified method should not require any capital outlay as compared to DOE's proposed method, which is estimated to require $150,000 for a code tester setup. (Mortex, No. 18 at p. 2.) Mortex stated during the public meeting that using the AFUE set up and calculating airflow based on temperature rise to rate furnace fans would be feasible for small manufacturers. Mortex added the caveat that such a method would only be feasible if paired with a reasonable confidence level (*i.e.,* the statistical confidence limit expressed as a percentage that must be achieved for the results of the group of samples tested according to the proposed sampling plan). (Mortex, Public Meeting Transcript, Public Meeting Transcript, No. 23 at p. 234.) A detailed discussion of the proposed sampling plan, including the proposed confidence limit, is provided in section III.D.

AHRI attributed some of the projected reduction in burden of its recommended test method to the labor savings that manufacturers would experience with respect to conducting tests and calculations. (AHRI, No. 16 at p. 3.) Allied Air Enterprises (''Allied Air'') commented that the time and cost of conducting the proposed test procedure would be unduly burdensome. (Allied Air, No 23 at p. 20.) Rheem and Lennox commented that measuring airflow is difficult, labor- and capital-intensive, and not necessary to rate furnace fan electrical energy use. (Rheem, No. 25 at p. 3; Lennox, No. 12 at p. 4.) As mentioned previously, Mortex suggested that airflow could be calculated by using the temperature rise methodology already employed for the DOE furnace test procedure prior to AHRI submitting its recommended alternative test method. (Mortex, Public Meeting Transcript, No. 23 at p. 234.) Goodman performed tests according to both DOE's proposed procedure and AHRI's suggested method and found that testing time is reduced by almost 60% using AHRI's method. (Goodman, No. 17 at p. 3.) Rheem also conducted tests according to both procedures and stated that the time to test a single-stage furnace was reduced from 4 hours to 45 minutes by using the AHRI method. (Rheem, No. 25 at p. 4.)

AHRI claimed that its suggested method would eliminate potential issues associated with fitting quadratic curves to the test data to derive FER as proposed in the NOPR. According to AHRI and Morrison, the quadratic curves can be easily manipulated. (AHRI, No. 16 at p. 3; Morrison, No. 21 at p. 5.) Furthermore, AHRI stated that the quadratic curves can be significantly skewed through a single incorrect measurement. (AHRI, No. 16 at p. 3.) Morrison agrees that DOE should abandon the system curve approach in favor of AHRI's proposed method because eliminating the need to curve fit and find the intersection of second order polynomials would reduce the burden on manufacturers. Morrison stated that the added burden of the NOPR method does not provide any added value to the purpose of saving energy, guiding consumers in making correct choices, or enhancing the regulatory process. (Morrison, No. 21 at p. 5.) NEEA explained that the need for quadratic curve-fitting could be eliminated by establishing the specified external static pressure values in a specific mode, and then running the remaining tests in other modes without modifying the physical test apparatus set-up. NEEA and NPPC suggested that DOE consider this simplified approach. According to NEEA and NPPC, the

result would be testing an air handler against a fixed intake and discharge configuration, accepting whatever static pressure the system generates when testing in modes other than the initial mode. NEEA and NPCC contended that this is how duct systems work in the field—they are in a fixed physical configuration and the air handler deals with the external static pressure created and imposed, regardless of what mode it is in. (NEEA/NPCC, No. 22 at pp. 2–3.)

Goodman commented that test results show that FER values generated using AHRI's test method are within 5% of the FER values generated using the test procedure proposed in the NOPR. (Goodman, No. 17 at p. 4.) Rheem's test results show similar results. (Rheem, No. 25 at p. 4.)

Efficiency advocates agreed that some hybrid of reference standards could be used to develop a test procedure that is less burdensome than wholly adopting ANSI/AMCA 210. However, the Joint Commenters stated that simply implementing ASHRAE 37 is an incomplete solution because this method lacks an electrical energy consumption measurement. (Joint Commenters, No. 13 at p. 3.) The CA IOU advised DOE to develop a hybrid test procedure that draws from AMCA 210, ASHRAE 37, and AHRI 210–240 but emphasized that portions of AMCA 210 are needed for measuring fan power at different airflow rates. (CA IOU, No. 20 at p. 1.) While unclear from CA IOU's comments, DOE infers that the CA IOU are referring to provisions for measuring fan performance in multiple airflow-control settings.

In today's notice, DOE proposes to adopt a modified version of the alternative test method proposed by AHRI. DOE agrees that the key concept embodied in the alternative method suggested by AHRI and manufacturers (using temperature rise to determine airflow) can be a viable approach to obtain accurate and repeatable FER values at significantly reduced burden. The methods suggested by AHRI are already used in existing industry and DOE test methods. ASHRAE 37 includes determining airflow based on temperature rise as an alternative method to using differential pressure across nozzles. In addition, the DOE test procedure for furnaces includes well established and accurate methods for measurement of temperature rise, fuel input, and steady state combustion efficiency based on flue gas temperature and carbon dioxide concentrations. Additionally, DOE recognizes the opportunity to reduce test burden by: (1) Aligning the furnace fan test set up and procedures with those of the existing DOE furnace test procedure; and (2) maintaining the same duct restrictions throughout the test after initial reference system conditions are met in lieu of the previously proposed methods of making multiple determinations in each airflow-control setting and curve-fitting to identify operating points. DOE also agrees with advocates and utilities that the proposed test procedure should reflect field ESP conditions and measure furnace fan electrical input power in multiple airflow-control settings. The AHRI method includes provisions that meet these goals. DOE has considered the AHRI approach and has concluded that some clarifications and modifications are necessary to make the approach more practicable and accurate. For these reasons, DOE proposes to adopt a modified version of the alternative furnace fan test procedure proposed by AHRI.

DOE proposes the following additions and modifications to the test method recommended by AHRI:

- Airflow in the maximum airflow-control setting would be calculated based on measured air temperature rise when the HVAC product is in a heating-mode airflow-control setting rather than in the maximum airflow-control setting.
- In the airflow calculation presented by AHRI, AFUE would be replaced by a function of steady state efficiency ($Effy_{SS}$), measured fuel energy input rate (Q_{IN}), jacket losses (L_J), and fan electrical input power (E_{Heat}) measured according to ASHRAE 103–2007 at the specified operating conditions.
- External static pressure would be measured as specified in ASHRAE 37.
- Additional thermocouples would be added to the outlet grids used to measure temperature rise.
- Use of a mixer, as described in ANSI/ASHRAE Standard 41.1–1986 (RA 2006), would be required to minimize outlet flow temperature gradients if the temperature difference between any two thermocouples is greater than 1.5 °F.
- Greater temperature measurement accuracy and tighter stabilization criteria would be specified.
- The 18 °F temperature rise minimum specified by ASHRAE 37–2005 would be incorporated by reference.

Each of the listed modifications is described and explained in more detail in subsequent sections.

1. Calculating Maximum Airflow

AHRI proposes to calculate airflow based on measured temperature rise, rated input heat capacity, and AFUE using the following equation (AHRI, No. 26 at p. 23):

$$Q = \frac{AFUE \times Q_{IN}}{1.08 \times \Delta T}$$

Where:

Q = airflow, in cubic feet per minute (CFM),
$AFUE$ = annual fuel utilization efficiency, as determined by the DOE furnace test procedure,
Q_{IN} = fuel energy maximum nameplate input rate at steady-state operating (including any pilot light input), in British Thermal Units per hour (Btu/h),
1.08 = Conversion from airflow and temperature rise to heating rate, and
ΔT = measured temperature rise.

DOE is concerned that using AFUE and the nameplate fuel energy input rate, as defined in AHRI's proposal, would not result in accurate representations of airflow at the proposed operating conditions because: (1) Neither parameter is measured at the proposed operating conditions; and (2) AFUE is a function of off-cycle parameters such as infiltration heat loss and pilot light heat generation, which do not contribute to the temperature rise proposed to be used to calculate airflow. While temperature rise would be measured at the ESP levels outlined in AHRI's alternative method (which are equivalent to those proposed in the NOPR and herein), AFUE and nameplate input rate would be determined based on measurements taken at the ESP levels required by the DOE furnace test procedure (*i.e.* specified in ASHRAE 103–1993), which are significantly lower. Also, results from a 2002 comparison of AFUE and steady stat efficiency show that the steady state efficiency ranges from zero to three percent higher than AFUE.[7] More recent DOE tests yielded similar results, with steady state efficiency reaching as high as six percent higher than AFUE. DOE proposes to use steady state efficiency and fuel energy input measured at the proposed operating conditions, instead of AFUE and nameplate fuel energy input, to address these discrepancies and minimize the resulting inaccuracies in calculated airflow. Manufacturers would only be required to take two additional measurements (flue or stack gas temperature and carbon dioxide concentration) using equipment that is already in place for AFUE testing as a result of the proposed modification. DOE recognizes that replacing AFUE with steady state combustion efficiency at operating conditions would also require that jacket losses and the usable heat generated by the motor be included

[7] Public Workshop on Residential Furnace and Boiler Venting. May 2002. *http://www1.eere.energy.gov/buildings/appliance_standards/furnboil_050802_reswh.html.*

in the calculation. The DOE test procedure for furnaces already includes methods for accounting for these additional factors. Accordingly, DOE proposes to use the following equation to calculate airflow:

$$Q = \frac{\left(Effy_{SS} - L_J\right) \times Q_{IN} + \left[(3413 \times E\right]_{Heat})}{1.08 \times \Delta T}$$

Where:

Q = airflow in CFM,

$Effy_{SS}$ = steady state efficiency in % as determined according to ASHRAE 103–2007 at the specified operating conditions,

L_J = jacket loss in % as determined according to ASHRAE 103–2007 at specified operating conditions,

Q_{IN} = measured fuel energy input in Btu/h at specified operating conditions based on the fuel's high heating value determined as required in section 8.2.1.3 or 8.2.2.3 of ASHRAE 103–2007,

3413 = conversion of kW to Btu/h;

E_{Heat} = electrical energy to the furnace fan motor in kW that is recovered as useable heat,

1.08 = conversion from airflow and temperature rise to heating rate, and

ΔT = temperature rise measured at specified operating conditions.

DOE requests comments on the proposed changes to the equation for calculating airflow. DOE recognizes that the use of the 1.08 conversion factor assumes that the airflow has standard air properties (*e.g.,* standard air density and specific heat). DOE anticipates that the properties of the airflow under test may deviate from these values at actual test conditions, resulting in inaccurate airflow calculation results. DOE expects that variation in airflow density would be the significant driver of these inaccuracies. Therefore, DOE also requests comment on whether the conversion factor should be adjusted by the barometric pressure at test conditions. (See Issue 1 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

DOE is concerned that certain of the test conditions proposed by AHRI could lead to test results that are not representative of actual furnace fan energy use. AHRI's recommended method specifies that the maximum airflow be calculated based on a temperature rise measurement taken while operating the furnace in the maximum airflow-control setting and firing the burner. (AHRI, No. 26 at p. 21.) DOE is aware that the maximum airflow-control setting is often designated for cooling operation and not for heating. DOE anticipates that firing the burner while the furnace is in the maximum airflow-control setting is not typical of furnace operation, and that achieving this combination of settings by interfacing with the furnace controls may not be possible. The AHRI approach also specifies electrical input power in the heating airflow-control setting be measured without firing the burner.

DOE proposes to modify the AHRI recommended method to specify that maximum airflow be calculated based on a temperature rise measurement taken while operating the furnace in the rated heating airflow-control setting and firing the burner at the heat input capacity associated with that airflow-control setting. For more details regarding the proposed rated airflow-control settings, refer to Table II.2 in the Summary of the NOPR, 77 FR at 28676 (May 15, 2012). DOE expects that these proposed combinations of operating conditions are typical of field furnace use. These requirements would help ensure that test results are representative of actual furnace fan energy use, and would minimize the potential difficulties associated with firing the furnace in an airflow-control setting not intended for heating. DOE is not proposing any changes in this notice to the rated airflow-control settings proposed in the NOPR. The procedure proposed herein would require that the temperature rise measurement be taken in the default heating airflow-control setting for single-stage furnaces and in the default low heating airflow-control setting for multi-stage and modulating furnaces.

DOE recognizes that, compared to AHRI's suggested method, more complex calculations are required to determine the airflow in the maximum airflow-control setting based on a temperature rise measurement in the heating airflow-control setting. DOE proposes to specify that ESP measurements be taken in conjunction with the temperature rise and furnace fan electrical input power measurements for each rated airflow-control setting. Airflow in the rated heating airflow-control setting can be calculated using the airflow calculation equation proposed above. Once the airflow in the rated heating airflow-control setting has been calculated, the physical constant (k_{ref}) can be calculated using the equation below. k_{ref} characterizes the reference system duct restrictions set in the initial test conditions.

$$k_{ref} = \frac{ESP_{Heat}}{Q_{Heat}^2}$$

Where:

k_{ref} = physical constant that characterizes the reference system duct restrictions,

ESP_{Heat} = external static pressure measured at the operating point in the heating airflow-control setting, and

Q_{Heat} = airflow in the rated heating airflow-control setting.

The same value for k_{ref} can be used to characterize the system for all airflow-control settings because the same duct restrictions would be used for all test settings. Airflow in the maximum airflow-control setting would be calculated using k_{ref} and the ESP measured in the maximum airflow-control setting using the following equation.

$$Q_{Max} = \sqrt{\frac{ESP_{Max}}{k_{ref}}} = Q_{Heat}\sqrt{\frac{ESP_{Max}}{ESP_{Heat}}}$$

DOE is aware that ESP, airflow, and electrical input measurements could vary due to the different physical properties of air (particularly density) at higher temperature. As a result, a different k_{ref} may apply when the furnace is firing as compared with room-temperature operation without firing. To a first order, the pressure drop imposed by flow through ductwork can be approximated as being proportional to fluid density multiplied by the square of the velocity. The velocity for a given mass flow is proportional to the inverse of the density. The density is inversely

proportional to absolute temperature (*i.e.* the temperature expressed in degrees Kelvin or Rankine). Hence, the relationship between ESP and temperature for a fixed mass flow of air approximately exhibits the following proportionality:

$$ESP \propto \rho v^2 \propto \frac{1}{\rho} \propto (T + 460)$$

Where:

ρ = Air density,
v = Air velocity,
T = Air temperature in degrees Fahrenheit (°F), and
460 = Conversion from degrees Fahrenheit to degrees Rankine.

For operation of a furnace, the higher ESP that occurs when it is firing would reduce the mass flow of air. Consequently, the value of Q_{Max}, as calculated according to the Q_{Max} equation proposed by DOE above would be slightly lower than the actual maximum airflow. This is because ESP_{Heat} would be slightly elevated and Q_{Heat} slightly reduced for the hot flow that occurs during the measurement relative to the way the system would behave for room temperature operating conditions. DOE proposes an adjustment in the Q_{Max} equation proposed by DOE above to account for the elevated temperature in the ductwork during the measurement, as follows:

$$Q_{Max} = \sqrt{\frac{ESP_{Max}}{k_{ref}} \times \frac{(T_{Heat} + 460)}{(T_{Max} + 460)}} = Q_{Heat}\sqrt{\frac{ESP_{Max}}{ESP_{Heat}} \times \frac{(T_{Heat} + 460)}{(T_{Max} + 460)}}$$

Where:

T_{Heat} = Outlet air temperature in the heating airflow-control setting, and
T_{Max} = Outlet air temperature in the maximum airflow-control setting.

DOE requests comment on the proposed adjustment to the Q_{Max} calculation above, which would result in greater accuracy in determination of the maximum airflow rate. DOE also requests comments on the proposed modified method for calculating airflow in the maximum airflow-control setting. Specifically, DOE requests comments on how ESP, furnace fan electrical input power, and airflow measurements are impacted by temperature rise. DOE also seeks comment on how those relationships would impact the accuracy of the calculated value of Q_{Max} and, ultimately, FER. (See Issue 2 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

DOE recognizes that a more accurate measurement of temperature rise could be made at higher temperature rises because the allowable error in temperature measurements would represent a lower percentage of the overall temperature rise. For example, the maximum allowable proposed error of ± 1 °F (± 0.5 °F at both the inlet and outlet) would represent an approximate error of 3 percent for a temperature rise of 30 °F, and half as much for a 60 °F temperature rise. DOE is aware that operating the furnace in the reduced heat setting for multi-stage furnaces would result in a lower temperature rise than if fired in the maximum heat setting. DOE requests comment on whether the maximum airflow should be calculated based on the temperature rise measured while operating the furnace fan in the maximum default heat airflow-control setting and at maximum heat input capacity to minimize the effect of temperature measurement error on the overall FER calculation. (See Issue 3 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

DOE is concerned that at higher elevations the temperature rise would be greater due to reduced air mass flow, resulting in a higher calculated airflow. DOE requests comments on the magnitude of potential elevation impacts on calculated airflow and FER values. DOE also requests comments on whether specifications, such as a maximum test elevation or elevation adjustment factor, should be used to avoid circumvention associated with conducting this test at high elevation. (See Issue 4 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

2. ASHRAE 37 External Static Pressure Measurements

DOE believes that more detailed specifications for setting and measuring ESP are required than those in the AHRI suggested test method. AHRI's suggested test method specifies that the reference system ESP be achieved by ''symmetrically restricting the outlet of the test duct.'' (AHRI, No. 26 at pp. 8, 19, 20) The AHRI test method does not provide details on the equipment or procedures that should be used to meet this requirement. (DOE is aware that independent test labs typically apply cardboard ducting or tape to the corners of the outlet to achieve the desired ESP.) DOE requests comments on whether one or more methods for restricting the outlet duct should be included in the test procedure. (See Issue 5 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

According to AHRI's suggested test method, use of a return air duct in the test setup is optional. (AHRI, No. 26 at p. 20.) DOE proposes to also allow for the optional use of a return air duct; however, DOE is concerned that ESP may differ when measured with a return air duct compared to when measured without a return air duct. DOE believes that each different motor type may react differently with the use of a return air duct, but the impacts on the FER measurements may be small. DOE requests comments on the ESP measurements and FER values that result when not using a return air duct compared to when a return air duct is used, and whether the test procedure should explicitly require use of a return air duct. (See Issue 6 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

AHRI's suggested test method specifies that ESP measurements be made between the furnace openings and any restrictions or elbows in the test plenums or ducts and as close as possible to the air supply and return openings of the furnace. (AHRI, No. 26 at p. 20) DOE proposes to incorporate by reference the ASHRAE 37 provisions for measuring ESP (sections 6.4 and 6.5), which are consistent with AHRI's suggested specifications and provide more detail. DOE anticipates that these more detailed specifications would minimize variations in test setups and, in turn, improve repeatability. DOE proposes to specify that ESP be measured according to the setup illustrated in Figure 8 of ASHRAE 37 when a return air duct is used. This setup would require direct measurement of the static pressure difference between the inlet and outlet of the unit under test as opposed to taking separate static measurements at the inlet and outlet and calculating the difference between the two measurements. Direct measurement in this context means that the inlet and outlet pressure signal tubing would be connected on opposite sides of a single manometer, rather than using two manometers or transducers, each being open to the ambient on one

side. DOE proposes to specify that ESP be measured according to the setup illustrated in Figure 7 of ASHRAE 37 when a return air duct is not used. DOE does not anticipate any issues with specifying ASHRAE 37 provisions for measuring ESP because, as mentioned above, manufacturers commented that ASHRAE 37 is a widely used standard for testing HVAC products and is recommended for rating furnace fans. DOE requests comments on its proposed provisions for measuring ESP, which are adopted from ASHRAE 37–2005. (See Issue 7 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

3. Temperature Rise Measurements

DOE recognizes that FER results generated according to the proposed test procedure are sensitive to the temperature rise measurement that would be used to calculate the airflow in the maximum airflow-control setting. DOE expects that the equipment and methods used to measure temperature rise in the AHRI method can be improved, which would result in a more accurate and repeatable test procedure. The modifications that DOE proposes are mostly derived from the provisions of the alternative method for calculating airflow specified in section 7.7.1.2 and 7.7.4 of ASHRAE 37–2005.

AHRI's recommended method adopts ASHRAE 103–2007 provisions that specify that temperature measurements shall have an error no greater than ±2 °F. In the worst case scenario, an error of 2 °F on both the inlet and outlet temperature measurements could result in an error of 4 °F. DOE estimates that an error of 4 °F for the temperature rise measurement could yield an error of approximately 10% in FER for a typical temperature rise between 30 °F and 60 °F.

DOE proposes to specify that temperature measurements have an error no greater than ±0.5 °F. The accuracy requirements of existing test standards that are used to test these products are more stringent—Table 1 in section 4 of ASHRAE 37–2005 requires temperature measurement accuracy of ±0.2 °F. DOE requests comment on whether ±0.5 °F is reasonably achievable. (See Issue 8 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

AHRI's proposed method does not include a minimum temperature rise requirement. DOE is concerned that the allowable error in temperature measurements coupled with a low temperature rise could result in inaccurate test results. For this reason, DOE proposes to require a minimum temperature rise of 18 °F, as specified in ASHRAE 37–2005. DOE notes that with its proposed ±0.5 °F temperature measurement accuracy requirement and its proposed minimum 18 °F temperature rise, the maximum potential error in measured airflow associated with the temperature rise measurement is approximately 5.6%. DOE requests comments on whether a minimum temperature rise should be required and, if so, what is an appropriate value for the minimum temperature rise. (See Issue 9 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

AHRI's recommended method adopts the stabilization criteria of the DOE test procedure for residential furnaces. 10 CFR part 430, subpart B, appendix N, section 7.0. According to section 7.0 of the DOE test procedure for furnaces, which references section 8.0 of ASHRAE 103–1993, steady-state conditions for gas and oil furnaces are attained as indicated by a temperature variation in three successive readings, taken 15 minutes apart, of not more than:

- 3 °F in the stack gas temperature for furnaces equipped with draft diverters;
- 5 °F in the stack gas temperature for furnaces equipped with either draft hoods, direct exhaust, or direct vent systems; and
- 1 °F in the flue gas temperature for condensing furnaces.

For electric furnaces, steady-state conditions are reached as indicated by a temperature variation of not more than 5 °F in the outlet temperature in four successive temperature readings taken 15 minutes apart.

DOE is concerned that the temperature variations specified in the above stabilization criteria are not stringent enough to maximize accuracy and repeatability for evaluating furnace fan performance. As mentioned above, the FER results generated according to the proposed test procedure are sensitive to temperature variation because they are a function of the airflow calculated using measured temperature rise. DOE proposes the following stabilization criteria to address this concern. For testing furnace fans used in gas and oil furnaces, DOE proposes that steady-state conditions are attained as indicated by a temperature variation in three successive readings, taken 15 minutes apart, of not more than:

- 1.5 °F in the stack gas temperature for furnaces equipped with draft diverters;
- 2.5 °F in the stack gas temperature for furnaces equipped with either draft hoods, direct exhaust, or direct vent systems; and
- 0.5 °F in the flue gas temperature for condensing furnaces.

For electric furnaces, DOE proposes that steady-state conditions are reached as indicated by a temperature variation of not more than 1 °F in the outlet temperature in four successive temperature readings taken 15 minutes apart. DOE requests comments on whether the proposed stabilization criteria are reasonably achievable, and whether the stabilization criteria for the AFUE test would be sufficient to assure that the entire furnace has thermally stabilized to a point such that the measured air temperature rise would no longer significantly change. (See Issue 10 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

AHRI's approach does not include provisions to account for potential inlet or outlet airflow temperature gradients. DOE is concerned that temperature gradients are likely to be present, which would compromise the accuracy and repeatability of the temperature rise measurement results. DOE proposes to specify the use of a mixer, as depicted in Figure 10 of ASHRAE 37–2005, which references ANSI/ASHRAE Standard 41.1–1986 (RA 2001), to minimize outlet flow temperature gradients if the temperature difference between any two thermocouples of the outlet air temperature grid is greater than 1.5 °F. DOE has not had the opportunity to evaluate the potential inaccuracies associated with allowing larger temperature gradients, and instead bases this selection on its use as the maximum allowable temperature difference threshold in ASHRAE 210/240 for the ''C'' and ''D'' tests for CAC products. These tests use temperature rise and airflow measurement to determine cooling capacity. The proposed furnace fan test method uses the inverse of the relationship for these factors to determine airflow based on measured temperature rise and input heat capacity. Hence, the implications for temperature gradients to result in measurement errors are equivalent. DOE requests comment on whether the effect on static pressure of adding a mixer would prevent the test setup from achieving the ESP levels specified in the DOE test procedure for residential furnaces or the lower ESP levels specified in this notice for measuring fan performance in the lowest rated airflow setting. DOE also seeks comment on whether additional thermocouples are needed to measure the inlet air temperature. (See Issue 11 under ''Issues

on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

C. Definitions

DOE proposes to adopt all definitions in section 3 of ASHRAE 103, which are already codified in section 2 of Appendix N to Subpart B of Part 430. DOE also proposes to include the additional and modified definitions listed below.

• *Active mode* means the condition in which the product in which the furnace fan is integrated is connected to a power source and circulating air through ductwork.

• *Airflow-control settings* are programmed or wired control system configurations that control a fan to achieve discrete, differing ranges of airflow, often designated for performing a specific HVAC function (*e.g.,* cooling, heating, or constant circulation), without manual adjustment other than interaction with a user-operable control such as a thermostat that meets the manufacturer specifications for installed use found in the product literature shipped with the unit.

• *Default airflow-control settings* are the airflow-control settings specified for installed use by the manufacturer in the product literature shipped with the product in which the furnace fan is integrated. In instances where a manufacturer specifies multiple airflow-control settings for a given function to account for varying installation scenarios, the highest airflow-control setting specified for the given function shall be used for the DOE test procedure.

• *External static pressure* means the difference between static pressures measured in the outlet duct and return air opening (or return air duct when used for testing) of the product in which the furnace fan is integrated.

• *Furnace fan* is an electrically-powered device used in a consumer product for the purpose of circulating air through ductwork.

• *Modular blower* means a product which only uses single-phase electric current, and which:

(a) Is designed to be the principal air circulation source for the living space of a residence;

(b) Is not contained within the same cabinet as a furnace or central air conditioner; and

(c) Is designed to be paired with HVAC products that have a heat input rate of less than 225,000 Btu per hour and/or cooling capacity less than 65,000 Btu per hour.

• *Off mode* means the condition in which the product in which the furnace fan is integrated is either not connected to the power source or connected to the power source but not energized.

• *Standby mode* means the condition in which the product in which the furnace fan is integrated is connected to the power source and the furnace fan is not circulating air.

D. Sampling Plans

DOE provides sampling plans for all covered products. The purpose of a sampling plan is to provide statistically valid representations of energy consumption or energy efficiency for each covered product by capturing the variability inherent in the manufacturing and testing process. These sampling plans apply to all aspects of the EPCA program for consumer products, including public representations, labeling, and compliance with energy conservation standards. 10 CFR 429.11. In the NOPR, DOE proposed that the existing sampling plans used for furnaces be adopted and applied to measures of energy consumption for furnace fans. 77 FR at 28691 (May 15, 2012).

AHRI and manufacturers commented that the 97.5 percent confidence limit required by the furnace sampling plan is too stringent. *See* 10 CFR 429.18(a). Morrison and Allied Air commented on the difficulty of obtaining accurate, precise airflow measurements. According to Morrison, the uncertainty allowable per AMCA 210–07 is much greater than what is permissible in the furnaces sampling plan. (Morrison, Public Meeting Transcript, No. 23 at p. 219; Allied Air, Public Meeting Transcript, No. 23 at p. 218.) Unico stated that it would have a problem with meeting anything close to 97.5 percent confidence. (Unico, Public Meeting Transcript, No. 23 at p. 224.) AHRI stated that the confidence limits used for the AFUE measurement are inappropriate for the proposed electrical measurements. (AHRI, Public Meeting Transcript, No. 23 at p. 226.) Ingersoll Rand stated that the 97.5 percent confidence limit is not going to work and would require at least three sample units for every model to meet the requirement. (Ingersoll Rand, Public Meeting Transcript, No. 23 at p. 230.) Carrier explained that the components of the furnace fan (*i.e.* electric motors, blower wheels and blower housings) are more analogous to an air conditioner or refrigerator than to the combustion process of a fuel-fired furnace. According to Carrier, AFUE does not consider the electrical efficiency of the furnace fan components. Carrier recommends the certification and enforcement level for furnaces fans to be 90%, which is consistent with the confidence limit for CAC. (Carrier, No. 10 at p. 4.) Allied Air, Goodman, Rheem, Ingersoll Rand, Lennox, and Morrison agreed that a sampling plan requiring a 90 percent confidence limit would be more appropriate. (Allied Air, Public Meeting Transcript, No. 23 at p. 225; Goodman, No. 17 at p. 6; Rheem, No. 25 at p. 11; Ingersoll Rand, No. 14 at p. 2; Lennox, No. 12 at p. 5; Morrison, No. 21 at p. 8.)

Efficiency advocates also support a less stringent confidence interval. Adjuvant commented that it strives for a 90 percent confidence interval in its work with HVAC products, which Adjuvant finds to be an appropriate level. Adjuvant added that it rarely uses 95 percent and would not push for anything higher than 90. (Adjuvant, Public Meeting Transcript, No. 23 at p. 229.) NPCC and NEEA commented that a 97.5 percent confidence limit is unrealistically stringent and might cause enforcement testing issues that are not helpful in certifying efficiency levels. NPCC and NEEA added that air flow and external static pressure measurements are prone to larger error bands than measurements such as power levels or temperatures, and are likely to cause real problems for manufacturers trying to certify to the 97.5 percent confidence limit. NPCC and NEEA recommended using the same confidence limits as those used for heat pump and air conditioning systems, which are subject to some of the same measurement error bands as air handlers. (NPCC/NEEA, No. 22 at p. 7.) AHRI stated that confidence limits historically have been set without supporting data and suggested that DOE do a rigorous analysis to determine an appropriate confidence limit. (AHRI, Public Meeting Transcript, No. 23 at p. 225.)

DOE agrees with interested parties that the furnace fan electrical input power measurements and external static pressure measurements that would be required by the test procedure proposed herein are different and inherently more variable than the measurements required for AFUE. DOE proposes to adopt a sampling plan that requires any represented value of FER to be greater or equal to the mean of the sample or the upper 90 percent (one-tailed) confidence limit divided by 1.05, as specified in the sampling plan for CAC/HP products. 10 CFR 429.16 DOE will continue to analyze the available test data to evaluate the proposed sampling plan parameters. DOE requests comments, including detailed data, regarding test result variance that it can use to assess the appropriateness of the sampling plan proposed herein. (See

Issue 12 under ''Issues on Which DOE Seeks Comment'' in section V.B of this SNOPR.)

E. Standby Mode and Off Mode Energy Consumption

EPCA, as amended by the Energy Independence and Security Act of 2007, Public Law 110–140 (EISA), requires that any final rule for a new or amended energy conservation standard adopted after July 1, 2010, must address standby mode and off mode energy use pursuant to 42 U.S.C. 6295(o). (42 U.S.C. 6295(gg)(3)) Thus, the statute implicitly directs DOE, when developing test procedures to support new energy conservation standards, to account for standby mode and off mode energy consumption. EISA also requires that such energy consumption be integrated into the overall energy efficiency, energy consumption, or other energy descriptor, unless the current test procedure already accounts for standby mode and off mode energy use. If an integrated test procedure is technically infeasible, DOE must prescribe a separate standby mode and off mode test procedure for the covered product, if technically feasible. (42 U.S.C. 6295(gg)(2)(A)) Accordingly, DOE must address the standby mode and off mode energy use of furnace fans in this test procedure. However, DOE has already fully incorporated standby mode and off mode energy use in the test procedures (or proposed test procedures) for all of the products to which this test procedure rulemaking would be applicable.

Table III.1 summarizes the test procedure rulemaking vehicles through which DOE addresses standby mode and off mode energy consumption for the various types of products which circulate air through ductwork.

TABLE III.1—RULEMAKING ACTIVITIES ADDRESSING FURNACE FAN STANDBY MODE AND OFF MODE ENERGY CONSUMPTION

HVAC products	Status	DOE rulemaking activity
• Gas Furnaces • Oil-fired Furnaces • Electric Furnaces	Addressed in separate rulemaking	• Codified Furnaces Test Procedure October 20, 2010 final rule (75 FR 64621) (10 CFR part 430, subpart B, appendix N, section 8.0). • September 13, 2011 NOPR (76 FR 56339).
• Modular Blowers • Weatherized Gas Furnace	Addressed in separate rulemaking	• June 2, 2010 NOPR (75 FR 31224). • April 1, 2011 SNOPR (76 FR 18105). • October 24, 2011 SNOPR (76 FR 65616).

DOE prescribed the measurement of standby mode and off mode energy use for non-weatherized gas furnaces, oil-fired furnaces, and electric furnaces in the furnace test procedure, 10 CFR part 430, subpart B, appendix N, section 8.0. DOE proposed coverage of standby mode and off mode energy use for modular blowers and weatherized gas furnaces in a June 2, 2010 NOPR. 75 FR 31224. In a September 13, 2011 NOPR, DOE proposed amendments to its furnace test procedure related to standby mode and off mode. 76 FR 56339. DOE subsequently published one SNOPR on April 1, 2011, and another on October 24, 2011, regarding standby mode and off mode test procedures for these products. 76 FR 18105; 76 FR 65616. DOE published a furnaces standby and off mode test procedure final rule on December 31, 2012. 77 FR 76831. Furnace fans are integrated in the electrical systems of the HVAC products in which they are used and controlled by the main control board. Therefore, the standby mode and off mode energy use associated with these furnace fans would be measured by the established or proposed test procedures associated with these products. There is no need for DOE to adopt additional test procedure provisions for these modes in this rulemaking.

F. Reference System Product Types

In the NOPR, DOE identified four installation types with unique reference system ESP considerations:

- Heating-only units;
- Units with an internal evaporator coil;
- Units designed to be paired with an evaporator coil; and
- Manufactured home units.

DOE anticipated that some HVAC products may not be designed to provide cooling. Specifically, DOE identified hydronic air handler models that are not designed to be paired with an evaporator coil (either factory-installed or separate). DOE proposed to specify a lower reference system ESP for these products because they do not experience the additional pressure drop of circulating air past an evaporator coil.

Ingersoll Rand commented that it was not aware of any product that would be categorized as a heating-only product. Ingersoll Rand added that including this installation type could provide manufacturers with a means of gaming the test procedure by modifying its furnaces to eliminate factory-installed cooling capabilities, which would allow such furnaces to be tested at the lower ESP specified for heating-only units. For these reasons, Ingersoll Rand recommended that DOE eliminate the heating-only designation. (Ingersoll Rand, Public Meeting Transcript, No. 23 at p. 50.) NPCC and NEEA also suggested that DOE eliminate the heating-only installation type. (NPCC/NEEA, No. 22 at p. 6)

DOE agrees with interested parties that the heating-only installation type should be eliminated from consideration. The scope of applicability of the test procedure proposed herein does not include hydronic air handlers as discussed in section III.A. Consequently, DOE proposes to eliminate the heating-only product designation as a result.

IV. Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

The Office of Management and Budget (OMB) has determined that test procedure rulemakings do not constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (Oct. 4, 1993). Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs (OIRA) at OMB.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis (IFRA) for any rule that by law must be proposed for public comment and a final regulatory flexibility analysis

(FRFA) for any such rule that an agency adopts as a final rule, unless the agency certifies that the rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the DOE rulemaking process, 68 FR 7990. DOE's procedures and policies may be viewed on the Office of the General Counsel's Web site (*http://energy.gov/gc/office-general-counsel*).

DOE reviewed today's proposed rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003, 68 FR 7990. DOE has tentatively concluded that the proposed rule would not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act. The factual basis for this certification is as follows:

The Small Business Administration (SBA) considers an entity to be a small business if, together with its affiliates, it employs fewer than a threshold number of workers as specified in 13 CFR part 121. The threshold values set forth in these regulations use size standards and codes established by the North American Industry Classification System (NAICS) that are available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.* The threshold number for NAICS classification for 333415, which applies to Air-Conditioning and Warm Air Heating Equipment and Commercial and Industrial Refrigeration Equipment Manufacturing (this includes furnace fan manufacturers) is 750 employees.[8] DOE reviewed AHRI's Directory of Certified Product Performance for Residential Furnaces and Boilers (2009),[9] the ENERGY STAR Product Databases for Gas and Oil Furnaces (May 15, 2009),[10] the California Energy Commission's Appliance Database for Residential Furnaces and Boilers,[11] and the Consortium for Energy Efficiency's Qualifying Furnace and Boiler List (April 2, 2009).[12] From this review, DOE identified 14 small businesses within the furnace fan industry. DOE does not believe the test procedure amendments described in this proposed rule would represent a substantial burden to any manufacturer, including small manufacturers, as explained below. DOE requests comments on its characterization of the furnace fan industry in terms of the number of and impacts on small businesses.

This proposed rule would establish test procedures that would be used for representations of energy use and to test compliance with new energy conservation standards, which are being developed in a concurrent rulemaking, for the products that are the subject of this rulemaking. This notice proposes new test procedures for active mode testing for all such products. The proposed rule would require a modified version of the testing methods prescribed in a public submission from AHRI (the trade organization that represents manufacturers of furnace fans). The AHRI proposal recommends test methods that are purposely aligned with the current DOE test procedure for furnaces in order to minimize test burden. (AHRI, No. 26); Appendix N of subpart B of 10 CFR part 430. As discussed above, this would not represent a substantial burden to any furnace fan manufacturer, small or large. According to AHRI, its proposed method would result in an 80 to 90 percent reduction in test burden compared to the test procedure proposed by DOE in the NOPR. AHRI attributed this reduction primarily to manufacturers not having to acquire or use any test equipment beyond the equipment that is already used to conduct the test method specified in the DOE furnace test procedure (*i.e.* the AFUE test setup). (AHRI, No. 16 at p. 3.) Mortex, a small manufacturer, stated that measuring airflow and electrical power input at a few more airflow-control settings as a part of the existing AFUE test procedure should not require any capital outlay, unlike the method proposed by DOE in the NOPR. (Mortex, No. 18 at p. 2.) DOE's proposed modifications to AHRI's approach would require minimal, low-cost equipment beyond what is currently used to perform the AFUE test. This additional equipment would include additional thermocouples and potentially an air mixer. Manufacturers commented that this equipment is already used by furnace fan manufacturers because it is required by either ASHRAE 103 or ASHRAE 37, which are currently used to test the HVAC products considered in this rulemaking. Therefore, DOE expects little or no additional cost as the result of the new test procedure.

DOE also expects that the time and cost to conduct testing according to the proposed test procedure will not be significantly burdensome. During discussions with manufacturers, DOE received feedback that the time to test a single unit according to the AHRI method would be 30 to 60 percent less relative to using the procedure DOE proposed in the NOPR. Goodman performed tests according to both DOE's NOPR test procedure proposal and AHRI's suggested method and found that testing time is reduced by almost 60 percent using AHRI's method. (Goodman, No. 17 at p. 3.) Rheem also conducted tests according to both procedures and stated that the time to test a single-stage furnace was reduced from 4 hours to 45 minutes by using the AHRI method. (Rheem, No. 25 at p. 4.) Assuming that the labor rate for a given manufacturer would be the same regardless of test method, DOE expects that the cost to conduct a test would also be reduced by 30 to 60 percent. DOE estimated that conducting a test according to its NOPR proposed test procedure would cost a small manufacturer $2.30 per unit shipped. This estimate is largely based on DOE's experience with third-party test lab labor rates for fan testing, 77 FR at 28691 (May 15, 2012). A 30 percent reduction would yield a conservative cost estimate of $1.61 per unit shipped to conduct a test according to AHRI's method. DOE does not expect that its proposed modifications to the AHRI method would result in additional costs to conduct a test. DOE finds that the selling price for HVAC products that incorporate furnace fans ranges from approximately $400 to $4,000. Therefore, the added cost of testing per DOE's revised proposed test procedure would be less than one percent of the manufacturer selling price (and lower than 0.1 percent in some cases).

For these reasons, DOE certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a

[8] U.S. Small Business Administration, Table of Small Business Size Standards (August 22, 2008) (Available at: *http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf*).

[9] The Air-Conditioning, Heating, and Refrigeration Institute, Directory of Certified Product Performance (June 2009) (Available at: *http://www.ahridirectory.org/ahridirectory/pages/home.aspx*).

[10] The U.S. Environmental Protection Agency and the U.S. Department of Energy, ENERGY STAR Furnaces—Product Databases for Gas and Oil Furnaces (May 15, 2009) (Available at: *http://www.energystar.gov/index.cfm?c=furnaces.pr_furnaces*).

[11] The California Energy Commission, Appliance Database for Residential Furnaces and Boilers (2009) (Available at: *http://www.appliances.energy.ca.gov/QuickSearch.aspxh*).

[12] Consortium of Energy Efficiency, Qualifying Furnace and Boiler List (April 2, 2009) (Available at: *http://www.ceedirectory.org/ceedirectory/pages/cee/ceeDirectoryInfo.aspx*).

regulatory flexibility analysis for this rulemaking. DOE will provide its certification and supporting statement of factual basis to the Chief Counsel for Advocacy of the SBA for review under 5 U.S.C. 605(b).

C. Review Under the Paperwork Reduction Act of 1995

There is currently no information collection requirement related to the test procedure for furnace fans. In the event that DOE proposes an energy conservation standard with which manufacturers must demonstrate compliance, or otherwise proposes to require the collection of information derived from the testing of furnace fans according to this test procedure, DOE will seek OMB approval of such information collection requirement.

Manufacturers of covered products must certify to DOE that their products comply with any applicable energy conservation standard, 10 CFR 429.12. In certifying compliance, manufacturers must test their products according to the applicable DOE test procedure, including any amendments adopted for that test procedure. *See* 10 CFR 429.13.

DOE established regulations for the certification and recordkeeping requirements for certain covered consumer products and commercial equipment, 76 FR 12422 (March 7, 2011). The collection-of-information requirement for the certification and recordkeeping was subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement was approved by OMB under OMB Control Number 1910–1400. Public reporting burden for the certification was estimated to average 20 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

As stated above, in the event DOE proposes an energy conservation standard for furnace fans with which manufacturers must demonstrate compliance, DOE will seek OMB approval of the associated information collection requirement. DOE will seek approval either through a proposed amendment to the information collection requirement approved under OMB control number 1910–1400 or as a separate proposed information collection requirement.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act of 1969

In this notice of proposed rulemaking, DOE proposes a new test procedure for furnace fans. DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. Specifically, this rule proposes a test procedure without affecting the amount, quality or distribution of energy usage, and, therefore, will not result in any environmental impacts. Thus, this rulemaking is covered by Categorical Exclusion A5 under 10 CFR part 1021, subpart D, which applies to any rulemaking that does not result in any environmental impacts. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, ''Federalism,'' 64 FR 43255 (August 10, 1999), imposes certain requirements on Federal agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations, 65 FR 13735. DOE has examined this proposed rule and has tentatively determined that it would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of today's proposed rule. States can petition DOE for exemption from such preemption to the extent, and based on criteria, set forth in EPCA (42 U.S.C. 6297(d)). No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

Regarding the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (Feb. 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; (3) provide a clear legal standard for affected conduct rather than a general standard; and (4) promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. (Pub. L. 104–4, sec. 201 (codified at 2 U.S.C. 1531)) For a proposed regulatory action likely to result in a rule that may cause the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish a written statement that estimates the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process

to permit timely input by elected officers of State, local, and Tribal governments on a ''significant intergovernmental mandate,'' and requires an agency plan for giving notice and opportunity for timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. DOE's policy statement is also available at *http://energy.gov/gc/office-general-counsel.* DOE examined today's proposed rule according to UMRA and its statement of policy and determined that the rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year. Accordingly, no assessment or analysis is required under UMRA.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings that might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for Federal agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today's proposed rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must provide a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has tentatively concluded that today's regulatory action, which would prescribe the test procedure for measuring the energy efficiency of furnace fans, is not a significant energy action because the proposed test procedure is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as a significant energy action by the Administrator of OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects on the proposed rule.

L. Review Under Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91), DOE must comply with all laws applicable to the former Federal Energy Administration, including section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788) Section 32 provides in relevant part that, where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Attorney General and the Chairman of the Federal Trade Commission (FTC) concerning the impact of the commercial or industry standards on competition.

The proposed rule incorporates testing methods contained in the DOE test procedure for furnaces codified in Appendix N or subpart B of part 430 of the CFR (which incorporates by reference ANSI/ASHRAE Standard 103, ''*Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers,*'' and ANSI/ASHRAE Standard 37–2005, *''Methods of Testing for Rating Electrically Driven Unitary Air-Conditioning and Heat Pump Equipment.''* While today's proposed test procedure is not exclusively based on these standards, some components of the DOE test procedure would adopt definitions, test setup, measurement techniques, and additional calculations from them without any change. The Department has evaluated these standards and is unable to conclude whether they fully comply with the requirements of section 32(b) of the FEAA (*i.e.,* that they were developed in a manner that fully provides for public participation, comment, and review). DOE will consult with the Attorney General and the Chairman of the FTC concerning the impact of these test procedures on competition prior to prescribing a final rule.

V. Public Participation

A. Submission of Comments

DOE will accept comments, data, and information regarding this proposed rule before or after the public meeting, but no later than the date provided in the **DATES** section at the beginning of this proposed rule. Interested parties may submit comments using any of the methods described in the **ADDRESSES** section at the beginning of this SNOPR.

Submitting comments via www.regulations.gov. The *www.regulations.gov* Web page requires you to provide your name and contact information. Your contact information will be viewable to DOE Building Technologies staff only. Your contact information will not be publicly viewable except for your first and last names, organization name (if any), and submitter representative name (if any). If your comment is not processed properly because of technical difficulties, DOE will use this information to contact you. If DOE cannot read your comment due to technical difficulties and cannot contact

you for clarification, DOE may not be able to consider your comment.

However, your contact information will be publicly viewable if you include it in the comment itself or in any documents attached to your comment. Any information that you do not want to be publicly viewable should not be included in your comment, nor in any document attached to your comment. Otherwise, persons viewing comments will see only first and last names, organization names, correspondence containing comments, and any documents submitted with the comments.

Do not submit to *www.regulations.gov* information for which disclosure is restricted by statute, such as trade secrets and commercial or financial information (hereinafter referred to as Confidential Business Information (CBI)). Comments submitted through *www.regulations.gov* cannot be claimed as CBI. Comments received through the Web site will waive any CBI claims for the information submitted. For information on submitting CBI, see the Confidential Business Information section.

DOE processes submissions made through *www.regulations.gov* before posting. Normally, comments will be posted within a few days of being submitted. However, if large volumes of comments are being processed simultaneously, your comment may not be viewable for up to several weeks. Please keep the comment tracking number that *www.regulations.gov* provides after you have successfully uploaded your comment.

Submitting comments via email, hand delivery, or mail. Comments and documents submitted via email, hand delivery, or mail also will be posted to *www.regulations.gov.* If you do not want your personal contact information to be publicly viewable, do not include it in your comment or any accompanying documents. Instead, provide your contact information in a cover letter. Include your first and last names, email address, telephone number, and optional mailing address. The cover letter will not be publicly viewable as long as it does not include any comments.

Include contact information each time you submit comments, data, documents, and other information to DOE. If you submit via mail or hand delivery/courier, please provide all items on a compact disk (CD), if feasible, in which case it is not necessary to submit printed copies. No telefacsimiles (faxes) will be accepted.

Comments, data, and other information submitted to DOE electronically should be provided in PDF (preferred), Microsoft Word or Excel, WordPerfect, or text (ASCII) file format. Provide documents that are not secured, written in English, and are free of any defects or viruses. Documents should not contain special characters or any form of encryption and, if possible, they should carry the electronic signature of the author.

Campaign form letters. Please submit campaign form letters by the originating organization in batches of between 50 to 500 form letters per PDF or as one form letter with a list of supporters' names compiled into one or more PDFs. This reduces comment processing and posting time.

Confidential Business Information. Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public disclosure should submit via email, postal mail, or hand delivery/courier two well-marked copies: one copy of the document marked confidential including all the information believed to be confidential, and one copy of the document marked non-confidential with the information believed to be confidential deleted. Submit these documents via email or on a CD, if feasible. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Factors of interest to DOE when evaluating requests to treat submitted information as confidential include: (1) A description of the items; (2) whether and why such items are customarily treated as confidential within the industry; (3) whether the information is generally known by or available from other sources; (4) whether the information has previously been made available to others without obligation concerning its confidentiality; (5) an explanation of the competitive injury to the submitting person which would result from public disclosure; (6) when such information might lose its confidential character due to the passage of time; and (7) why disclosure of the information would be contrary to the public interest.

It is DOE's policy that all comments may be included in the public docket, without change and as received, including any personal information provided in the comments (except information deemed to be exempt from public disclosure).

B. Issues on Which DOE Seeks Comment

Although DOE welcomes comments on any aspect of this proposal, DOE is particularly interested in receiving comments and views of interested parties concerning the following issues:

1. Airflow Equation

DOE is concerned that using AFUE and Q_{IN}, as defined in AHRI's proposal, would not result in accurate representations of airflow at the proposed operating conditions because neither parameter is measured at the proposed operating conditions. DOE proposes to use steady state combustion efficiency and fuel energy input measured at the proposed operating conditions instead of AFUE and Q_{IN} to address this discrepancy and minimize the potential resulting inaccuracies in calculated airflow. DOE recognizes that replacing AFUE with steady state combustion efficiency would also require that jacket losses and the usable heat generated by the motor also be included in the calculation. Section III.B.1 includes a detailed discussion of this issue and DOE's proposed modified version of the airflow calculation equation. DOE requests comments on these modifications to the equation proposed by AHRI to calculate airflow.

DOE recognizes that the use of the 1.08 conversion factor assumes that the airflow has standard air properties (*i.e.* standard air density and specific heat). DOE anticipates that the properties of the airflow under test may deviate from these values at actual test conditions. Therefore, DOE also requests comment on whether the conversion factor should be adjusted by the barometric pressure at test conditions.

2. Using Temperature Rise in the Rated Heating Airflow-Control Setting To Calculate Maximum Airflow

DOE proposes to modify the AHRI recommended method to specify that maximum airflow be calculated based on a temperature rise measurement taken while operating the furnace in the rated heating airflow-control setting and firing the burner at the heat input capacity associated with that airflow-control setting. DOE recognizes that, compared to AHRI's suggested method, more complex calculations are required to determine the airflow in the maximum airflow-control setting based on a temperature rise measurement in the heating airflow-control setting. Section III.B.1 includes a detailed discussion of DOE's reasoning, methodology, and equations for the modified approach to calculating airflow in the maximum airflow control setting. DOE requests comments on the proposed modified method for calculating airflow in the maximum airflow-control setting. DOE also requests comment on whether the

proposed adjustment to this calculation, which accounts for the elevated temperature in the ductwork, should be incorporated to achieve greater accuracy in determination of the maximum airflow rate. Specifically, DOE requests comments on how ESP, furnace fan electrical input power, and airflow measurements are impacted by temperature rise. DOE also seeks comment on how those relationships would impact the accuracy of the calculated value of Q_{Max} and, ultimately, FER.

3. Using the Maximum Heat Setting to Measure Temperature Rise

DOE recognizes that a more accurate measurement of temperature rise could be made at higher throughput temperatures because the allowable error in temperature measurements would represent a lower percentage of the overall temperature rise. DOE requests comment on whether the maximum airflow should be calculated based on the temperature rise measured while operating the furnace fan in the maximum default heat airflow-control setting and at maximum heat input capacity to minimize temperature measurement error. Section III.B.1 includes a detailed discussion of this issue.

4. Elevation Impacts

DOE is concerned that at higher elevations the temperature rise would be high due to reduced air mass flow, resulting in higher calculated airflow. DOE requests comments on the magnitude of potential elevation impacts on calculated airflow and FER values. DOE also requests comments on whether specifications, such as a maximum test elevation or elevation adjustment factors, should be used to avoid circumvention associated with conducting this test at high elevation.

5. Outlet Duct Restriction Specifications

AHRI's suggested test method specifies that the reference system ESP be achieved by ''symmetrically restricting the outlet of the test duct.'' (AHRI, No. 26 at p. 19.) The AHRI test method does not provide details on the method or equipment to be used to meet this requirement. DOE is aware that independent test labs typically apply cardboard ducting or tape to the corners of the outlet until the desired ESP is achieved. DOE requests comments on whether more specific methods for restricting the outlet duct should be included and what these specific duct restriction requirements should be. Section III.B.2 includes a detailed discussion of this issue.

6. Optional Return Air Duct

According to AHRI's suggested test method, use of an return air duct in the test setup is optional. (AHRI, No. 26 at p. 20.) DOE proposes to also allow for the optional use of a return air duct; however, DOE is concerned that ESP may differ when measured with a return air duct compared to when measured without a return air duct. DOE requests comments on the relative ESP measurements and FER values that result when not using an air return duct compared to when an air return duct is used, and whether the test procedure should explicitly require use of a return air duct. Section III.B.2 includes a detailed discussion of this issue.

7. ASHRAE 37–2005 External Static Pressure Measurement Provisions

AHRI's suggested test method specifies that ESP measurements be made as close as possible to the air supply and return openings of the furnace and in all cases, between the furnace openings and any restrictions or elbows in the test plenums or ducts. (AHRI, No. 26 at p. 20.) DOE agrees with these specifications, but proposes to incorporate by reference the ASHRAE 37 provisions for measuring ESP (sections 6.4 and 6.5), which are consistent with AHRI's suggested specifications but are more detailed. DOE anticipates that these more detailed specifications would minimize variations in test setups and, in turn, improve repeatability. DOE requests comments on its proposed provisions for measuring ESP, which are adopted from ASHRAE 37–2005. Section III.B.2 includes details of DOE's proposal for measuring external static pressure.

Temperature Measurement Accuracy Requirement

AHRI's recommended method adopts ASHRAE 103–1993 provisions that specify that temperature measurements shall have an error no greater than ±2 °F. DOE proposes to specify that temperature measurements have an error no greater than ±0.5 °F to minimize error in the resulting FER values. DOE requests comment on whether ±0.5 °F is reasonably achievable. Section III.B.3 includes a more detailed discussion of this issue.

9. Minimum Temperature Rise

AHRI's method does not include a minimum temperature rise requirement. DOE is concerned that the allowable error in temperature measurements coupled with a low temperature rise could result in inaccurate test results. For this reason, DOE also proposes to require a minimum temperature rise of 18 °F, as specified in ASHRAE 37–2005. DOE requests comments on whether a minimum temperature rise should be required, and if so, what an appropriate value for the minimum temperature rise would be. Section III.B.3 includes a detailed discussion of this issue.

10. Steady-State Stabilization Criteria

AHRI's recommended method adopts the stabilization criteria of the DOE test procedure for residential furnaces. 10 CFR part 430, subpart B, appendix N, section 7.0 DOE is concerned that the temperature variations specified in the residential furnace stabilization criteria are not stringent enough to maximize accuracy and repeatability for evaluating furnace fan performance according to the proposed test procedure. In section III.B.3 DOE proposes modified stabilization criteria to address this concern.. DOE requests comments on whether the proposed stabilization criteria are reasonably achievable, and whether the stabilization criteria for the AFUE test would be sufficient to assure that the entire furnace has thermally stabilized to a point such that the measured air temperature rise would no longer significantly change.

11. Inlet and Outlet Airflow Temperature Gradients

AHRI's approach does not include provisions to account for potential inlet or outlet airflow temperature gradients. DOE is concerned that temperature gradients are likely to be present, which would compromise the accuracy and repeatability of the temperature rise measurement results. DOE proposes to specify the use of a mixer, as depicted in Figure 10 of ASHRAE 37–2005, which references ANSI/ASHRAE Standard 41.1–1986 (RA 2001), to minimize outlet flow temperature gradients if the temperature difference between any two thermocouples of the outlet air temperature grid is greater than 1.5 °F. DOE requests comments on the proposed requirements for use of an air mixer. DOE also requests comment on whether the static pressure drop of adding a mixer would prevent the test setup from achieving the ESP levels specified in the DOE test procedure for furnaces or the lower ESP levels specified in this notice for measuring fan performance in the lowest rated airflow setting. DOE also seeks comment on whether additional thermocouples are needed for the inlet. Section III.B.3 includes a detailed discussion of this issue.

12. Sampling Plan Criteria

DOE agrees with interested parties that the furnace fan electrical input power measurements and external static pressure measurements that would be required by the test procedure proposed herein are different and inherently more variable than the measurements required for AFUE. DOE proposes to adopt a sampling plan that requires any represented value of FER to be greater or equal to the mean of the sample or the upper 90 percent (one-tailed) confidence limit divided by 1.05, as specified in the sampling plan for CAC/HP products. 10 CFR 429.16 DOE requests comments that include detailed data regarding test result variance that it can use to assess the appropriateness of the sampling plan proposed herein.

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's notice of proposed rulemaking.

List of Subjects

10 CFR Part 429

Confidential business information, Energy conservation, Household appliances, Imports, Reporting and recordkeeping requirements.

10 CFR Part 430

Administrative practice and procedure, Confidential business information, Energy conservation, Household appliances, Imports, Incorporation by reference, Intergovernmental relations, Small businesses.

Issued in Washington, DC, on March 25, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy .

For the reasons stated in the preamble, DOE proposes to amend parts 429 and 430 of chapter II, subchapter D, of Title 10 of the Code of Federal Regulations as set forth below:

PART 429—CERTIFICATION, COMPLIANCE, AND ENFORCEMENT FOR CONSUMER PRODUCTS AND COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 429 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Add § 429.58 to read as follows:

§ 429.58 Furnace fans.

(a) *Sampling plan for selection of units for testing.* (1) The requirements of § 429.11 are applicable to furnace fans; and

(2) For each basic model of heating, ventilation, and air-conditioning (HVAC) product using a furnace fan, a sample of sufficient size shall be randomly selected and tested to ensure that any represented value of fan energy rating (FER), rounded to the nearest integer, shall be greater than or equal to the higher of:

(i) The mean of the sample, where:

$$\bar{x} = \frac{1}{n}\sum_{i=1}^{n} x_i$$

And, $\bar{x}$ is the sample mean; n is the number of samples; and x_i is the measured value for the ith sample; or,

(ii) The upper 90 percent confidence limit (UCL) of the true mean divided by 1.05, where:

$$UCL = \bar{x} + t_{0.90}\left(\frac{s}{\sqrt{n}}\right)$$

And $\bar{X}$ is the sample mean; s is the sample standard deviation; n is the number of samples; and $t_{0.90}$ is the t statistic for a 90% one-tailed confidence interval with n-1 degrees of freedom (from Appendix A of this subpart).

(b) *Certification reports.* [Reserved]

PART 430—ENERGY CONSERVATION PROGRAM FOR CONSUMER PRODUCTS

■ 3. The authority citation for part 430 continues to read as follows:

Authority: 42 U.S.C. 6291–6309; 28 U.S.C. 2461 note.

■ 4. Section 430.3 is amended by:

■ a. Removing, in paragraph (f)(3) ''appendix M to subpart B'' and adding in its place ''appendix M and appendix AA to subpart B'';

■ b. Removing, in paragraph (f)(4), ''Reaffirmed 2001'' and adding in its place ''Reaffirmed 2006''; and removing ''appendix E and appendix M to subpart B'' and adding in its place ''appendices E, M, and AA to subpart B'';

■ c. Redesignating paragraph (f)(10) as (f)(11); and

■ d. Adding paragraph (f)(10);

The addition reads as follows:

§ 430.3 Materials incorporated by reference.

* * * * *

(f) * * *

(10) ANSI/ASHRAE Standard 103–2007, (''ASHRAE 103–2007''), Methods of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers, except for sections 7.2.2.5, 8.6.1.1, 9.1.2.2, 9.5.1.1, 9.5.1.2.1, 9.5.1.2.2, 9.5.2.1, 9.7.1, 11.2.12, 11.3.12, 11.4.12, 11.5.12 and appendices B and C, ASHRAE approved June 27, 2007, ANSI approved March 25, 2008, IBR approved for appendix AA to subpart B.

* * * * *

■ 5. Section 430.23 is amended by adding paragraph (cc) to read as follows:

§ 430.23 Test procedures for the measurement of energy and water consumption.

* * * * *

(cc) *Furnace Fans.* The energy consumption of a single unit of furnace fan basic model expressed in watts per 1000 cubic feet per minute (cfm) to the nearest integer shall be calculated in accordance with appendix AA of this subpart.

■ 6. Appendix AA to subpart B of part 430 is added to read as follows:

Appendix AA to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Furnace Fans

Note: Any representation made after September 30, 2013 for energy consumption of furnace fans must be based upon results generated under this test procedure. Upon the compliance date(s) of any energy conservation standard(s) for furnace fans, use of the applicable provisions of this test procedure to demonstrate compliance with the energy conservation standard will also be required.

1. *Scope.* This appendix covers the test requirements used to measure the energy consumption of a furnace fan.

2. *Definitions.* Definitions include the definitions as specified in section 3 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and the following additional definitions, some of which supersede definitions found in ASHRAE 103–2007:

2.1. *Active mode* means the condition in which the product in which the furnace fan is integrated is connected to a power source and circulating air through ductwork.

2.2. *Airflow-control settings* are programmed or wired control system configurations that control a fan to achieve discrete, differing ranges of airflow—often designated for performing a specific function (*e.g.,* cooling, heating, or constant circulation)—without manual adjustment other than interaction with a user-operable control such as a thermostat that meets the manufacturer specifications for installed-use. For the purposes of this appendix, manufacturer specifications for installed-use shall be found in the product literature shipped with the unit.

2.3. *ASHRAE 103–2007* means ANSI/ASHRAE Standard 103–2007, published in 2007 by ASHRAE, approved by the American National Standards Institute (ANSI) on March 25, 2008, and entitled ''Method of Testing for Annual Fuel Utilization Efficiency of Residential Central Furnaces and Boilers''. Only those sections of ASHRAE 103–2007 (incorporated by reference; see

§ 430.3) specifically referenced in this test procedure are part of this test procedure. In cases where there is a conflict, the language of the test procedure in this appendix takes precedence over ASHRAE 103–2007.

2.4. *ANSI/ASHRAE Standard 41.1–1986 (RA 2006)* means the test standard published in 1986, approved by ANSI on February 18, 1987, reaffirmed in 2006, and entitled ''Standard Method for Temperature Measurement''.

2.5. *ASHRAE Standard 37–2005* means the test standard published in 2005 by ASHRAE entitled ''Methods of Testing for Rating Unitary Air-Conditioning and Heat Pump Equipment''.

2.6. *Default airflow-control settings* are the airflow-control settings specified for installed-use by the manufacturer. For the purposes of this appendix, manufacturer specifications for installed-use are those specifications provided for typical consumer installations in the product literature shipped with the product in which the furnace fan is installed. In instances where a manufacturer specifies multiple airflow-control settings for a given function to account for varying installation scenarios, the highest airflow-control setting specified for the given function shall be used for the procedures specified in this appendix.

2.7. *External static pressure* (ESP) means the difference between static pressures measured in the outlet duct and return air opening (or return air duct when used for testing) of the product in which the furnace fan is integrated.

2.8. *Furnace fan* is an electrically-powered device used in a consumer product for the purpose of circulating air through ductwork.

2.9. *Modular blower* means a product which only uses single-phase electric current, and which:

(a) Is designed to be the principal air circulation source for the living space of a residence;

(b) Is not contained within the same cabinet as a furnace or central air conditioner; and

(c) Is designed to be paired with HVAC products that have a heat input rate of less than 225,000 Btu per hour or cooling capacity less than 65,000 Btu per hour.

2.10. *Off mode* means the condition in which the product in which the furnace fan is integrated is either not connected to the power source or connected to the power source but not energized.

2.11. *Seasonal off switch* means a switch on the product in which the furnace fan is integrated that, when activated, results in a measurable change in energy consumption between the standby and off modes.

2.12. *Standby mode* means the condition in which the product in which the furnace fan is integrated is connected to the power source and the furnace fan is not circulating air.

2.13. *Thermal stack damper* means a type of stack damper that opens only during the direct conversion of thermal energy of the stack gases.

3. *Classifications.* Classifications are as specified in section 4 of ASHRAE 103–2007 (incorporated by reference, see § 430.3).

4. *Requirements.* Requirements are as specified in section 5 of ASHRAE 103–2007 (incorporated by reference, see § 430.3). In addition, Fan Energy Rating (FER) of furnace fans shall be determined using test data and estimated national average operating hours pursuant to section 10.10 of this appendix.

5. *Instruments.* Instruments must be as specified in section 6, except section 6.2, of ASHRAE 103–2007 (incorporated by reference, see § 430.3); and as specified in section 5.1 of this appendix.

5.1. *Temperature.* Temperature measuring instruments shall meet the provisions specified in section 5.1 of ASHRAE 37–2005 (incorporated by reference, see § 430.3) and shall be accurate to within 0.5 degree Fahrenheit.

5.1.1. *Outlet Air Temperature Thermocouple Grid.* Outlet air temperature shall be measured as described in section 8.2.1.5.5 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and illustrated in Figure 2 of ASHRAE 103–2007. If the temperature range of the nine individual measurements exceeds 1.5 °F, an air mixer as described in section 6 of ASHRAE 41.1–1986 (RA 2006) (incorporated by reference, see § 430.3) shall be used to reduce the temperature range to within 1.5 °F. Thermocouples shall be placed downstream of pressure taps used for external static pressure measurement.

6. *Apparatus.* The apparatus used in conjunction with the furnace during the testing shall be as specified in section 7 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) except for section 7.1, the second paragraph of section 7.2.2.2, section 7.2.2.5, and section 7.7, and as specified in sections 6.1, 6.2, 6.3, 6.4, 6.5 and 6.6 of this appendix.

6.1. *General.* The product in which the furnace fan is integrated shall be installed in the test room in accordance with the product manufacturer's written instructions that are shipped with the product unless required otherwise by a specific provision of this appendix. The apparatus described in this section is used in conjunction with the product in which the furnace fan is integrated. Each piece of the apparatus shall conform to material and construction specifications and the reference standard cited. Test rooms containing equipment shall have suitable facilities for providing the utilities necessary for performance of the test and be able to maintain conditions within the limits specified.

6.2. *Downflow furnaces.* Install the internal section of vent pipe the same size as the flue collar for connecting the flue collar to the top of the unit, if not supplied by the manufacturer. Do not insulate the internal vent pipe during the jacket loss test (if conducted) described in section 8.6 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) or the steady-state test described in section 9.1 of ASHRAE 103–2007. Do not insulate the internal vent pipe before the cool-down and heat-up tests described in sections 9.5 and 9.6, respectively, of ASHRAE 103–2007. If the vent pipe is surrounded by a metal jacket, do not insulate the metal jacket. Install a 5-ft test stack of the same cross sectional area or perimeter as the vent pipe above the top of the furnace. Tape or seal around the junction connecting the vent pipe and the 5-ft test stack. Insulate the 5-ft test stack with insulation having a minimum R-value of 7 and an outer layer of aluminum foil. (See Figure 3–E of ASHRAE 103–2007.)

6.3. *Modular Blowers.* A modular blower shall be equipped with the electric heat resistance kit that is likely to have the largest volume of retail sales with that particular basic model of modular blower.

6.4. *Ducts and Plenums.* An apparatus for measuring external static pressure as specified in sections 6.4 and 6.5 of ASHRAE 37–2005 (incorporated by reference, see § 430.3) shall be integrated in the plenum and test duct. External static pressure measuring instruments shall be placed between the furnace openings and any restrictions or elbows in the test plenums or ducts. For tests conducted using a return air duct, the external static pressure shall be directly measured as a differential pressure as depicted in Figure 8 of ASHRAE 37–2005 rather than determined by separately measuring inlet and outlet static pressure and subtracting the results. For tests conducted without a return air duct, the external static pressure shall be directly measured as the differential pressure between the duct static pressure and the ambient static pressure as depicted in Figure 7a of ASHRAE 37–2005.

6.5. *Air Filters.* Air filters shall be removed.

6.6. *Electrical Measurement.* Only electrical input power to the furnace fan shall be measured for the purposes of this appendix. Electrical input power to all other electricity-consuming components of the product in which the furnace fan is integrated shall not be included in the electrical input power measurements used in the FER calculation. If the procedures of this appendix are being conducted at the same time as another test that requires metering of components other than the furnace fan, the electrical input power to the furnace fan shall be sub-metered.

7. *Test Conditions.* The testing conditions shall be as specified in section 8, except for section 8.6.1.1, of ASHRAE 103–2007 (incorporated by reference, see § 430.3); and as specified in section 7.1 of this appendix.

7.1. *Measurement of Jacket Surface Temperature.* The jacket of the furnace or boiler shall be subdivided into 6-inch squares when practical, and otherwise into 36-square-inch regions comprising 4 in. × 9 in. or 3 in. × 12 in. sections, and the surface temperature at the center of each square or section shall be determined with a surface thermocouple. The 36-square-inch areas shall be recorded in groups where the temperature differential of the 36-square-inch area is less than 10 °F for temperature up to 100 °F above room temperature and less than 20 °F for temperature more than 100 °F above room temperature. For forced air central furnaces, the circulating air blower compartment is considered as part of the duct system and no surface temperature measurement of the blower compartment needs to be recorded for the purpose of this test. For downflow furnaces, measure all cabinet surface temperatures of the heat exchanger and combustion section, including the bottom around the outlet duct, and the burner door, using the 36 square-inch thermocouple grid.

The cabinet surface temperatures around the blower section do not need to be measured (*see* figure 3–E of ASHRAE 103–2007.)

8. *Test Procedure.* Testing and measurements shall be as specified in section 9 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) except for sections 9.1.2.1, 9.3, 9.5.1.1, 9.5.1.2.1, 9.5.1.2.2, 9.5.2.1, and section 9.7.1; and as specified in sections 8.1 through 8.6 of this appendix.

8.1. *Direct Measurement of Off-Cycle Losses Testing Method.* [Reserved]

8.2. *Measurement of Electrical Standby and Off Mode Power.* [Reserved]

8.3. *Steady-State Conditions for Gas and Oil Furnaces.* Steady-state conditions are indicated by a temperature variation in three successive readings, taken 15 minutes apart, of not more than

(a) 1.5 °F in the stack gas temperature for furnaces equipped with draft diverters;

(b) 2.5 °F in the stack gas temperature for furnaces equipped with either draft hoods, direct exhaust, or direct vent systems; and

(c) 0.5 °F in the flue gas temperature for condensing furnaces.

8.4. *Steady-state Conditions for Electric Furnaces and Modular Blowers.* Steady state conditions are indicated by a temperature variation of not more than 1 °F in the outlet air temperature in four successive temperature readings taken 15 minutes apart.

8.5. *Steady-State Conditions for Cold Flow Tests.* For tests during which the burner or electric heating elements are turned off (*i.e.,* cold flow tests), steady-state conditions are indicated by a temperature variation of not more than 1 °F in the outlet air temperature in four successive temperature readings taken 15 minutes apart.

8.6. *Fan Energy Rating (FER) Test.*

8.6.1. *Initial FER test conditions and maximum airflow-control setting measurements.* The main burner or electric heating elements shall be turned off. The furnace fan controls shall be adjusted to the maximum airflow-control setting. The external static pressure shall be adjusted to the value shown in Table VI.1 by symmetrically restricting the outlet of the test duct. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix. Measure and record furnace fan electrical input power (E_{Max}) and external static pressure (ESP_{Max}).

TABLE VI.1—REQUIRED MINIMUM EXTERNAL STATIC PRESSURE IN THE MAXIMUM AIRFLOW-CONTROL SETTING BY INSTALLATION TYPE

Installation type	ESP (in.w.c.)
Units with an internal, factory-installed evaporator coil	0.50
Units designed to be paired with an evaporator coil, but without one installed	0.65
Manufactured home	0.30

Once the specified ESP has been achieved, the same outlet duct restrictions shall be used for the remainder of the furnace fan test.

8.6.2. *Constant circulation airflow-control setting measurements.* The furnace fan controls shall be adjusted to the default constant circulation airflow-control setting. If the manufacturer does not specify a constant circulation airflow-control setting, the lowest airflow-control setting shall be used. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix. Measure and record furnace fan electrical input power (E_{Circ}) and external static pressure (ESP_{Circ}).

8.6.3. *Heating airflow-control setting measurements.* For single-stage gas and oil furnaces, the burner shall be fired at the maximum heat input rate. Burner adjustments shall be made as specified by section 8.4.1 of ASHRAE 103–2007 (incorporated by reference, see § 430.3). For single-stage electric furnaces, the electric heating elements shall be energized at the maximum heat input rate. For multi-stage and modulating furnaces the reduced heat input rate settings shall be used. After the burner is activated and adjusted or the electric heating elements are energized, the furnace fan controls shall be adjusted to operate the fan in the default heat airflow-control setting. Maintain these settings until steady-state conditions are attained as specified in section 8.3, 8.4, and 8.5 of this appendix. Measure and record furnace fan electrical input power (E_{Heat}), external static pressure (ESP_{Heat}), flue or stack carbon dioxide concentration ($X_{CO2,a}$), flue or stack gas temperature ($T_{a,SS,X}$), and temperature rise (ΔT_{Heat}).

9. *Nomenclature.* Nomenclature shall include the nomenclature specified in section 10 of ASHRAE 103–2007 (incorporated by reference, see § 430.3) and the following additional variables:

CH = annual furnace fan cooling hours

CCH = annual furnace fan constant-circulation hours

E_{Circ} = furnace fan electrical consumption at the default constant-circulation airflow-control setting operating point (or minimum airflow-control setting operating point if a default constant-circulation airflow-control setting is not specified), in watts

E_{Heat} = furnace fan electrical consumption in the default heat airflow-control setting for single-stage heating products or the default low-heat setting for multi-stage heating products, in watts

E_{Max} = furnace fan electrical consumption in the maximum airflow-control setting, in watts

ESP_i = external static pressure, in inches water column, at time of the electrical power measurement in airflow-control setting *i,* where *i* can be ''Circ'' to represent constant-circulation (or minimum airflow) mode, ''Heat'' to represent heating mode, or ''Max'' to represent cooling (or maximum airflow) mode.

FER= fan energy rating, in watts/1000 cfm

HH = annual furnace fan heating operating hours

HCR = heating capacity ratio (reduced heat input capacity divided by maximum input heat capacity)

k_{ref} = physical descriptor characterizing the reference system

ΔT_i = air throughput temperature rise in setting *i,* in °F

Q_{Max} = airflow at maximum airflow-control setting at, in cubic feet per minute (CFM)

10. *Calculation of derived results from test measurements for a single unit.* Calculations shall be as specified in section 11 of ASHRAE 103–2007 (incorporated by reference, see § 430.3), except for appendices B and C; and as specified in sections 10.1 through 10.10 and Figure 1 of this appendix.

10.1. *Fan Energy Rating (FER)*

$$FER = \frac{(CH \times E_{Max}) + (HH \times E_{Heat}) + (CCH \times E_{Circ})}{(CH + 830 + CCH) \times Q_{Max}} \times 1000$$

Where:

$$Q_{Max} = Q_{Heat}\sqrt{\frac{ESP_{Max}}{ESP_{Heat}} \times \frac{(T_{Heat} + 460)}{((T)_{Max} + 460)}}$$

; and

$$Q = \frac{(Effy_{SS} - L_J) \times Q_{IN} + (3413 \times E_{Heat})}{1.08 \times \Delta T}$$

The estimated national average operating hours presented in Table VI.2 shall be used to calculate FER.

TABLE VI.2—ESTIMATED NATIONAL AVERAGE OPERATING HOUR VALUES FOR CALCULATING FER

Operating mode	Variable	Single-stage (hours)	Multi-stage or modulating (hours)
Heating	HH	830	830/HCR
Cooling	CH	640	640
Constant Circulation	CCH	400	400

Where:

$$HCR = \frac{Q_{IN,R}}{Q_{IN}}$$

[FR Doc. 2013–07327 Filed 4–1–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0186; Directorate Identifier 2013–NE–11–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain General Electric Company (GE) GE90–76B, –85B, –90B, –94B, –110B1, and –115B turbofan engines. This proposed AD was prompted by multiple reports of failure of certain stage 1 high-pressure turbine (HPT) stator shrouds due to accelerated corrosion and oxidation. This proposed AD would require initial and repetitive on-wing borescope inspections (BSIs) for corrosion and oxidation, of the affected stage 1 HPT stator shrouds, and removal from service before further flight, if the parts fail the inspection. We are proposing this AD to prevent failure of the stage 1 HPT stator shrouds, resulting in in-flight shutdown of one or more engines, loss of thrust control, and damage to the airplane.

DATES: We must receive comments on this proposed AD by June 3, 2013.

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

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

For service information identified in this proposed AD, contact General Electric Company, One Neumann Way, MD Y–75, Cincinnati, OH; phone: 513–552–2913; email: *geae.aoc@ge.com;* and Web site: *www.GE.com.* You may view the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *jason.yang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0186; Directorate Identifier 2013–NE–11–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received one report of an aborted takeoff, and multiple reports of stage 1 HPT stator shroud distress resulting in engine removals on airplanes with GE90 turbofan engines. Investigation revealed that the stage 1 HPT stator shrouds failed due to accelerated corrosion and oxidation. GE is still investigating the cause of the accelerated corrosion and oxidation. This condition, if not corrected, could result in failure of the stage 1 HPT stator shrouds, resulting in in-flight shutdown of one or more engines, loss of thrust control, and damage to the airplane.

Relevant Service Information

We reviewed GE Service Bulletin (SB) No. GE90 S/B 72–1076, dated November 19, 2012, and SB No. GE90–100 S/B 72–0528, dated November 15, 2012. The SBs describe procedures for performing BSIs of the stage 1 HPT stator shrouds for accelerated corrosion and oxidation.

FAA's Determination

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

Proposed AD Requirements

This proposed AD would require initial and repetitive on-wing BSIs of stage 1 HPT stator shrouds, part number (P/N) 1847M52P14, and P/N 1847M52P16, for corrosion and oxidation, and removal from service before further flight if the parts fail the inspection.

Differences Between the Proposed AD and the Service Information

The SBs require completing and sending to GE the Inspection Findings Report Form after each inspection. This proposed AD does not.

Costs of Compliance

We estimate that this proposed AD would affect about 100 GE90 engines installed on airplanes of U.S. registry. We also estimate that it would take about four hours per engine to perform one inspection. The average labor rate is $85 per hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators for one inspection to be $34,000.

Authority for This Rulemaking

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

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

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

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

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

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

(3) Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction, and

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

General Electric Company: Docket No. FAA–2013–0186; Directorate Identifier 2013–NE–11–AD.

(a) Comments Due Date

We must receive comments by June 3, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company (GE):

(1) GE90–76B, –85B, –90B, and –94B turbofan engines with stage 1 high-pressure turbine (HPT) stator shrouds, part number (P/N) 1847M52P14, installed.

(2) GE90–110B1 and –115B turbofan engines with stage 1 HPT stator shrouds, P/N 1847M52P16, installed.

(d) Unsafe Condition

This AD was prompted by multiple reports of failure of certain stage 1 HPT stator shrouds due to accelerated corrosion and oxidation. We are issuing this AD to prevent failure of the stage 1 HPT stator shrouds, resulting in in-flight shutdown of one or more engines, loss of thrust control, and damage to the airplane.

(e) Compliance

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

(f) Borescope Inspections of the Stage 1 HPT Stator Shrouds

(1) Perform an initial on-wing borescope inspection (BSI) of the stage 1 HPT stator shrouds for corrosion and oxidation before accumulating 2,100 cycles since new (CSN), or within 100 cycles in service (CIS) after the effective date of this AD, whichever occurs later.

(2) Thereafter, repeat the BSI of the stage 1 HPT stator shrouds every 250 cycles since last inspection (CSLI) or fewer, depending on the results of the inspection.

(3) For engines listed in paragraph (c)(1) of this AD:

(i) Perform the inspections using Section 3.A of the Accomplishment Instructions of GE Service Bulletin (SB) No. GE90 S/B 72–1076, dated November 19, 2012; and

(ii) Use Section 3.B of the Accomplishment Instructions of SB No. GE90 S/B 72–1076, dated November 19, 2012, to determine the next inspection interval.

(4) For engines listed in paragraph (c)(2) of this AD:

(i) Perform the inspections using Section 3.A of the Accomplishment Instructions of GE SB No. GE90–100 S/B 72–0528, dated November 15, 2012; and

(ii) Use Section 3.B of the Accomplishment Instructions of SB No. GE90–100 S/B 72–0528, dated November 15, 2012, to determine the next inspection interval.

(5) Remove from service before further flight, any stage 1 HPT stator shrouds found with any hole further than 0.35-inch from the shroud leading edge and hole size more than 0.25-inch diameter, or more than 0.049 square inch area.

(6) The inspection findings reporting specified in Section 3.A of the

Accomplishment Instructions of GE SB No. GE90 S/B 72–1076, dated November 19, 2012, and in Section 3.A of the Accomplishment Instructions of GE SB No. GE90–100 S/B 72–0528, dated November 15, 2012, are not required by this AD.

(g) Alternative Methods of Compliance (AMOCs)

The Manager, Engine Certification Office, FAA, may approve AMOCs for this AD. Use the procedures in 14 CFR 39.19 to make your request.

(h) Related Information

(1) For more information about this AD, contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; email: *jason.yang@faa.gov.*

(2) For service information identified in this AD, contact General Electric Company, One Neumann Way, MD Y–75, Cincinnati, OH; phone: 513–552–2913; email: *geae.aoc@ge.com;* and Web site: *www.GE.com.* You may view the referenced service information at the FAA, Engine & Propeller Directorate, 12 New England Executive Park, Burlington, MA. For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington, Massachusetts, on March 26, 2013.

Thomas A. Boudreau,

Acting Manager, Engine & Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2013–07546 Filed 4–1–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2012–1239]

Interpretation of the Rest Requirements of Nonstop International Supplemental Operations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of Draft Interpretation.

SUMMARY: This action provides interested persons with the opportunity to comment on the FAA's draft interpretation regarding nonstop international supplemental operations scheduled for longer than 12 hours. Additionally, this draft interpretation discusses the appropriate international flight time limitations that would apply to the operation. As discussed in the draft interpretation, the FAA finds that the operation of such flights would be precluded under the flight time limitations of the ''U.S. mainland rules'' found in the supplemental flight and duty rules. However, the operation could be conducted under the ''international rules'' provisions of our regulations.

DATES: Comments must be received on or before May 2, 2013.

ADDRESSES: You may send comments identified by docket number FAA–2012–1239 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send Comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

FOR FURTHER INFORMATION CONTACT: Dean E. Griffith, Attorney, International Law, Legislation and Regulations Division, Office of Chief Counsel, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–3073; email: *dean.griffith@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to submit written comments, data, or views concerning this interpretation. The most helpful comments reference a specific portion of the draft interpretation, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

The FAA will file in the docket all comments received, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposal. Before acting on this proposal, the FAA will consider all comments received on or before the closing date for comments and any late-filed comments if it is possible to do so without incurring expense or delay.

Availability of This Draft Interpretation

You can get an electronic copy using the Internet by—

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

(2) Visiting the FAA's Regulations and Policies Web page at *http://www.faa.gov/regulations_policies/*; or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number or notice number of this proposal.

Background

The FAA publishes draft legal interpretations when the matter in question is likely to be highly controversial or the likely answer has the potential to significantly and adversely affect long-standing practices that regulated parties have been engaged in, reasonably believing that these practices were consistent with FAA regulations. The intent is not to seek input on whether the FAA is correct—the FAA has the responsibility for interpreting its regulations. Rather, the reason for publishing the draft interpretation for comment is to see whether there may be unintended consequences for regulated parties that merit a further examination of how the agency's regulatory provisions should be applied in conjunction with agency policy and guidance material.

We are issuing this draft interpretation because it has come to our attention that supplemental air carriers might be misinterpreting and misapplying the regulations governing flight time limitations for supplemental operations to operate international flight segments longer than 12 hours by reading § 121.509 of title 14, Code of Federal Regulations in isolation, without also complying with § 121.503(a) or, in the alternative, without adequate sleeping facilities for the flight crew as required under § 121.523(b). As discussed below, such a reading fails to consider the full meaning of the FAA's regulations.

Discussion of the Proposal

I. Introduction

The purpose of this notice of draft interpretation is to address whether a supplemental air carrier may conduct an international nonstop flight scheduled for more than 12 hours without crew rest facilities on board the aircraft. The answer is ''no.''

For purposes of this interpretation we will use the hypothetical example of a supplemental air carrier that has scheduled four pilots to conduct a non-

stop flight lasting 12.5 hours that departs from a point outside of the contiguous United States and arrives at a point in the contiguous United States. The aircraft is type certificated for two-pilot operation.

Supplemental air carriers conducting overseas and international supplemental operations may elect, pursuant to § 121.513, to comply with the flight time limitations of §§ 121.515 and 121.521 through 121.525 (commonly referred to as the ''international rules''), rather than the flight time limitations found in §§ 121.503 through 121.511 (commonly referred to as the ''U.S. mainland rules''). *See* 14 CFR 121.513. Because this hypothetical flight would operate from a point outside the contiguous United States, the carrier would be eligible to make the election. *See* 121.513(a) (stating that a flight between a ''place in the 48 contiguous states * * * and any place outside thereof'' qualifies for the election).

We will first evaluate whether the operation could be conducted under the ''U.S. mainland rules'' and then discuss how the operation could be conducted under the ''international rules.''

II. Flight Time Limitations on Supplemental Operations Conducted Within the 48 Contiguous United States

Section 121.503 sets out the basic flight time limitations and rest requirements for pilots during supplemental operations. Section 121.503(a) establishes that a pilot may be scheduled to ''fly in an airplane for eight hours or less during any 24 consecutive hours without a rest period during those eight hours.'' [1] The FAA has interpreted the eight-hour period of § 121.503(a) to be a hard scheduling limit on block to block time for supplemental operations without an intervening rest prior to the eighth hour flown. *See* Legal Interpretation to G.L. Davison, from Edward P. Faberman, Deputy Assistant Chief Counsel, Regulations and Enforcement Division (July 17, 1979) (stating that § 121.503 ''contains an 8 hour limitation'').

Section 121.503(f) provides an exception to the above 8-hour limit for transcontinental non-stop flights, allowing a crewmember to be scheduled for ''more than eight but less than 10 hours of continuous duty without an intervening rest period'' under certain conditions.

This exception to the hard limit of 8 hours came about as a result of the improvements in aircraft capabilities and range, which led to the ability to conduct transcontinental non-stop flights. *See* footnote 3. In other words, a flight conducted under the ''U.S. mainland rules'' cannot be scheduled to be aloft continuously for more than 8 hours unless operating under the exception found in § 121.503(f).

Section 121.509 establishes flight time limitations for four pilot crews in addition to those specified in § 121.503(a). This section provides that, in a 24 hour period, a pilot may not be scheduled for more than 8 hours of flight deck duty, 16 hours of duty aloft, and 20 hours of duty. 14 CFR 121.509(a)-(b). Read in the context of § 121.503(a), a pilot may be scheduled for a total of 16 hours of duty aloft, *but that time aloft must not occur in legs scheduled for longer than 8 hours.*[2] To read § 121.509(a)(2) as permitting up to16 hours of continuous duty aloft would nullify the prohibition in § 121.503(a) on scheduled operations of longer than 8 hours without a rest period during those 8 hours. Such a reading would not be consistent with FAA legal interpretation and would conflict with a fundamental principle of statutory interpretation that specific provisions must be read in the context of the larger rule. *See* Legal Interpretation to Michael Daly, from James B. Minor, Associate General Counsel, Regulations and Codification Division (Jun. 29, 1966) (stating that § 121.503(a)-(f) ''contain[s] general flight time limitation provisions that apply to all [part 121] supplemental air carrier or commercial operations under that Part, regardless of the size of the crew''); *see, e.g., United States Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.,* 484 U.S. 365, 371 (1988) (''A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'' (citation omitted)); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.,* 412 U.S. 609, 631–32 (1973) (''It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.'').

Accordingly, unless the hypothetical operation is scheduled in segments of eight hours or less it cannot be conducted under the flight time limitations contained in §§ 121.503-.511.[3] In other words, a supplemental

[1] We note that the term ''fly in'' as used in the regulation refers to ''block to block time'' rather than flight deck duty time. *See* 14 CFR 42.48–1 (1956); Legal Interpretation to Timothy D. Miller, from Donald Byrne, Assistant Chief Counsel (Aug. 27, 1997).

[2] As an example, the following schedule for a four pilot crew in an aircraft type certificated for two pilots would comply with §§ 121.503(a) and 121.509. A pilot is scheduled to report at 0000 for preflight duty. His first flight is scheduled to depart ''A'' at 0100 and arrive at ''B'' at 0900 (8 hours of flight time). Assuming that the four pilots evenly divide time at the controls, on that flight he will be on flight deck duty for 4 hours. After the first flight lands he will perform 1 hour of post-flight duty (0900–1000), then rest from 1000 to 1400. From 1400–1600 the pilot will perform preflight duty for his second scheduled flight which is scheduled to depart ''B'' at 1600 and arrive at ''A'' at 2359 (7:59 of flight time). Again, assuming that the four pilot crew evenly divides time at the controls, on that flight he will be on flight deck duty for 4 hours. Accordingly, the pilot will have accrued 8 hours of flight deck duty, 16 hours aloft, and performed 20 hours of duty during the 24 hour period in compliance with §§ 121.503(a) and 121.509.

[3] We note that operations using the flight time limitations of §§ 121.503 through 121.511 may exceed the 8 hour flight segment time limit under two circumstances. First, transcontinental operations may be scheduled for a continuous flight time of up to 10 hours under an exception to § 121.503(a). *See* § 121.503(f). This exception permits certificate holders to schedule a flight crewmember for a transcontinental non-stop flight consisting of ''more than eight but not more than 10 hours of continuous duty aloft without an intervening rest period'' if certain conditions are met. In 1954 the Civil Aeronautics Board (CAB) adopted an exception (similar to current § 121.503(f)) applicable to domestic scheduled operations that were then subject to an 8 hour limitation on duty aloft without an intervening rest period. *See* 14 CFR 40.320(b) (1954) (flight time limitations for domestic air carriers); 19 FR 3759 (June 19, 1954) (adopting SR–405). The CAB stated that the then current, 8 hour rule ''prohibits domestic nonstop flight operations of more than eight hours' duration.'' *See* 19 FR 3760. The change was effected to permit non-stop transcontinental flights between the east coast and the west coast which, unlike flights in the opposite direction, could not be completed in the 8 hour period. *Id.* The CAB noted that ''if west-bound nonstop service is to be continued to be made available to the public, some modification of the eight-hour rule will be necessary.'' *Id.*

In 1955, the CAB established SR–410 which extended the 8-hour rule for supplemental air carriers to 10 hours for transcontinental nonstop flights on ''substantially the same basis as they are currently applied to scheduled air carriers.'' *See* 20 FR 2675 (Apr. 22, 1955) (establishing SR–410). Therefore, based on the language of § 121.503(f), which is derived from SR–410, it is clear that the maximum time aloft for a nonstop flight would be 10 hours, and only if it meets the requirements contained in the rule. All other flights conducted pursuant to the 121.503-.511 rules would be limited to a maximum 8 hours continuously aloft.

Additionally, when scheduled realistically, flights may exceed the 8 hour continuous flying time limit due to circumstances beyond the control of the certificate holder. In such circumstances, § 121.503(b) requires the pilot to have 16 hours of rest prior to being assigned any duty with the certificate holder. *See* Legal Interpretation to Randall C. Kania, from Rebecca MacPherson, Assistant Chief Counsel, Regulations Division (Apr. 29, 2004) (stating that a pilot who has already flown more than 8 hours in a 24-hour period may not take off until he has received the rest required by 121.503(b)); Legal Interpretation to John R. Griffith, from George L. Thompson, Associate Regional Counsel, ANE–7, (Feb. 5, 1975) (stating that the

Continued

carrier would not be able to conduct this operation as a non-stop flight under these sections of the rules.

III. Overseas and International Supplemental Operation Flight Time Limitations

The next question is whether the flight could be conducted under the ''international rules'' found in § 121.515 and §§ 121.521 through 121.525 if the certificate holder makes that election under § 121.513. In connection with that question is the issue of when and under what circumstances ''adequate sleeping quarters'' are required.

First, § 121.521 states that an airman may not be scheduled to be ''aloft as a member of the flight crew in an airplane that has a crew of two pilots and at least one additional flight crewmember for more than 12 hours during any 24 consecutive hours.'' Because the hypothetical flight in question is scheduled to be aloft for 12.5 hours, it could not be conducted with only two pilots and one additional flight crewmember because a certificate holder may only schedule this crew complement for 12 total hours aloft or less.

Next, § 121.523 establishes the flight time limitations for a crew of three or more pilots and additional airmen as required. Unlike § 151.521, this section allows flights lasting longer than 12 hours. In consideration of the longer flights, § 121.523 requires a crew of at least three pilots and additional airmen as required, provides additional rest provisions, limits flight deck duty time for flight engineers and navigators, and requires the certificate holder to ''provide adequate sleeping quarters on the airplane whenever an airman is scheduled to be aloft as a flight crewmember for more than 12 hours during any 24 consecutive hours.'' § 121.523(b). Because the operation in question is scheduled with a four-pilot complement, it would meet the crew requirements under this section. However, in order to operate under this provision, the certificate holder would need to comply with all of the provisions of § 121.523, including the need to provide adequate sleeping quarters on the airplane.[4]

IV. Conclusion

Therefore, the hypothetical supplemental air carrier operation in which four pilots are scheduled to conduct a non-stop flight lasting 12.5 hours, between a point outside the contiguous United States and a point in the contiguous United States, or other locations permitting the § 121.513 election, could only be operated under the flight time limitations of § 121.523 (including the required crew rest facilities on board the aircraft). It could not be conducted as proposed under the provisions of §§ 121.503, 121.509 or 121.521.

Issued in Washington, DC, on March 25, 2013.

Mark W. Bury,

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

[FR Doc. 2013–07375 Filed 4–1–13; 8:45 am]

BILLING CODE 4910–13–P

purpose of § 121.503(b) ''is to assure an adequate rest period when such deviations do occur'').

[4] The FAA has consistently interpreted ''adequate sleeping quarters on the airplane'' to mean a bunk or a berth, but that it is a matter of safety policy to consider each air carrier's means of compliance on its individual merits. *See* Legal Interpretation to Daniel J. Wells, from Donald P. Byrne, Assistant Chief Counsel for Regulations (Sept. 22, 2003); Legal Interpretation to William W. Edmunds, Jr., from John Cassady, Assistant Chief Counsel, Regulations and Enforcement Division (Apr. 22, 1986). A passenger seat, even if it reclines, is not considered to be adequate sleeping quarters. *Id.*

DEPARTMENT OF LABOR

Office of the Secretary of Labor

29 CFR Part 15

Employment and Training Administration

20 CFR Parts 638 and 670

RIN 1290–AA25

Administrative Claims Under the Federal Tort Claims Act and Related Statutes

AGENCY: Office of the Secretary, Employment and Training Administration, Department of Labor.

ACTION: Withdrawal of proposed rule.

SUMMARY: With this document, the Department of Labor (DOL) is withdrawing its proposed rule that accompanied its direct final rule revising the regulations governing administrative claims under the Federal Tort Claims Act and related statutes.

DATES: Effective April 2, 2013 the proposed rule published on April 13, 2012 (77 FR 22236), is withdrawn.

FOR FURTHER INFORMATION CONTACT: Catherine P. Carter, Counsel for Claims and Compensation, Office of the Solicitor, U.S. Department of Labor, Room S–4325, 200 Constitution Avenue NW., Washington, DC 20210, Telephone: 202–693–5320 (this is not a toll-free number). Individuals with hearing or speech impairments may access this telephone number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: On April 13, 2012, DOL published a direct final rule (77 FR 22204) and concurrent notice of proposed rulemaking, proposing to amend the regulations governing administrative claims under the Federal Tort Claims Act and related statutes. In both the direct final rule and notice of proposed rulemaking, DOL explained that if no significant adverse comments were received to the notice of proposed rulemaking, DOL would withdraw the proposed rule and the direct final rule would become effective on July 12, 2012 without further notice. DOL has received no comments regarding either the direct final rule or the notice of proposed rulemaking. Accordingly, DOL is not proceeding with the proposed rule and is withdrawing it from the rulemaking process. DOL is also confirming the effective date of the direct final rule as July 12, 2012.

Signed at Washington, DC, the 28th of February, 2013.

M. Patricia Smith,

Solicitor of Labor.

[FR Doc. 2013–07525 Filed 4–1–13; 8:45 am]

BILLING CODE 4510–23–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2013–0145]

RIN 1625–AA08

Special Local Regulations; St. Thomas Carnival Watersport Activities, Charlotte Amalie Harbor; St Thomas, USVI

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a special local regulation on the waters of Charlotte Amalie Harbor in St Thomas, USVI during the St. Thomas Carnival Watersport Activities, a high speed boat race. The event is scheduled to take place on Sunday, April 21, 2013. Approximately 40 high-speed power boats will be participating in the races and it is anticipated that 50 spectator crafts will be present during the races. The special local regulation is necessary for the safety of race participants,

participant vessels, spectators, and the general public during the event. The special local regulation will establish the following four areas: (1) A high speed boat race area, where all persons and vessels, except those persons and vessels participating in the high-speed boat races, are prohibited from entering, transiting through, anchoring in, or remaining within; (2) a jet ski race area, where all persons and vessels, except those persons and vessels participating in the jet ski races, are prohibited from entering, transiting through, anchoring in, or remaining within; (3) a buffer zone around the race areas, where all persons and vessels, except those persons and vessels enforcing the buffer zone or authorized participants transiting to their authorized the race area, are prohibited from entering, transiting through, anchoring in, or remaining within; and (4) a spectator area, where all vessels are prohibited from anchoring and from traveling in excess of wake speed, unless authorized by the Captain of the Port San Juan or a designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before April 10, 2013.

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

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

(2) *Fax:* 202–493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Chief Warrant Officer Anthony Cassisa, Sector San Juan Prevention Department, Coast Guard; telephone (787) 289–2073, email *Anthony.J.Cassisa@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

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

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number [USCG–2013–0145] in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number (USCG–2013–0145) in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

The Coast Guard is issuing this notice of proposed rulemaking (NPRM) with a comment period shorter than 30 days. The Coast Guard is doing this because the sponsor did not provide information regarding the event details with sufficient time to provide for a 30 day comment period. This is an annual event, which in the past has not received comments from the public, however, the Coast Guard prefers to allow the public an opportunity to comment, therefore it is publishing this NPRM with a comment period shorter than 30 days.

C. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the rule is to ensure safety of life on navigable waters of the United States during the St Thomas Carnival Watersport Activities.

On April 21, 2013, Virgin Islands Carnival Committee Inc. is sponsoring the St Thomas Carnival Watersport Activities, a series of high-speed boat races and jet ski races. The races will be held on the waters of Charlotte Amalie Harbor in St Thomas, USVI. Approximately 40 high-speed power

boats will be participating in the races. It is anticipated that approximately 50 spectator vessels will be present during the races.

D. Discussion of Proposed Rule

The special local regulation encompasses certain waters of Charlotte Amalie in St Thomas, USVI. The special local regulation will be enforced from 10 a.m. until 5 p.m. on April 21, 2013. The special local regulation consists of the following four areas: (1) A high-speed boat race area, where all persons and vessels, except those persons and vessels participating in the high-speed boat races, are prohibited from entering, transiting through, anchoring in, or remaining within; (2) a jet ski race area, where all persons and vessels, except those persons and vessels participating in the jet ski races, are prohibited from entering, transiting through, anchoring in, or remaining within; (3) a buffer zone around the race areas, where all persons and vessels, except those persons and vessels enforcing the buffer zone or authorized participants transiting to their respective race areas, are prohibited from entering, transiting through, anchoring in, or remaining within; and (4) a spectator area, where all vessels are prohibited from anchoring and from traveling in excess of wake speed unless authorized by the Captain of the Port San Juan or a designated representative. Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the race area, or buffer zone; or to anchor or travel in excess of wake speed in the spectator area by contacting the Captain of the Port San Juan by telephone at (787) 289–2041, or a designated representative via VHF radio on channel 16. If authorization to enter, transit through, anchor in, or remain within the race area, or buffer zone; or to anchor or travel in excess of wake speed in the spectator area is granted by the Captain of the Port San Juan or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port San Juan or a designated representative. The Coast Guard will provide notice of the special local regulations by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. The economic impact of this rule is not significant for the following reasons: (1) The special local regulations will be enforced for only seven hours; (2) although persons and vessels will not be able to enter, transit through, anchor in, or remain within the race area and buffer zone, or anchor in the spectator area, without authorization from the Captain of the Port San Juan or a designated representative, they may operate in the surrounding area during the enforcement period; (3) persons and vessels may still enter, transit through, anchor in, or remain within the race area and buffer zone, or anchor in the spectator area, during the enforcement period if authorized by the Captain of the Port San Juan or a designated representative; and (4) the Coast Guard will provide advance notification of the special local regulations to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered the impact of this proposed rule on small entities. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect the following entities, some of which may be small entities: the owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of Charlotte Amalie harbor encompassed within the special local regulation from 10 a.m. until 5 p.m. on April 21, 2013. For the reasons discussed in the Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

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

13. Technical Standards

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

14. Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a special local regulation issued in conjunction with a regatta or marine parade. This rule is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard proposes to amend part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.35T07–1089 to read as follows:

§ 100.35T07–0145 Special Local Regulations; St Thomas Watersports Activities, Charlotte Amalie Harbor; St Thomas, USVI.

(a) *Regulated Areas.* The following regulated areas are established as special local regulations. All coordinates are North American Datum 1983.

(1) *Power Boat Race Area.* All waters of the St. Thomas Harbor located around Hassel Island, St. Thomas, U.S. Virgin Island encompassed within an imaginary line connecting the following points for the Power Boat Race: Starting at Point 1 in position 18°20.19′ N, 64°56.07′ W; thence southeast to Point 2 in position 18°19.70′ N 64°55.70′ W; thence southwest to Point 3 in position 18°19.35′ N, 64°55.71′ W; thence west to point 4 in position 18°19.27′ N, 64°56.01′ N; thence north to point 5 in position 18°19.98′ N, 64°56.46′ W; thence northeast to point 6 in position 18°20.21′ N, 064°56.31′ W; thence east back to origin. All persons and vessels, except those persons and vessels participating in the high-speed boat race, are prohibited from entering, transiting, anchoring, or remaining within the race area.

(2) *Jet Ski Race Area.* All waters encompassed within an imaginary line connecting the following points: starting at Point 1 in position 18°20.08′ N, 64°55.88′ W; thence west to Point 2 in position 18°20.08′ N, 64°56.06′ W; thence north to Point 3 in position 18°20.28′ N, 64°56.06′ W; thence east to Point 4 in position 18°20.28′ N, 64°55.88′ W; thence south back to origin. All persons and vessels, except those persons and vessels participating in the Jet Ski Race, are prohibited from entering, transiting, anchoring, or remaining within the race area.

(3) *Buffer Zone.* All waters of the St Thomas Harbor located around Hassel Island; St. Thomas, U.S. Virgin Island excluding the power boat race area and jet ski race area, encompassed within an imaginary line connecting the following points: starting at Point 1 in position 18°20.34′ N, 64°55.91′ W; thence southeast to Point 2 in position 18°19.70′ N, 64°55.71′ W; thence south to Point 3 in position 18°19.31′ N, 64°55.72′ W; thence southwest to Point 4 in position 18°19.23′ N, 64°56.04′ W; thence northwest to Point 5 in position 18°19.94′ N, 64°56.50′ W; thence northeast to Point 6 in position 18°20.26′ N, 64°56.31′ W thence east back to origin. All persons and vessels except those persons and vessels enforcing the buffer zone are prohibited from entering, transiting through, anchoring in, or remaining within the buffer zone, with the exception of authorized race participants transiting to their respective race areas.

(4) *Spectator Area.* All waters of the St. Thomas Harbor located east of Hassel Island, excluding the power boat race area, the jet ski race area, and the buffer zone, encompassed within an imaginary line connecting the following points: starting at Point 1 in position 18°20.30′ N, 64°55.76′ W; thence south to Point 2 in position 18°19.97′ N, 64°55.67′ W; thence northeast to Point 3 in position 18°20.19′ N, 64°55.54′ W; thence northwest back to origin. On-scene designated representatives will direct spectator vessels to the spectator area.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, state, and local officers designated by or assisting the Captain of the Port San Juan in the enforcement of the regulated areas.

(c) *Regulations.*

(1) All persons and vessels are prohibited from:

(A) Entering, transiting through, anchoring in, or remaining within the power boat race area, unless participating in the power boat race.

(B) Entering, transiting through, anchoring in, or remaining within the

jet ski race area, unless participating in the jet ski race.

(C) Transiting through, anchoring in, or remaining within the buffer zone, unless enforcing the buffer zone or a race participant transiting to their designated race area.

(D) All persons and vessels are prohibited from anchoring in, or traveling in excess of wake speed in the spectator zone.

(2) Persons and vessels may request authorization to enter, transit through, anchor in, or remain within the race areas by contacting the Captain of the Port San Juan by telephone at (787) 289–2041, or a designated representative via VHF radio on channel 16. If authorization is granted by the Captain of the Port San Juan or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port San Juan or a designated representative.

(3) The Coast Guard will provide notice of the regulated areas by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Date.* This rule will be enforced from 10 a.m. until 5 p.m. on April 21, 2013.

Dated: March 14, 2013.

D.W. Pearson,

Captain, U.S. Coast Guard, Captain of the Port San Juan.

[FR Doc. 2013–07573 Filed 4–1–13; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 70

[EPA–R07–OAR–2012–0749; FRL–9795–1]

Approval and Promulgation of Implementation Plans and Operating Permits Program; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the State Implementation Plan (SIP) and Operating Permits Program to amend the definitions provisions of the rules. This SIP revision and revision to the Missouri operating permits program proposes to add the compounds propylene carbonate and dimethyl carbonate to the list of compounds which are excluded from the definition of Volatile Organic Compound (VOC) for consistency with the Federal definition of VOC. The SIP revision also proposes to correct two asbestos method subpart references. This revision also proposes approval of Missouri's request to amend the SIP to meet the 2008 fine particulate matter ($PM_{2.5}$) National Ambient Air Quality Standards implementation requirements of the May 16, 2008, New Source Review (NSR) $PM_{2.5}$ Rule. In this SIP revision, Missouri adopted rule revisions to establish the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; and significant emission rates for direct $PM_{2.5}$ and precursor pollutants (sulfur dioxide (SO_2) and nitrogen dioxide (NO_X)).

DATES: Comments on this proposed action must be received in writing by May 2, 2013.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2012–0749, by mail to: Craig Bernstein, Environmental Protection Agency, Air Planning and Development Branch, 11201 Renner Boulevard, Lenexa, Kansas 66219. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the direct final rule located in the rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Craig Bernstein at (913) 551–7688, or by email at *bernstein.craig@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of the **Federal Register**, EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no relevant adverse comments to this action. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed action. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: March 20, 2013.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2013–07403 Filed 4–1–13; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register
Vol. 78, No. 63
Tuesday, April 2, 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

Agricultural Marketing Service

[Doc. No. AMS–NOP–12–0060; NOP–12–14]

National Organic Program: Notice of Draft Guidance on Classification of Materials and Materials for Organic Crop Production

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of availability of draft guidance with request for comments.

SUMMARY: This notice announces draft guidance for review and comment by accredited certifying agents, certified operations, material evaluation programs, and other organic industry stakeholders. The first set of draft guidance documents implements recommendations from the National Organic Standards Board (NOSB) concerning the classification of materials under the USDA organic regulations (7 CFR part 205). The Classification of Materials draft guidance, NOP 5033, details the procedures and decision trees for classifying materials used for organic crop production, livestock production, and handling. The second set of draft guidance documents, NOP 5034, provides clarification regarding materials for use in organic crop production. These documents include an itemization of allowed natural and synthetic materials and a limited appendix of materials prohibited in organic crop production.

The guidance explains the policy of the National Organic Program (NOP) concerning the portions of the regulations in question, referenced herein. The Agricultural Marketing Service (AMS) invites organic producers, handlers, certifying agents, material evaluation programs, consumers and other interested parties to submit comments about these guidance provisions. Notices of availability of final guidance on these topics will be issued upon final approval. Once finalized, final guidance documents will be available from NOP through ''The Program Handbook: Guidance and Instructions for Certifying Agents and Certified Operations.'' This Handbook provides those who own, manage, or certify organic operations with guidance and instructions that can assist them in complying with the USDA organic regulations. The current edition of the Program Handbook is available online at *http://www.ams.usda.gov/nop* or in print upon request.

DATES: Comments must be submitted on or before June 3, 2013.

ADDRESSES: Submit written requests for hard copies of this draft guidance document to Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave., SW., Room 2646 So., Ag Stop 0268, Washington, DC 20250–0268. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance documents.

Interested persons may submit comments on these draft guidance documents using the following procedures:

- *Federal eRulemaking Portal*: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Toni Strother, Agricultural Marketing Specialist, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave., SW., Room 2646-So., Ag Stop 0268, Washington, DC 20250–0268.

Written comments responding to this request should be identified with the document number AMS–NOP–12–0060; NOP–12–14. Clearly indicate the draft guidance and, if applicable, the material(s) you are addressing, your support for or opposition to it, and the reason for your position. Please include only relevant information and data to support your position. AMS is specifically requesting comments on the status of some materials as described in the **SUPPLEMENTARY INFORMATION** below.

USDA intends to make available all comments, including names and addresses when provided, regardless of submission procedure used, on *www.regulations.gov* and at USDA,AMS, NOP, Room 2646-South building, 1400 Independence Ave., SW., Washington, DC, from 9 a.m. to noon and from 1 to 4 p.m., Monday through Friday (except official Federal holidays). Persons wanting to visit the USDA South building to view comments from the public to this notice are request to make an appointment by calling (202) 720–3252.

FOR FURTHER INFORMATION CONTACT: Melissa Bailey, Ph.D., Director, Standards Division, National Organic Program, USDA–AMS–NOP, 1400 Independence Ave. SW., Room 2646-So., Ag Stop 0268, Washington, DC 20250. Telephone: (202) 720–3252; Fax: (202) 205–7808.

SUPPLEMENTARY INFORMATION:

I. Background

The draft guidance documents announced through this notice were developed in response to outstanding NOSB recommendations. These documents also address the identified need to develop guidance to address requests by certifying agents and certified operations for clarification on the classification of materials and for more definitive information on materials used in organic crop production.

Under the Organic Foods Production Act (OFPA) (7 U.S.C. 6501–6522), the National List of Allowed and Prohibited Substance section of the USDA organic regulations must include synthetic substances which are permitted for use in organic crop production, and nonsynthetic (natural) substances which are prohibited for use in organic crop production.

Within the guidance, NOP has used the synonymous term ''material'' in place of the term ''substance,'' as the term ''material'' is more commonly used within the organic community.

Nonsynthetic (natural) materials are generally permitted to be used in organic production, but are not required to be included in the National List. At times, this unique construction of the National List has been a source of confusion or inconsistency in determining which input materials are allowed for organic production, since permitted nonsynthetic materials (*e.g.,* feather meal, fish meal, botanical pesticides) are not specifically identified in the standards. The lack of guidance on classification has led to confusion and inconsistency in the industry in how to classify materials as natural or synthetic, and, by extension,

whether the material needs to be on the National List.

The draft guidance document NOP 5033, Classification of Materials, provides additional guidance to the industry on how materials are classified as nonsynthetic, synthetic, agricultural, or nonagricultural. The terms ''nonsynthetic,'' ''synthetic,'' ''agricultural,'' and ''nonagricultural'' are defined at 7 CFR 205.2 of the USDA organic regulations. This guidance implements a series of recommendations of the NOSB and provides clarification on how materials should be classified according to these defined terms. Draft guidance NOP 5033–1 includes a decision tree for classifying a material as synthetic or nonsynthetic. Draft guidance NOP 5033–2 includes a decision tree for classifying a material as agricultural or nonagricultural. For materials used in organic crop production, the classification guidance is intended to be used in conjunction with the draft guidance NOP 5034, Materials for Organic Crop Production, to assist in determining whether a material is permitted for use.

The draft guidance document NOP 5034, Materials for Organic Crop Production, provides guidance to the industry on materials used in organic crop production. Once finalized, NOP 5034–1 is intended to provide a tool for organic producers to understand which input materials are allowed in organic crop production. The guidance includes substances which are specifically allowed in section 205.601 of the USDA organic regulations, as well as materials which are permitted, but are not required to be included on the National List. The appendix NOP 5034–2 provides a list of materials that are specifically prohibited in organic crop production. The appendix of prohibited materials is not intended to be all inclusive, but is provided for guidance to the industry of items which have been previously reviewed by the NOSB and not recommended for use. The appendix of prohibited materials also includes materials which are specifically listed in section 205.602 the National List as prohibited for use in organic crop production (*e.g.,* lead salts) or that are otherwise prohibited by the USDA organic regulations (*e.g.,* sewage sludge). The guidance, once finalized, will not grant new allowances for any synthetic substance to be used in organic production that have not been specifically recommended by the NOSB and added to the National List through rulemaking for such purpose.

NOP is aware that there may have been some inconsistency in the classification of a small number of materials used in organic crop production. NOP is issuing this draft guidance in an effort to clarify the status of these materials. Comments are specifically requested on the classification and descriptions provided in NOP 5034–1 for the following materials: bagasse, biochar, corn steep liquor, fatty acids, glycerin, molasses, vegetable protein hydrolysate, vinasse, and xanthan gum. NOP is requesting comments on whether these materials are accurately classified according to the draft guidance on classification, NOP 5033–1, and whether any amendments are needed to the descriptions provided in NOP 5034–1, Materials for Organic Crop Production.

II. Significance of Guidance

This draft guidance document is being issued in accordance with the Office of Management and Budget (OMB) Bulletin on Agency Good Guidance Practices (GGPs) (January 25, 2007, 72 FR 3432–3440).

The purpose of GGPs is to ensure that program guidance documents are developed with adequate public participation, are readily available to the public, and are not applied as binding requirements. The draft guidance, when finalized, will represent the NOP's current thinking on these topics. It does not create or confer any rights for, or on, any person and does not operate to bind the NOP or the public. Guidance documents are intended to provide a uniform method for operations to comply that can reduce the burden of developing their own methods and simplify audits and inspections. Alternative approaches that can demonstrate compliance with the Organic Foods Production Act (OFPA), as amended (7 U.S.C. 6501–6522), and its implementing regulations are also acceptable. The NOP strongly encourages industry to discuss alternative approaches with the NOP before implementing them to avoid unnecessary or wasteful expenditures of resources and to ensure the proposed alternative approach complies with the Act and its implementing regulations.

Authority: 7 U.S.C. 6501–6522.

Dated: March 28, 2013.

David R. Shipman,

Administrator, Agricultural Marketing Service.

[FR Doc. 2013–07613 Filed 4–1–13; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on April 23, 2013, 9:30 a.m., in the Herbert C. Hoover Building, Room 6087B, 14th Street between Constitution and Pennsylvania Avenues, NW., Washington, DC The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than April 16, 2013.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on December 11, 2012 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app.

2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Dated: March 28, 2013.

Yvette Springer,

Committee Liaison.

[FR Doc. 2013–07638 Filed 4–1–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840, A–549–822]

Certain Frozen Warmwater Shrimp From India and Thailand: Notice of Initiation of Antidumping Duty Administrative Reviews

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of the antidumping duty orders on certain frozen warmwater shrimp (shrimp) from India and Thailand. The anniversary month of these orders is February. In accordance with the Department's regulations, we are initiating these administrative reviews.

DATES: *Effective Date:* April 2, 2013.

FOR FURTHER INFORMATION CONTACT: David Crespo at (202) 482–3693 (India) and Blaine Wiltse (202) 482–6345 (Thailand), AD/CVD Operations, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

During the anniversary month of February 2013, the Department received timely requests, in accordance with 19 CFR 351.213(b), for administrative reviews of the antidumping duty orders on shrimp from India and Thailand from the Ad Hoc Shrimp Trade Action Committee (hereinafter, petitioner), the American Shrimp Processors Association (ASPA), and certain individual companies.

All deadlines for the submission of various types of information, certifications, or comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting time.

Notice of No Sales

If a producer or exporter named in this notice of initiation had no exports, sales, or entries during the period of review (POR), it must notify the Department within 60 days of publication of this notice in the **Federal Register**. All submissions must be filed electronically at *http://iaaccess.trade.gov* in accordance with 19 CFR 351.303. *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). Such submissions are subject to verification in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act).

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews, the Department intends to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the POR. We intend to release the CBP data under Administrative Protective Order (APO) to all parties having an APO within seven days of publication of this initiation notice and to make our decision regarding respondent selection within 21 days of publication of this **Federal Register** notice. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the applicable review.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, or changed circumstances review). For any company subject to these reviews, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the antidumping duty orders on shrimp from India and Thailand. We intend to issue the final results of these reviews not later than February 28, 2014.

	Period to be reviewed
Antidumping Duty Proceedings	
India: Certain Frozen Warmwater Shrimp, A–533–840	2/1/12–1/31/13
Abad Fisheries.	
Accelerated Freeze-Drying Co.	
Adilakshmi Enterprises.	

	Period to be reviewed
Allana Frozen Foods Pvt. Ltd.	
Allansons Ltd.	
AMI Enterprises.	
Amulya Seafoods.	
Ananda Aqua Applications/Ananda Aqua Exports (P) Limited/Ananda Foods.	
Anand Aqua Exports.	
Andaman Sea Foods Pvt. Ltd.	
Angelique Intl.	
Anjaneya Seafoods.	
Apex Frozen Foods Private Limited. [1]	
Arvi Import & Export.	
Asvini Exports.	
Asvini Fisheries Private Limited.	
Avanti Feeds Limited.	
Ayshwarya Seafood Private Limited.	
Baby Marine Exports.	
Baby Marine International.	
Baby Marine Sarass.	
Balasore Marine Exports Private Limited.	
Bhatsons Aquatic Products.	
Bhavani Seafoods.	
Bijaya Marine Products.	
Blue Fin Frozen Foods Pvt. Ltd.	
Blue Water Foods & Exports P. Ltd.	
Bluefin Enterprises.	
Bluepark Seafoods Private Ltd.	
BMR Exports.	
Britto Exports.	
C P Aquaculture (India) Ltd.	
Calcutta Seafoods Pvt. Ltd.	
Canaan Marine Products.	
Capithan Exporting Co.	
Castlerock Fisheries Ltd.	
Chemmeens (Regd).	
Cherukattu Industries (Marine Div.).	
Choice Canning Company.	
Choice Trading Corporation Private Limited.	
Coastal Aqua.	
Coastal Corporation Ltd.	
Cochin Frozen Food Exports Pvt. Ltd.	
Coreline Exports.	
Corlim Marine Exports Pvt. Ltd.	
D2 D Logistics Private Limited.	
Damco India Private.	
Delsea Exports Pvt. Ltd.	
Devi Fisheries Limited/Satya Seafoods Private Limited/Usha Seafoods.	
Devi Marine Food Exports Private Ltd./Kader Exports Private Limited/Kader Investment and Trading Company Private Limited/Liberty Frozen Foods Pvt. Ltd./Liberty Oil Mills Ltd./Premier Marine Products/Universal Cold Storage Private Limited.	
Diamond Seafood Exports/Edhayam Frozen Foods Pvt. Ltd./Kadalkanny Frozen Foods/Theva & Company.	
Digha Seafood Exports.	
Esmario Export Enterprises.	
Exporter Coreline Exports.	
Falcon Marine Exports Limited/K.R. Enterprises.	
Five Star Marine Exports Private Limited.	
Forstar Frozen Foods Pvt. Ltd.	
Frontline Exports Pvt. Ltd.	
G A Randerian Ltd.	
Gadre Marine Exports.	
Galaxy Maritech Exports P. Ltd.	
Gayatri Seafoods.	
Geo Aquatic Products (P) Ltd.	
Geo Seafoods.	
Goodwill Enterprises.	
Grandtrust Overseas (P) Ltd.	
GVR Exports Pvt. Ltd.	
Haripriya Marine Exports Pvt. Ltd.	
Harmony Spices Pvt. Ltd.	
HIC ABF Special Foods Pvt. Ltd.	
Hindustan Lever, Ltd.	
Hiravata Ice & Cold Storage.	
Hiravati Exports Pvt. Ltd.	
Hiravati International P. Ltd. (located at APM—Mafco Yard, Sector—18, Vashi, Navi, Mumbai—400 705, India).	

	Period to be reviewed
Hiravati International Pvt. Ltd. (located at Jawar Naka, Porbandar, Gujarat, 360 575, India).	
Hiravati Marine Products Private Limited.	
IFB Agro Industries Ltd.	
Indian Aquatic Products.	
Indo Aquatics.	
Innovative Foods Limited.	
International Freezefish Exports.	
Interseas.	
ITC Limited, International Business.	
ITC Ltd.	
Jagadeesh Marine Exports.	
Jaya Satya Marine Exports.	
Jaya Satya Marine Exports Pvt. Ltd.	
Jayalakshmi Sea Foods Private Limited.	
Jinny Marine Traders.	
Jiya Packagings.	
K R M Marine Exports Ltd.	
K V Marine Exports.	
Kalyan Aqua & Marine Exports India Pvt. Ltd.	
Kalyanee Marine.	
Kanch Ghar.	
Kay Kay Exports.	
Kings Marine Products.	
Koluthara Exports Ltd.	
Konark Aquatics & Exports Pvt. Ltd.	
Landauer Ltd.	
LCL Logistix (India) Private Limited.	
Libran Cold Storages (P) Ltd.	
Lighthouse Trade Links Pvt. Ltd.	
Magnum Estates Limited.	
Magnum Export.	
Magnum Sea Foods Limited.	
Malabar Arabian Fisheries.	
Malnad Exports Pvt. Ltd.	
Mangala Marine Exim India Pvt. Ltd.	
Mangala Sea Products.	
Meenaxi Fisheries Pvt. Ltd.	
MSC Marine Exporters.	
MSRDR Exports.	
MTR Foods.	
N.C. John & Sons (P) Ltd.	
Naga Hanuman Fish Packers.	
Naik Frozen Foods.	
Naik Seafoods Ltd.	
Navayuga Exports.	
Nekkanti Sea Foods Limited.	
Nezami Rekha Sea Food Private Limited.	
NGR Aqua International.	
Nila Sea Foods Pvt. Ltd.	
Nine Up Frozen Foods.	
Overseas Marine Export.	
Paragon Sea Foods Pvt. Ltd.	
Parayil Food Products Pvt. Ltd.	
Penver Products Pvt. Ltd.	
Pesca Marine Products Pvt. Ltd.	
Pijikay International Exports P Ltd.	
Pisces Seafood International.	
Premier Exports International.	
Premier Marine Foods.	
Premier Marine Products.	
Premier Seafoods Exim (P) Ltd.	
R V R Marine Products Limited.	
Raa Systems Pvt. Ltd.	
Raju Exports.	
Ram's Assorted Cold Storage Ltd.	
Raunaq Ice & Cold Storage.	
Raysons Aquatics Pvt. Ltd.	
Razban Seafoods Ltd.	
RBT Exports.	
RDR Exports.	
Riviera Exports Pvt. Ltd.	
Rohi Marine Private Ltd.	
S & S Seafoods.	

	Period to be reviewed
S. A. Exports.	
S Chanchala Combines.	
Safa Enterprises.	
Sagar Foods.	
Sagar Grandhi Exports Private Limited.	
Sagar Samrat Seafoods.	
Sagarvihar Fisheries Pvt. Ltd.	
SAI Marine Exports Pvt. Ltd.	
SAI Sea Foods.	
Sanchita Marine Products Private Limited.	
Sandhya Aqua Exports.	
Sandhya Aqua Exports Pvt. Ltd.	
Sandhya Marines Limited.	
Santhi Fisheries & Exports Ltd.	
Sarveshwari Exp.	
Sarveshwari Ice & Cold Storage Pvt. Ltd.	
Sawant Food Products.	
Seagold Overseas Pvt. Ltd.	
Selvam Exports Private Limited.	
Sharat Industries Ltd.	
Shimpo Exports Pvt. Ltd.	
Shippers Exports.	
Shiva Frozen Food Exp. Pvt. Ltd.	
Shree Datt Aquaculture Farms Pvt. Ltd.	
Shroff Processed Food & Cold Storage P Ltd.	
Silver Seafood.	
Sita Marine Exports.	
Sowmya Agri Marine Exports.	
Sprint Exports Pvt. Ltd.	
Sri Chandrakantha Marine Exports.	
Sri Sakkthi Cold Storage.	
Sri Sakthi Marine Products P Ltd.	
Sri Satya Marine Exports.	
Sri Venkata Padmavathi Marine Foods Pvt. Ltd.	
Srikanth International.	
SSF Ltd.	
Star Agro Marine Exports Private Limited.	
Star Organic Foods Incorporated.	
Sun-Bio Technology Ltd.	
Suryamitra Exim Pvt. Ltd.	
Suvarna Rekha Exports Private Limited.	
Suvarna Rekha Marines P Ltd.	
TBR Exports Pvt Ltd.	
Teekay Marine P. Ltd.	
Tejaswani Enterprises.	
The Waterbase Ltd.	
Triveni Fisheries P Ltd.	
Uniroyal Marine Exports Ltd.	
Unitriveni Overseas.	
V.S. Exim Pvt. Ltd.	
Vasista Marine.	
Veejay Impex.	
Victoria Marine & Agro Exports Ltd.	
Vinner Marine.	
Vishal Exports.	
Wellcome Fisheries Limited.	
West Coast Frozen Foods Private Limited.	
Z A Sea Foods Pvt. Ltd.	
Thailand: Certain Frozen Warmwater Shrimp, A–549–822	2/1/12–1/31/13
A Foods 1991 Co., Ltd. [2]	
A. Wattanachai Frozen Products Co., Ltd.	
A.S. Intermarine Foods Co., Ltd.	
ACU Transport Co., Ltd.	
Anglo-Siam Seafoods Co., Ltd.	
Apex Maritime (Thailand) Co., Ltd.	
Apitoon Enterprise Industry Co., Ltd.	
Applied DB Ind.	
Asian Seafood Coldstorage (Sriracha).	
Asian Seafoods Coldstorage Public Co., Ltd./Asian Seafoods Coldstorage (Suratthani) Co., Limited/STC Foodpak Ltd.	
Assoc. Commercial Systems.	
B.S.A. Food Products Co., Ltd.	
Bangkok Dehydrated Marine Product Co., Ltd.	
C Y Frozen Food Co., Ltd.	

	Period to be reviewed
C.P. Retailing and Marketing Co., Ltd.	
C.P. Intertrade Co. Ltd.	
Calsonic Kansei (Thailand) Co., Ltd.	
Century Industries Co., Ltd.	
Chaivaree Marine Products Co., Ltd.	
Chaiwarut Company Limited.	
Charoen Pokphand Foods Public Company Limited.	
Chonburi LC.	
Chue Eie Mong Eak Ltd. Part.	
Commonwealth Trading Co., Ltd.	
Core Seafood Processing Co., Ltd.	
CP Merchandising Co., Ltd.	
C.P. Mdse.	
Crystal Frozen Foods Co., Ltd. and/or Crystal Seafood.	
CY Frozen Food Co., Ltd.	
Daedong (Thailand) Co. Ltd.	
Daiei Taigen (Thailand) Co., Ltd.	
Daiho (Thailand) Co., Ltd.	
Dynamic Intertransport Co., Ltd.	
Earth Food Manufacturing Co., Ltd.	
F.A.I.T. Corporation Limited.	
Far East Cold Storage Co., Ltd.	
Findus (Thailand) Ltd.	
Fortune Frozen Foods (Thailand) Co., Ltd.	
Frozen Marine Products Co., Ltd.	
Gallant Ocean (Thailand) Co., Ltd.	
Gallant Seafoods Corporation.	
Global Frozen Food (Thailand) Co.	
Global Maharaja Co., Ltd.	
Golden Seafood International Co., Ltd.	
Golden Sea Frozen Foods Co., Ltd.	
Golden Thai Imp. & Exp. Co., Ltd.	
Good Fortune Cold Storage Co. Ltd.	
Good Luck Product Co., Ltd.	
Grobest Frozen Foods Co., Ltd.	
GSE Lining Technology Co., Ltd.	
Gulf Coast Crab Intl.	
H.A.M. International Co., Ltd.	
Haitai Seafood Co., Ltd.	
Handy International (Thailand) Co., Ltd.	
Heng Seafood Limited Partnership.	
Heritrade Co., Ltd.	
HIC (Thailand) Co., Ltd.	
High Way International Co., Ltd.	
I.T. Foods Industries Co., Ltd.	
Inter-Oceanic Resources Co., Ltd.	
Inter-Pacific Marine Products Co., Ltd.	
K & U Enterprise Co., Ltd.	
K Fresh.	
K. D. Trading Co., Ltd.	
K.L. Cold Storage Co., Ltd.	
KF Foods Limited.	
Kiang Huat Sea Gull Trading Frozen Food Public Co., Ltd.	
Kibun Trdg.	
Kingfisher Holdings Ltd.	
Kitchens of the Oceans (Thailand) Company, Limited.	
Klang Co., Ltd.	
Kongphop Frozen Foods Co., Ltd.	
Kosamut Frozen Foods Co., Ltd.	
Lee Heng Seafood Co., Ltd.	
Leo Global Logistics Co., Ltd.	
Leo Transports.	
Li-Thai Frozen Foods Co., Ltd.	
Lucky Union Foods Co., Ltd.	
Maersk Line.	
Magnate & Syndicate Co., Ltd.	
Mahachai Food Processing Co., Ltd.	
Marine Gold Products Ltd.	
Merit Asia Foodstuff Co., Ltd.	
Merkur Co., Ltd.	
Ming Chao Ind Thailand.	
N&N Foods Co., Ltd.	
NR Instant Produce Co., Ltd.	

	Period to be reviewed
Namprik Maesri Ltd. Part.	
Narong Seafood Co., Ltd.	
Nha Trang Seaproducts Company (“Nha Trang”) and/or Nha Trang Seaproduct Company (“NHA TRANG SEA-FOODS”).	
Nongmon SMJ Products.	
Ongkorn Cold Storage Co., Ltd./Thai-Ger Marine Co., Ltd.	
Pacific Queen Co., Ltd.	
Pakfood Public Company Limited/Asia Pacific (Thailand) Co., Ltd./Chaophraya Cold Storage Co., Ltd./Okeanos Co., Ltd./Okeanos Food Co., Ltd./Takzin Samut Co., Ltd.	
Penta Impex Co., Ltd.	
Pinwood Nineteen Ninety Nine.	
Piti Seafood Co., Ltd.	
Premier Frozen Products Co., Ltd.	
Preserved Food Specialty Co., Ltd.	
Queen Marine Food Co., Ltd.	
Rayong Coldstorage (1987) Co., Ltd.	
S&D Marine Products Co., Ltd.	
S&P Aquarium.	
S&P Syndicate Public Company Ltd.	
S. Chaivaree Cold Storage Co., Ltd.	
S. Khonkaen Food Industry Public Co., Ltd. and/or S. Khonkaen Food Ind. Public.	
S.K. Foods (Thailand) Public Co. Limited.	
Samui Foods Company Limited.	
SB Inter Food Co., Ltd.	
SCT Co., Ltd.	
Sea Bonanza Food Co., Ltd.	
SEA NT’L CO., LTD.	
Seafoods Enterprise Co., Ltd.	
Seafresh Fisheries/Seafresh Industry Public Co., Ltd.	
Search & Serve.	
Shianlin Bangkok Co., Ltd.	
Shing Fu Seaproducts Development Co.	
Siam Food Supply Co., Ltd.	
Siam Intersea Co., Ltd.	
Siam Marine Products Co. Ltd.	
Siam Ocean Frozen Foods Co. Ltd.	
Siamchai International Food Co., Ltd.	
Smile Heart Foods.	
SMP Products, Co., Ltd.	
Southport Seafood Co., Ltd.	
Stapimex.	
Star Frozen Foods Co., Ltd.	
Starfoods Industries Co., Ltd.	
Suntechthai Intertrading Co., Ltd.	
Surapon Foods Public Co., Ltd./Surat Seafoods Co., Ltd.	
Surapon Nichirei Foods Co., Ltd.	
Suratthani Marine Products Co., Ltd.	
Suree Interfoods Co., Ltd.	
T.S.F. Seafood Co., Ltd.	
Tanaya International Co., Ltd.	
Tep Kinsho Foods Co., Ltd.	
Teppitak Seafood Co., Ltd.	
Tey Seng Cold Storage Co., Ltd.	
Thai Agri Foods Public Co., Ltd.	
Thai Mahachai Seafood Products Co., Ltd.	
Thai Ocean Venture Co., Ltd.	
Thai Patana Frozen.	
Thai Prawn Culture Center Co., Ltd.	
Thai Royal Frozen Food Co., Ltd.	
Thai Spring Fish Co., Ltd.	
Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd.	
Thai Union Manufacturing Company Limited.	
Thai World Import and Export Co., Ltd.	
Thai Yoo Ltd., Part.	
The Siam Union Frozen Foods Co., Ltd.	
The Union Frozen Products Co., Ltd./Bright Sea Co., Ltd.	
Trang Seafood Products Public Co., Ltd.	
Transamut Food Co., Ltd.	
Tung Lieng Tradg.	
United Cold Storage Co., Ltd.	
UTXI Aquatic Products Processing Company.	
V. Thai Food Product Co., Ltd.	
Xian-Ning Seafood Co., Ltd.	

	Period to be reviewed
Yeenin Frozen Foods Co., Ltd. YHS Singapore Pte. ZAFCO TRDG.	

[1] On December 11, 2012, the Department determined that Apex Frozen Foods Private Limited is the successor-in-interest to Apex Exports. *See Final Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp From India,* 77 FR 73619 (December 11, 2012)

[2] On December 1, 2011, the Department found that A Foods 1991 Co., Limited is the successor-in-interest to May Ao Company Limited/May Ao Foods Co., Ltd. *See Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Frozen Warmwater Shrimp from Thailand,* 75 FR 74684 (Dec. 1, 2011). Because the effective date of this determination is during a prior POR, we have included only A Foods 1991 Co., Limited for purposes of initiation.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305. On January 22, 2008, the Department published *Antidumping and Countervailing Duty Proceedings: Documents Submission Procedures; APO Procedures,* 73 FR 3634 (January 22, 2008). Those procedures apply to the administrative reviews included in this notice of initiation. Parties wishing to participate in either of these administrative reviews should ensure that they meet the requirements of these procedures (*e.g.,* the filing of separate letters of appearance as discussed at 19 CFR 351.103(d)).

Any party submitting factual information in an antidumping duty proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all segments of any antidumping duty proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (*Interim Final Rule*), amending 19 CFR 351.303(g)(1) and (2). The formats for the revised certifications are provided at the end of the *Interim Final Rule.* The Department intends to reject factual submissions in these proceedings if the submitting party does not comply with the revised certification requirements.

These initiations and this notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.221(c)(1)(i).

Dated: March 28, 2013.

Edward C. Yang,

Senior Director, China/Non-Market Economy Unit.

[FR Doc. 2013–07648 Filed 4–1–13; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Brenda E. Waters, Office of AD/CVD Operations, Customs Unit, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, telephone: (202) 482–4735.

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (''the Act''), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (''the Department'') conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

In the event the Department decides it is necessary to limit individual examination of respondents and conduct respondent selection under section 777A(c)(2) of the Act:

In general, the Department has found that determinations concerning whether particular companies should be ''collapsed'' (*i.e.,* treated as a single entity for purposes of calculating antidumping duty rates) require a substantial amount of detailed information and analysis, which often require follow-up questions and analysis. Accordingly, the Department will not conduct collapsing analyses at the respondent selection phase of this review and will not collapse companies at the respondent selection phase unless there has been a determination to collapse certain companies in a previous segment of this antidumping proceeding (*i.e.,* investigation, administrative review, new shipper review or changed circumstances review). For any company subject to this review, if the Department determined, or continued to treat, that company as collapsed with others, the Department will assume that such companies continue to operate in the same manner and will collapse them for respondent selection purposes. Otherwise, the Department will not collapse companies for purposes of respondent selection. Parties are requested to (a) identify which companies subject to review previously were collapsed, and (b) provide a citation to the proceeding in which they were collapsed. Further, if companies are requested to complete

the Quantity and Value Questionnaire for purposes of respondent selection, in general each company must report volume and value data separately for itself. Parties should not include data for any other party, even if they believe they should be treated as a single entity with that other party. If a company was collapsed with another company or companies in the most recently completed segment of this proceeding where the Department considered collapsing that entity, complete quantity and value data for that collapsed entity must be submitted.

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after April 2013, the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

The Department is providing this notice on its Web site, as well as in its ''Opportunity to Request Administrative Review'' notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

Opportunity to Request a Review: Not later than the last day of April 2013,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in April for the following periods:

	Period of review
Antidumping Duty Proceedings	
India: 1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) A–533–847	4/1/12–3/31/13
Russia Federation: Solid Fertilizer Grade Ammonium Nitrate A–821–811	4/1/12–3/31/13
The People's Republic of China:	
Activated Carbon A–570–904	4/1/12–3/31/13
Frontseating Service Valves A–570–933	4/1/12–3/31/13
1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) A–570–934	4/1/12–3/31/13
Magnesium Metal A–570–896	4/1/12–3/31/13
Non-Malleable Cast Iron Pipe Fittings A–570–875	4/1/12–3/31/13
Steel Threaded Rod A–570–932	4/1/12–3/31/13
Countervailing Duty Proceedings	
None.	
Suspension Agreements	
None.	

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import Administration Web site at *http://trade.gov/ia.*

All requests must be filed electronically in Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS'') on the IA ACCESS Web site at *http://iaaccess.trade.gov. See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

[1] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when the Department is closed.

[2] If the review request involves a non-market economy and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of April 2013. If the Department does not receive, by the last day of April 2013, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified above, the Department will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: March 22, 2013.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations .

[FR Doc. 2013–07547 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating five-year reviews (''Sunset Reviews'') of the antidumping duty orders listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same orders.

DATES: *Effective Date:* April 1, 2013.

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin,* 63 FR 18871 (April 16, 1998), and in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating Sunset Reviews of the following antidumping duty orders:

DOC Case No.	ITC Case No.	Country	Product	Department contact
A–570–914	731–TA–1118	China	Light-Walled Rectangular Pipe and Tube (1st Review).	Jennifer Moats (202) 482–5047.
C–570–915	701–TA–449	China	Light-Walled Rectangular Pipe and Tube (1st Review).	David Goldberger (202) 482–4136.
A–580–859	731–TA–1119	Korea	Light-Walled Rectangular Pipe and Tube (1st Review).	Dana Mermelstein (202) 482–1391.
A–201–836	731–TA–1120	Mexico	Light-Walled Rectangular Pipe and Tube (1st Review).	Dana Mermelstein (202) 482–1391.
A–489–815	731–TA–1121	Turkey	Light-Walled Rectangular Pipe and Tube (1st Review).	Dana Mermelstein (202) 482–1391.
A–533–824	731–TA–933	India	Polyethylene Terephthalate (Pet) Film (2nd Review).	Dana Mermelstein (202) 482–1391.
C–533–825	701–TA–415	India	Polyethylene Terephthalate (Pet) Film (2nd Review).	Dana Mermelstein (202) 482–1391.
A–583–837	731–TA–934	Taiwan	Polyethylene Terephthalate (Pet) Film (2nd Review).	Dana Mermelstein (202) 482–1391.

With respect to the orders on Light-Walled Rectangular Pipe and Tube, we have advanced the initiation date of certain Sunset Reviews upon determining that initiation of the Sunset Reviews for all of the Light-Walled Rectangular Pipe and Tube orders on the same date would promote administrative efficiency.

Filing Information

As a courtesy, we are making information related to Sunset proceedings, including copies of the pertinent statute and Department's regulations, the Department's schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Internet Web site at the following address: ''*http://ia.ita.doc.gov/sunset/.*'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''), can be found at 19 CFR

351.303. *See also Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

This notice serves as a reminder that any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all AD/CVD investigations or proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (''*Interim Final Rule*'') amending 19 CFR 351.303(g)(1) and (2) and supplemented by *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings: Supplemental Interim Final Rule,* 76 FR 54697 (September 2, 2011). The formats for the revised certifications are provided at the end of the *Interim Final Rule.* The Department intends to reject factual submissions if the submitting party does not comply with the revised certification requirements.

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order (''APO'') immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b) wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that *all parties* wishing to participate in a Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[1] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: March 25, 2013.

Edward C. Yang,

Senior Director, China/Non-Market Economy Unit.

[FR Doc. 2013–07550 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–DS–P

[1] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Northeast Region Dealer Purchase Reports

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 3, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to David Ulmer, (757) 723–0303 or *David.Ulmer@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

Federally permitted dealers, and any individual acting in the capacity of a dealer, must submit to NOAA's National Marine Fisheries Service (NMFS) Regional Administrator or to the official designee a detailed report of all fish purchased or received for a commercial purpose, other than solely for transport on land by one of the available electronic reporting mechanisms approved by NMFS. The information obtained is used by economists, biologists, and managers in the management of the fisheries. The data collection parameters are consistent with the current requirements for Federal dealers under the authority of the Magnuson-Stevens Fishery Conservation and Management Act.

II. Method of Collection

Dealers submit purchase information through an electronic process by either the Web-based system as administered by the Atlantic Coast Cooperative Statistics Program, the computer-based

trip ticket program issued by the NMFS or through a NMF- approved proprietary mechanism, a private industry program which has met NMFS requirements in being able to enter data and submit files in accordance to NMFS regulations.

III. Data

OMB Control Number: 0648–0229.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for profit organizations.

Estimated Number of Respondents: 781.

Estimated Time Per Response: 4 minutes per fishing trip.

Estimated Total Annual Burden Hours: 2,643.

Estimated Total Annual Cost to Public: $460,200 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 28, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–07624 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Southwest Region Permit Family of Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before June 3, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Craig D'Angelo, (562) 980–4024 or *Craig.Dangelo@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension of a current information collection. Under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et *seq.,* permits are required for persons to participate in Federally-managed fisheries off the West Coast. There are three types of permits: Basic fishery permits for Highly Migratory Species (HMS), limited entry permits for Coastal Pelagic Species (CPS) and experimental fishing permits (EFPs). Appeals and certain waiver requests may also be submitted. Transfer applications may also be required.

The permit application forms provide basic information about permit holders and the vessels and gear being used. This information is important for understanding the nature of the fisheries and provides a link to participants. It also aids in enforcement of regulations. Minor modifications of the current HMS permit application will occur to simplify application questions.

II. Method of Collection

Forms are available on the internet; paper applications are also available and may be submitted by mail or FAX. In addition, an online submission option is expected to be available for Highly Migratory Species permits by April 30, 2013.

III. Data

OMB Control Number: 0648–0204.

Form Number: None.

Type of Review: Regular submission (revision and extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,695 (HMS), 65 (CPS).

Estimated Time per Response: HMS permit renewal applications, 6 minutes; CPS transfers, 15 minutes; new HMS permits, 60 minutes; additional information (when requested) for the CPS fishery, 1 hour; appeals, 2 hours.

Estimated Total Annual Burden Hours: 170.

Estimated Total Annual Cost to Public: $25,855.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 27, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–07575 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC528

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Exempted Fishing Permit

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

ACTION: Notice of receipt of an application for an exempted fishing permit; request for comments.

SUMMARY: NMFS announces the receipt of an application for an exempted fishing permit (EFP) from the Gulf Headboat Cooperative (Cooperative). The Cooperative proposes to evaluate the efficacy of an allocation-based management system, using a limited number of headboats in a 2-year pilot study. This study, to be conducted in the exclusive economic zone (EEZ) of the Gulf of Mexico (Gulf), is intended to assess whether such a system can better achieve conservation goals established in the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico; evaluate the effectiveness of a more timely electronic data reporting system; and evaluate the potential social and economic benefits of an alternative management strategy for the headboat segment of the recreational fishing sector within the Gulf reef fish fishery.

DATES: Comments must be received no later than 5 p.m., eastern time, on May 2, 2013.

ADDRESSES: You may submit comments on the application, identified by RIN 0648–XC528, by any of the following methods:

- *Email: 0648–XC528.Headboat.IFQ.EFP@noaa.gov.* Include in the subject line of the email comment the following document identifier: ''Headboat IFQ''.
- *Mail:* Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

The application and related documents are available for review upon written request to any of the above addresses.

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, 727–824–5305; email: *Steve.Branstetter@noaa.gov.*

SUPPLEMENTARY INFORMATION: The EFP is requested under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*) (Magnuson-Stevens Act), and regulations at 50 CFR 600.745(b) concerning exempted fishing.

Overall Program Concept

The described research program is being proposed by a sub-set of the headboat fleet in the Gulf reef fish fishery. A headboat is a for-hire vessel that charges a fee on an individual angler (per head) basis. These headboats have formed a Cooperative to conduct a pilot study to evaluate the efficacy of an allocation-based management strategy, which if proven successful, could potentially be implemented by the Gulf of Mexico Fishery Management Council (Council) for the entire reef fish headboat fleet in the Gulf.

Currently, headboats operate under a common set of management measures, such as recreational bag limits, size limits, and open fishing seasons. According to the Cooperative, regulatory responses to overharvesting of reef fish in the recreational sector and the need for more timely harvest data have resulted in shorter fishing seasons, reduced bag limits, and other factors that make it difficult to operate successful headboat businesses. Because headboat operators can now only fish for certain species during brief seasons in each year, there are increased regulatory discards during the closed seasons, and boats often lose out on potential customers during periods of high tourist traffic along the Gulf coast that do not coincide with those open fishing seasons. In addition, even long-time customers are losing confidence that if they book a headboat trip in advance, the fishing seasons for their target reef fish species will be open when their fishing trip occurs. This lack of certainty makes customers reluctant to book headboat fishing trips.

The Cooperative is requesting that they be issued an EFP authorizing their members to harvest a specific amount of red snapper and gag anytime during the 2014 and 2015 fishing years. The amount of fish that would be authorized for harvest by the Cooperative would be based on the Cooperative participants' 2011 aggregate landings of red snapper and gag reported through the Southeast Regional Headboat Survey (SRHS) program relative to the total recreational landings of red snapper and gag in 2011. That percentage would then be applied to the 2014 and 2015 red snapper recreational quota and gag recreational allocation to determine the amount of fish authorized under the EFP to be harvested by the Cooperative.

The Cooperative would be responsible for distributing the allotted fish to individual headboats in the program. Final distribution would be in numbers of fish, calculated from the proportional landings data, which are reported in weight. The Cooperative would then be responsible for reporting their landings electronically to the NMFS Southeast Regional Office.

NMFS would establish an electronic account for the Cooperative manager before the start of the 2014 fishing season. Vessel accounts would also be established by NMFS for each vessel participating in the EFP. NMFS would provide the Cooperative Manager and participating Gulf charter-headboat for reef fish permit holders each with a unique UserID and Personal Identification Number (PIN) to log-in to their accounts. The amount of fish authorized for harvest under the EFP would be deposited in the Cooperative manager's electronic account on January 1, each year. The Cooperative manager would then transfer fish to and from headboat vessel accounts. The number of fish each vessel receives would be determined by the Cooperative and not NMFS. Vessel account holders would be able to view the number of fish available for harvest at any point in time through their account. Landed fish would be deducted from the vessel account after each recorded trip. After all fish have been harvested, the vessel would either need to obtain additional fish from the Cooperative manager to continue landing fish or no longer harvest red snapper and gag for the remainder of the fishing year.

Data Collection and Reporting

The Cooperative has proposed to provide a transparent real-time monitoring system. All vessels in the program would be required to purchase, install, activate, and maintain a Vessel Monitoring System (VMS) unit in accordance with NMFS Office of Law Enforcement procedures. A participating captain would ''hail out'' using the VMS device or by telephone as the vessel leaves the dock, notifying NMFS of the fishing trip. In return, the captain would receive a confirmation number for that particular trip. When returning to port, the vessel would be required to ''hail in'' using the VMS or by telephone at least 1 hour prior to landing, alerting law enforcement and port agents to his/her return. This would provide sufficient notice to allow a dockside intercept if deemed necessary by enforcement and headboat port samplers.

Landings would be reported at the end of the trip using a software application (iSnapper) developed by Texas A&M University's Harte Research Institute. The software application was pilot-tested by the for-hire fleet in the Gulf during 2011 and 2012. Before returning to the dock, the headboat captain would enter the species and number of fish retained during the trip, approximate GPS location to identify fishing zones, and social and economic information regarding the customers on each trip. At the end of the trip, the captain would use the iSnapper data to print out a receipt for each individual customer, which would include summary information such as species and number of fish landed, the date of the trip, and the name of the vessel. This receipt would be used at the dock to track the fish that had been landed on the Cooperative vessel participating in the EFP.

By using this electronic reporting methodology, the Cooperative would maintain a real-time, internet-based tracking system to ensure accounting of each fish landed. The data would be collected on remote servers and sent to NMFS. The Cooperative would maintain an electronic account with NMFS, specifying the numbers of red snapper and gag grouper that could be landed. As fish are landed, they would be deducted from the headboat's vessel account. Finally, headboat captains would continue submitting completed NMFS SRHS logbook data for each trip in compliance with 50 CFR 622.5.

Socio-Economic Study

The pilot project, if approved, offers an opportunity to evaluate the impacts of an alternative management system on the economic performance of the Gulf reef fish headboat industry. It also provides a valuable opportunity to customize data collection to maximize usefulness of the data for answering important management questions. Academic researchers, in collaboration with the Cooperative, would conduct a socio-economic study of the anticipated effects of the change in headboat cooperative management using currently available data sources. Simultaneously, the academic researchers and the Cooperative would develop additional survey instruments to gather economic data for a post-EFP analysis of the effects of the pilot project on Cooperative vessels after its first and second years. Data collection would emphasize post-EFP impacts of the pilot project. A partial list of impacts to assess in the study includes:

1. How has the pilot project changed the temporal and spatial distributions of fishing by Cooperative members?
2. How has the number of anglers/customers changed as a result of Cooperative members being able to better target their trips to the seasonality of demand specific to red snapper and gag?
3. Do headboat owners utilize increased flexibility to provide a more differentiated recreational product to customers?
4. How has the pilot project affected the cost and net revenue associated with a representative trip?

Data collection would include trip-level catch and effort characteristics (e.g., retained and discarded catch, spatial location, and number of customers), trip and season-level variable revenues and costs (e.g., trip pricing, gear, bait, ice, fuel, and maintenance expenditures), and labor employment and compensation information. Many trip-level data would be collected using the iSnapper application, whereas seasonal data would be collected through supplementary survey instruments.

The public and the Council questioned if the establishment of an allocation-based system for the Cooperative could be considered the establishment of an individual fishing quota (IFQ) program, which would require approval via a referendum. Section 303A(c)(6)(D), 16 U.S.C. 1853a(c)(6)(D), of the Magnuson-Stevens Act, requires a referendum to approve or implement a fishery management plan or plan amendment that creates an IFQ program for any species in the Gulf. Although the allocation-based system requested by the Cooperative might reasonably be considered to create such an IFQ program, the mere issuance of an EFP to test the program on a limited basis does not trigger the referendum requirement. The statutory language is explicit that the referendum is only required to approve a fishery management plan or plan amendment that would implement such a program. An EFP is neither a fishery management plan nor a plan amendment, and does not implement any new requirements for all or a portion of recreational participants. If issued, the EFP would only establish specific requirements for the members of the voluntary Cooperative who have requested the EFP. Therefore, NMFS has determined that no referendum is required.

Currently, the recreational red snapper fishing season begins on June 1 of each year, and is closed when NMFS projects the recreational quota will be landed. As noted above, the recreational seasons have become shorter each year, impacting the ability of headboats to operate in an efficient and economically viable manner. If this EFP is authorized, identified Gulf reef fish headboats in the Cooperative would be able to use their allocation to fish during the open recreational season, but also would be able to select days outside the designated season where they could use their red snapper allocation to meet specific customer demands. Nevertheless, in accordance with section 407(d)(1) (16 U.S.C. 1883(d)) of the Magnuson-Stevens Act, when NMFS determines the recreational red snapper fishing quota is reached, NMFS is required to prohibit the retention of red snapper caught during the rest of the fishing year. Should NMFS determine that the recreational red snapper quota is reached prior to the end of the 2014 or 2015 fishing year, including consideration of fish already harvested by the Cooperative, headboats participating under the EFP would have to cease retaining red snapper, even if the Cooperative still has allocation of red snapper available.

The Council reviewed the Cooperative's initial application at its April 2012 meeting, and recommended that NMFS approve the application. NMFS finds this application does warrant further consideration. Possible conditions the agency may impose on this permit, if it is indeed granted, include but are not limited to, a prohibition of conducting research within marine protected areas, marine sanctuaries, or special management zones, without additional authorization. A report on the research would be due at the end of the collection period, to be submitted to NMFS and reviewed by the Council.

A final decision on issuance of the EFP will depend on NMFS's review of public comments received on the application, the Council's recommendation, consultations with the affected states, and the U.S. Coast Guard, as well as a determination that it is consistent with all applicable laws.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 28, 2013.

Kara Meckley,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–07630 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC594

New England Fishery Management Council; Public Meeting; Correction

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

ACTION: Notice of correction of a public meeting.

SUMMARY: The New England Fishery Management Council's (Council) Groundfish Oversight Committee will meet to consider actions affecting New England fisheries in the exclusive economic zone (EEZ).

DATES: The two-day meeting will be held on Tuesday, April 16, 2013 beginning at 12 p.m. and Wednesday, April 17, 2013 beginning at 8:30 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 339–1040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The original notice published in the **Federal Register** on March 28, 2013 (78 FR 18963). The original notice in the **SUMMARY** stated that the meeting was for the Recreational Advisory Panel. This notice corrects it to read Groundfish Oversight Committee. All other previously-published information remains unchanged.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 28, 2013.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–07623 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC560

Takes of Marine Mammals Incidental to Specified Activities; Office of Naval Research Acoustic Technology Experiments in the Western North Pacific Ocean

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS has received an application from the U.S. Navy's Office of Naval Research (ONR) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting Acoustic Technology Experiments (ATE) in the western North Pacific Ocean. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA). Pursuant to the MMPA, NMFS is requesting comments on its proposal to issue an IHA to ONR to incidentally harass, by Level B harassment only, 34 species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than May 2, 2013.

ADDRESSES: Comments on the application should be addressed 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. The mailbox address for providing email comments is *ITP.Magliocca@noaa.gov.* NMFS is not responsible for email comments send to addresses other than the one provided here. Comments sent via email, including all attachments, must not exceed a 10-megabyte file size.

All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

An electronic copy of the application containing a list of the references used in this document may be obtained by visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Michelle Magliocca, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which U.S. citizens can apply for a 1-year authorization to incidentally take small numbers of marine mammals by harassment, provided that there is no potential for serious injury or mortality to result from the activity. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

The NDAA (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].]

Summary of Request

On December 20, 2012, NMFS received an application from ONR for the taking of marine mammals incidental to ATE in the western North Pacific Ocean. ONR provided additional information on March 7, 2013 and NMFS determined that the application was adequate and complete on March 7, 2013.

ONR proposes to conduct ATE in one of nine provinces comprising the western North Pacific Ocean. The proposed activity would occur for no more than 2 weeks during the spring or summer of 2013. Transmissions from four underwater active acoustic sources are likely to result in the take of marine mammals. Take, by Level B harassment only, of individuals of up to 34 species is anticipated to result from the specified activity.

Description of the Specified Activity

The purpose of ONR's ATE is to collect data and demonstrate underwater acoustic technology in a realistic at-sea environment. The proposed activity fulfills the Navy's need for measured in situ scientific data on underwater acoustic technology from which the performance of the acoustic systems and their conceptual foundation can be assessed. No more than four underwater acoustic sources would be used from a vessel during the experiments and none of the sources would transmit concurrently. The acoustic sources are considered non-impulsive and non-continuous and no explosives would be used. All transmission frequencies would be below 1.5 kilohertz (kHz) and sound pressure levels would be less than 220 decibels (dB) (significantly lower than tactical mid-frequency or low-frequency active sonar) for a total of no more than 69 hours of acoustic transmissions over 6 days. Despite being classified, the detailed characteristics of the active acoustic sources were made known to NMFS staff and factored into our MMPA analysis. An environmental survey of the waters of the proposed action area would also be conducted employing an oceanographic acoustic source. The vessel would be stationary during deployment and transmission of the ATE underwater active acoustic sources, except that of the oceanographic acoustic source. The vessel would move at speeds less than 5 knots when the oceanographic source is transmitting. All equipment deployed during the ATE would be recovered once data collection is complete.

Dates and Duration of Activity

The ATE would take place during the spring or summer of 2013, and would last no longer than 2 weeks. No more than 69 hours of acoustic transmissions would occur over 6 at-sea days. The Navy is unable to define a detailed schedule of events because experimental work, such as the proposed activity, requires a degree of flexibility to respond to weather fluctuations and hardware conditions. However, a nominal outline of a schedule, including the amount of time each source would be expected to be used, and the possibility of temporal overlap in source transmissions has been planned (Table 1). At most, two of the acoustic sources would operate at the same time during specific experiment events. In all cases of concurrent source operations, there is sufficient horizontal and vertical separation between the active acoustic sources so that potential environmental effects associated with the operation of the sources is no more than the sources considered individually.

TABLE 1—NOMINAL SCHEDULE OF ONR ATE ACTIVITIES AND EVENTS

Day	Activity	Equipment	Acoustic transmission
1	Environmental Survey	Oceanographic Source	One 24-hr event.
	Experimental Transmissions	Sources 1 or 2 or 3	Maximum 1-hr per source.
2	Experimental Transmissions	Source 1	Two 9-hr events.
3	Experimental Transmissions	Source 2	One 5-hr event.
4	Experimental Transmissions	Source 3	Two 10-hr events.
5	Experimental Transmissions	Source 2	Two 5-hr events.
6	Experimental Transmissions	Source 2	One 5-hr events.
		Sources 1 or 3 (contingency day)	Two 4-hr events.

Location of Activity

The ATE would take place in international waters, in one of nine provinces comprising the western North Pacific Ocean. The nine provinces are discrete areas identified with the following geographic titles: Sea of Japan, East China Sea, South China Sea, North Philippine Sea, West Philippine Sea, East of Japan, Offshore Guam, Northwest Pacific Ocean: 25° to 40° north latitude, or Northwest Pacific Ocean: 10° to 25° north latitude. The proposed action area would be between 360,000–800,000 square kilometers (km^2) and water could be as shallow as 100 m or as deep as 9,500 m (Table 2).

TABLE 2—SIZE AND RANGE OF WATER DEPTHS FOR THE WESTERN NORTH PACIFIC PROVINCES IN WHICH THE ATE MAY OCCUR

Western North Pacific Province	Area (km^2)	Water depth range (m)
Sea of Japan	360,000	1,000–3,500
East China Sea	370,000	100–2,500
South China Sea	800,000	100–4,500
North Philippine Sea	500,000	1,000–5,500
West Philippine Sea	400,000	1,500–7,500
East of Japan	600,000	5,000–6,000
Offshore Guam	470,000	500–9,500
Northwest Pacific Ocean—25° to 40° N	560,000	2,500–6,000
Northwest Pacific Ocean—10° to 25° N	450,000	1,500–6,000

Metrics Used in This Document

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure level in underwater acoustics is 1 μPa, and the units for SPLs are dB re: 1 μPa.

SPL (in decibels (dB)) = 20 log (pressure/reference pressure)

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak (p-p), or the root mean square (rms). RMS, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square unless otherwise noted. SPL does not take the duration of a sound into account.

Marine Mammals in the Area of the Proposed Activity

Thirty-four marine mammal species may potentially occur in at least one of the nine provinces comprising the western North Pacific Ocean in which the ATE may occur. Eight of these species are listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 et seq.) and depleted under the MMPA: blue whale (*Balaenoptera musculus*), fin whale (*Balaenoptera physalus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaeangliae*), North Pacific right whale (*Eubalaena japonica*), sei whale (*Balaenoptera borealis*), sperm whale (*Physeter macrocephalus*), and Hawaiian monk seal (*Monachus schauinslandi*). Although 34 species of marine mammals may potentially occur in the waters of the nine western North Pacific provinces, the two species of *Kogia* are often considered together due to the difficulty in identifying these animals to the species level at sea and the sparse information that is known about the individual species. The 34 species considered include eight mysticetes, 25 odontocetes, and one pinniped (Table 3)

TABLE 3—MARINE MAMMALS POTENTIALLY OCCURRING IN THE NINE PROVINCES OF THE WESTERN NORTH PACIFIC WHERE THE ATE MAY BE CONDUCTED AND THEIR STATUS

Common name	Scientific name	ESA and MMPA status
Mysticetes		
Blue Whale	*Balaenoptera musculus*	Endangered/Depleted.
Bryde's Whale	*Balaenoptera edeni*	
Common Minke Whale	*Balaenoptera acutorostrata*	
Fin Whale	*Balaenoptera physalus*	Endangered/Depleted.
Gray Whale	*Eschrichtius robustus*	Endangered/Depleted.[1]
Humpback Whale	*Megaptera novaeangliae*	Endangered/Depleted.
North Pacific Right Whale	*Eubalaena japonica*	Endangered/Depleted.
Sei Whale	*Balaenoptera borealis*	Endangered/Depleted.
Odontocetes		
Baird's Beaked Whale	*Berardius bairdii*	
Blainville's Beaked Whale	*Mesoplodon densirostris*	
Common Bottlenose Dolphin	*Tursiops truncatus*	
Cuvier's Beaked Whale	*Ziphius cavirostris*	
Dall's Porpoise	*Phocoenoides dalli*	
False killer whale	*Pseudorca crassidens.*[2]	
Fraser's Dolphin	*Lagenodelphis hosei*	
Ginkgo-toothed Beaked Whale	*Mesoplodon ginkgodens*	
Hubbs' Beaked Whale	*Mesoplodon carhubbsi*	
Killer Whale	*Orca orcinus*	
Kogia spp.		
Longman's Beaked Whale	*Indopacetus pacificus*	
Melon-headed Whale	*Peponocephala electra*	
Pacific White-sided Dolphin	*Lagenorhynchus obliquidens.*	
Pantropical Spotted Dolphin	*Stenella attenuata*	
Pygmy Killer Whale	*Feresa attenuata*	
Risso's Dolphin	*Grampus griseus*	
Rough-toothed Dolphin	*Steno bredanensis*	
Short-beaked Common Dolphin	*Delphinus delphis*	
Short-finned Pilot Whale	*Globicephala macrorhynchus.*	
Sperm Whale	*Physeter macrocephalus*	Endangered/Depleted.
Spinner Dolphin	*Stenella longirostris*	
Stejneger's Beaked Whale	*Mesoplodon stejnegeri*	
Striped Dolphin	*Stenella coeruleoalba*	
Pinnipeds		
Hawaiian Monk Seal	*Monachus schauinslandi*	Endangered/Depleted.

[1] Only the western Pacific population is listed as endangered under the ESA.
[2] As a species, the false killer whale is not listed under the ESA; however, the insular Main Hawaiian Islands distinct population segment (DPS) of false killer whales is listed as endangered under the ESA.

The distribution and densities of cetaceans and pinnipeds are highly ''patchy.'' Patchy distributions are characterized by irregular clusters (patches) of occurrence that can frequently be correlated with that of their prey, which often are associated with productive continental shelves, ocean fronts, upwelling areas,

bathymetric relief, or water mass convergence areas (Katona and Whitehead, 1998). Movements of marine mammals are often related to feeding or breeding activity. Some baleen whale species, such as humpback whales, make extensive annual migrations to low-latitude mating and calving grounds in the coldest months and high-latitude feeding grounds in the warmest season (Corkeron and Connor, 1999). Several cetacean species undergo seasonal north-south migrations that track peaks in prey availability while others reside year-round in specific areas. Some of the cetacean species potentially occurring in one of the nine provinces of the western North Pacific, such as the North Pacific right whale, only occur seasonally while most others occur year-round.

Density estimates were derived for each marine mammal species potentially occurring in the nine provinces of the western North Pacific in which the ONR ATE may occur during the spring or summer (Tables 4–13). The process for developing density estimates was a multi-step procedure. Direct estimates from line-transect surveys that occurred in or near the experiment area were utilized first (e.g., Buckland *et al.,* 1992). However, density estimates from line-transect surveys in the western North Pacific were not always available for each species. When density estimates were not available from a survey in the western North Pacific, then density estimates from a region with similar oceanographic characteristics were extrapolated to those provinces. For example, the eastern tropical Pacific has been extensively surveyed and provides a comprehensive understanding of marine mammals in warm temperate oceanic waters, so density estimates from this well-studied ocean region were sometimes used to derive density estimates for the nine provinces (Ferguson and Barlow, 2001, 2003). Furthermore, density estimates are sometimes pooled for species of the same genus if sufficient data are not available to compute a density for individual species or the species are difficult to distinguish at sea. This is often the case for pygmy and dwarf sperm whales (*Kogia* spp.); density estimates are available for these species groups rather than individual species.

TABLE 4—MARINE MAMMAL DENSITY ESTIMATES FOR THE SEA OF JAPAN [1]

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Bryde's Whale	0.0004	0.0004	Ferguson and Barlow, 2001 and 2003.
Common Minke Whale	0.0002	0.0002	Ferguson and Barlow, 2001 and 2003.
Common Minke Whale—J Stock	0.0009	0.0009	Pastene *et al.,* 1998.
Fin Whale	0.0001	0.0001	Ferguson and Barlow, 2001 and 2003.
Gray Whale	<0.00001	<0.00001	
North Pacific Right Whale	<0.00001		
Odontocetes			
Baird's Beaked Whale	0.0003	0.0003	Ferguson and Barlow, 2001 and 2003.
Common Bottlenose Dolphin	0.0008	0.0008	LGL, 2011.
Cuvier's Beaked Whale	0.0031	0.0031	Ferguson and Barlow, 2001 and 2003.
Dall's Porpoise	0.0520	0.0520	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0027	0.0027	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0017	0.0017	Ferguson and Barlow, 2001 and 2003.
Pacific White-sided Dolphin	0.0030		Ferguson and Barlow, 2001 and 2003.
Risso's Dolphin	0.0073	0.0073	Miyashita, 1993.
Rough-toothed Dolphin	0.00355	0.00355	Barlow, 2006.
Short-beaked Common Dolphin	0.0860	0.0860	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0014	0.0014	Miyashita, 1993.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin		0.00083	Barlow, 2006.
Stejneger's Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Striped Dolphin	0.0058	0.0058	LGL, 2011.

[1] In Tables 4 through 13, a blank space during a season indicates that the species does not occur in those waters during that season. A density of <0.00001 in any of the tables indicates that there are no occurrence data for that species sufficient to quantify or from which to extrapolate a density; in these instances, a ''default'' density of <0.00001 was used so that harassment estimates could be quantified.

TABLE 5—MARINE MAMMAL DENSITY ESTIMATES FOR THE EAST CHINA SEA

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Bryde's Whale	0.0006	0.0006	Ohsumi, 1977.
Common Minke Whale	0.0044	0.0044	Buckland *et al.,* 1992.
Common Minke Whale—J Stock	0.0018	0.0018	Pastene *et al.,* 1998.
Fin Whale	0.0002	0.0002	Tillman, 1977.
Gray Whale	<0.00001		
North Pacific Right Whale	<0.00001		

TABLE 5—MARINE MAMMAL DENSITY ESTIMATES FOR THE EAST CHINA SEA—Continued

Species	Spring density estimate (animals/km²)	Summer density estimate (animals/km²)	References for density estimates
Odontocetes			
Blainville's Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Common Bottlenose Dolphin	0.0008	0.0008	LGL, 2011.
Cuvier's Beaked Whale	0.0003	0.0003	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0011	0.0011	Fulling *et al.,* 2011.
Fraser's Dolphin	0.00417	0.00417	Barlow, 2006.
Ginkgo-toothed Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0017	0.0017	Ferguson and Barlow, 2001 and 2003.
Longman's Beaked Whale	0.00025	0.00025	LGL, 2011.
Melon-headed Whale	0.0043	0.0043	Fulling *et al.,* 2011.
Pacific White-sided Dolphin	0.0028	.....	Ferguson and Barlow, 2001 and 2003.
Pantropical Spotted Dolphin	0.0137	0.0137	Miyashita, 1993.
Pygmy Killer Whale	0.0001	0.0001	Fulling *et al.,* 2011.
Risso's Dolphin	0.0106	0.0106	Miyashita, 1993.
Rough-toothed Dolphin	0.00355	0.00355	Barlow, 2006.
Short-beaked Common Dolphin	0.0461	0.0461	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0016	0.0016	Fulling *et al.,* 2011.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin	0.00083	0.00083	Barlow, 2006.
Striped Dolphin	0.0058	0.0058	LGL, 2011.

TABLE 6—MARINE MAMMAL DENSITY ESTIMATES FOR THE SOUTH CHINA SEA

Species	Spring density estimate (animals/km²)	Summer density estimate (animals/km²)	References for density estimates
Mysticetes			
Bryde's Whale	0.0006	0.0006	Ohsumi, 1977.
Common Minke Whale	0.0033	0.0033	Buckland *et al.,* 1992.
Fin Whale	0.0002	0.0002	Tillman, 1977.
Gray Whale	<0.00001	.....	
North Pacific Right Whale	<0.00001	.....	
Odontocetes			
Blainville's Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Common Bottlenose Dolphin	0.0008	0.0008	LGL, 2011.
Cuvier's Beaked Whale	0.0003	0.0003	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0011	0.0011	Fulling *et al.,* 2011.
Fraser's Dolphin	0.00417	0.00417	Barlow, 2006.
Ginkgo-toothed Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0017	0.0017	Ferguson and Barlow, 2001 and 2003.
Longman's Beaked Whale	0.00025	0.00025	LGL, 2011
Melon-headed Whale	0.0043	0.0043	Fulling *et al.,* 2011.
Pantropical Spotted Dolphin	0.0137	0.0137	Miyashita, 1993.
Pygmy Killer Whale	0.0001	0.0001	Fulling *et al.,* 2011.
Risso's Dolphin	0.0106	0.0106	Miyashita, 1993.
Rough-toothed Dolphin	0.00355	0.00355	Barlow, 2006.
Short-finned Pilot Whale	0.0016	0.0016	Fulling *et al.,* 2011.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin	0.00083	0.00083	Barlow, 2006.
Striped Dolphin	0.0058	0.0058	LGL, 2011.

TABLE 7—MARINE MAMMAL DENSITY ESTIMATES FOR THE NORTH PHILIPPINE SEA

Species	Spring density estimate (animals/km²)	Summer density estimate (animals/km²)	References for density estimates
Mysticetes			
Blue Whale	0.00001	.....	Ferguson and Barlow, 2001 and 2003.
Bryde's Whale	0.0006	0.0006	Ohsumi, 1977.
Common Minke Whale	0.0044	0.0044	Buckland *et al.,* 1992.

TABLE 7—MARINE MAMMAL DENSITY ESTIMATES FOR THE NORTH PHILIPPINE SEA—Continued

Species	Spring density estimate (animals/km²)	Summer density estimate (animals/km²)	References for density estimates
Fin Whale	0.0002		Tillman, 1977.
Humpback Whale	0.00089		LGL, 2008.
North Pacific Right Whale	<0.00001		
Odontocetes			
Blainville's Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Common Bottlenose Dolphin	0.0146	0.0146	Miyashita, 1993.
Cuvier's Beaked Whale	0.0054	0.0054	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0029	0.0029	Miyashita, 1993.
Fraser's Dolphin	0.00417	0.00417	Barlow, 2006.
Ginkgo-toothed Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0031	0.0031	Ferguson and Barlow, 2001 and 2003.
Longman's Beaked Whale	0.00025	0.00025	LGL, 2011.
Melon-headed Whale	0.00428	0.00428	Fulling *et al.,* 2011.
Pacific White-sided Dolphin	0.0119		Ferguson and Barlow, 2001 and 2003.
Pantropical Spotted Dolphin	0.0137	0.0137	Miyashita, 1993.
Pygmy Killer Whale	0.0021	0.0021	Ferguson and Barlow, 2001 and 2003.
Risso's Dolphin	0.0106	0.0106	Miyashita, 1993.
Rough-toothed Dolphin	0.0059	0.0059	Ferguson and Barlow, 2001 and 2003.
Short-beaked Common Dolphin	0.0562	0.0562	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0153	0.0153	Miyashita, 1993.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin	0.00083	0.00083	Barlow, 2006.
Striped Dolphin	0.0329	0.0329	Miyashita, 1993.

TABLE 8—MARINE MAMMAL DENSITY ESTIMATES FOR THE WEST PHILIPPINE SEA

Species	Spring density estimate (animals/km²)	Summer density estimate (animals/km²)	References for density estimates
Mysticetes			
Blue Whale	0.00001		Ferguson and Barlow, 2001 and 2003.
Bryde's Whale	0.0006	0.0006	Ohsumi, 1977.
Common Minke Whale	0.0033	0.0033	Buckland *et al.,* 1992.
Fin Whale	0.0002		Tillman, 1977.
Humpback Whale	0.00089		LGL, 2008.
Odontocetes			
Blainville's Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Common Bottlenose Dolphin	0.0146	0.0146	Miyashita, 1993.
Cuvier's Beaked Whale	0.0003	0.0003	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0029	0.0029	Miyashita, 1993.
Fraser's Dolphin	0.00417	0.00417	Barlow, 2006.
Ginkgo-toothed Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0017	0.0017	Ferguson and Barlow, 2001 and 2003.
Longman's Beaked Whale	0.00025	0.00025	LGL, 2011.
Melon-headed Whale	0.00428	0.00428	Fulling *et al.,* 2011.
Pantropical Spotted Dolphin	0.0137	0.0137	Miyashita, 1993.
Pygmy Killer Whale	0.0021	0.0021	Ferguson and Barlow, 2001 and 2003.
Risso's Dolphin	0.0106	0.0106	Miyashita, 1993.
Rough-toothed Dolphin	0.0059	0.0059	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0076	0.0076	Miyashita, 1993.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin	0.00083	0.00083	Barlow, 2006.
Striped Dolphin	0.0164	0.0164	Miyashita, 1993.

TABLE 9—MARINE MAMMAL DENSITY ESTIMATES FOR THE EAST OF JAPAN

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Bryde's Whale	0.0006	0.0006	Ohsumi, 1977.
Common Minke Whale	0.0022	0.0022	Buckland *et al.,* 1992.
Fin Whale		0.0002	Tillman, 1977.
North Pacific Right Whale	<0.00001		
Sei Whale	0.0006	0.0006	Tillman, 1977.
Odontocetes			
Baird's Beaked Whale	0.0029	0.0029	Kasuya, 1986.
Common Bottlenose Dolphin	0.0171	0.0171	Miyashita, 1993.
Cuvier's Beaked Whale	0.0031	0.0031	Ferguson and Barlow, 2001 and 2003.
False Killer Whale	0.0036	0.0036	Miyashita, 1993.
Ginkgo-toothed Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Hubbs' Beaked Whale	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0001	0.0001	LGL, 2011.
Kogia spp.	0.0031	0.0031	Ferguson and Barlow, 2001 and 2003.
Pacific White-sided Dolphin	0.0082	0.0082	Ferguson and Barlow, 2001 and 2003.
Pantropical Spotted Dolphin		0.0259	Miyashita, 1993.
Pygmy Killer Whale	0.0021	0.0021	Ferguson and Barlow, 2001 and 2003.
Risso's Dolphin	0.0097	0.0097	Miyashita, 1993.
Rough-toothed Dolphin	0.0059	0.0059	Ferguson and Barlow, 2001 and 2003.
Short-beaked Common Dolphin	0.0761	0.0761	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0128	0.0128	Miyashita, 1993.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin		0.00083	Barlow, 2006.
Striped Dolphin	0.0111	0.0111	Miyashita, 1993.

TABLE 10—MARINE MAMMAL DENSITY ESTIMATES FOR OFFSHORE GUAM

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Blue Whale	0.00001		Ferguson and Barlow, 2001 and 2003.
Bryde's Whale	0.00041	0.00041	Fulling *et al.,* 2011.
Common Minke Whale	0.0003		Ferguson and Barlow, 2001 and 2003.
Fin Whale	0.00001		Ferguson and Barlow, 2001 and 2003.
Humpback Whale	0.00089		LGL, 2008.
Sei Whale	0.00029		Fulling *et al.,* 2011.
Odontocetes			
Blainville's Beaked Whale	0.00117	0.00117	Barlow, 2006.
Common Bottlenose Dolphin	0.00131	0.00131	Barlow, 2006.
Cuvier's Beaked Whale	0.0062	0.0062	Barlow, 2006.
Dwarf Sperm Whale	0.0071	0.0071	Barlow, 2006.
False Killer Whale	0.00111	0.00111	Fulling *et al.,* 2011.
Fraser's Dolphin	0.00417	0.00417	Barlow, 2006.
Ginkgo-toothed Beaked Whale	0.00093	0.00093	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.00014	0.00014	Barlow, 2006.
Longman's Beaked Whale	0.00041	0.00041	Barlow, 2006.
Melon-headed Whale	0.00428	0.00428	Fulling *et al.,* 2011.
Pantropical Spotted Dolphin	0.0226	0.0226	Fulling *et al.,* 2011.
Pygmy Killer Whale	0.00014	0.00014	Fulling *et al.,* 2011.
Pygmy Sperm Whale	0.0029	0.0029	Barlow, 2006.
Risso's Dolphin	0.00097	0.00097	Barlow, 2006.
Rough-toothed Dolphin	0.00335	0.00335	Barlow, 2006.
Short-finned Pilot Whale	0.00362	0.00362	Barlow, 2006.
Sperm Whale	0.0012	0.0012	Fulling *et al.,* 2011.
Spinner Dolphin	0.0008	0.0008	Barlow, 2006.
Striped Dolphin	0.00616	0.00616	Fulling *et al.,* 2011.

TABLE 11—MARINE MAMMAL DENSITY ESTIMATES FOR THE NORTHWEST PACIFIC OCEAN (25° TO 40° N)

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Bryde's Whale	0.00041	0.00041	Fulling *et al.,* 2011.
Common Minke Whale	0.0003	0.0003	Buckland *et al.,* 1992.
Fin Whale		0.0001	Tillman, 1977.
Sei Whale	0.00029	0.00029	Fulling *et al.,* 2011.
Odontocetes			
Baird's Beaked Whale	0.0001	0.0001	Kasuya, 1986.
Blainville's Beaked Whale	0.0007	0.0007	LGL, 2011.
Common Bottlenose Dolphin	0.0008	0.0008	LGL, 2011.
Cuvier's Beaked Whale	0.0037	0.0037	LGL, 2011.
Dwarf Sperm Whale	0.0043	0.0043	LGL, 2011.
False Killer Whale	0.0001	0.0001	Miyashita, 1993.
Hubbs' Beaked Whale	0.0007	0.0007	Ferguson and Barlow, 2001 and 2003.
Killer Whale	0.0008	0.0008	LGL, 2011.
Longmans' Beaked Whale	0.0037	0.0037	LGL, 2011.
Melon-headed Whale	0.0043	0.0043	LGL, 2011.
Mesoplodon spp.	0.0005	0.0005	Ferguson and Barlow, 2001 and 2003.
Pacific White-sided Dolphin	0.0048	0.0048	Ferguson and Barlow, 2001 and 2003.
Pantropical Spotted Dolphin	0.0113	0.0113	LGL, 2011.
Pygmy Killer Whale	0.0001	0.0001	LGL, 2011.
Pygmy Sperm Whale	0.0018	0.0018	LGL, 2011.
Risso's Dolphin	0.0005	0.0005	LGL, 2011.
Rough-toothed Dolphin	0.0019	0.0019	LGL, 2011.
Short-beaked Common Dolphin	0.0863	0.0863	Ferguson and Barlow, 2001 and 2003.
Short-finned Pilot Whale	0.0021	0.0021	LGL, 2011.
Sperm Whale	0.0022	0.0022	LGL, 2011.
Spinner Dolphin	0.0019	0.0019	LGL, 2011.
Striped Dolphin	0.0058	0.0058	LGL, 2011.
Pinnipeds			
Hawaiian Monk Seal	<0.00001	<0.00001	

TABLE 12—MARINE MAMMAL DENSITY ESTIMATES FOR THE NORTHWEST PACIFIC OCEAN (10° TO 25° N)

Species	Spring density estimate (animals/km^2)	Summer density estimate (animals/km^2)	References for density estimates
Mysticetes			
Blue Whale	0.00001		Ferguson and Barlow, 2001 and 2003.
Bryde's Whale	0.0003	0.0003	LGL, 2011.
Fin Whale	0.00001		Ferguson and Barlow, 2001 and 2003.
Sei Whale	0.0001		LGL, 2011.
Odontocetes			
Blainville's Beaked Whale	0.0007	0.0007	LGL, 2011.
Common Bottlenose Dolphin	0.0008	0.0008	LGL, 2011.
Cuvier's Beaked Whale	0.0037	0.0037	LGL, 2011.
Dwarf Sperm Whale	0.0043	0.0043	LGL, 2011.
False Killer Whale	0.0006	0.0006	LGL, 2011.
Fraser's Dolphin	0.0025	0.0025	LGL, 2011.
Killer Whale	0.0001	0.0001	LGL, 2011.
Longman's Beaked Whale	0.00025	0.00025	LGL, 2011.
Melon-headed Whale	0.0027	0.0027	LGL, 2011.
Pantropical Spotted Dolphin	0.0113	0.0113	LGL, 2011.
Pygmy Killer Whale	0.0001	0.0001	LGL, 2011.
Pygmy Sperm Whale	0.0018	0.0018	LGL, 2011.
Risso's Dolphin	0.0005	0.0005	LGL, 2011.
Rough-toothed Dolphin	0.0019	0.0019	LGL, 2011.
Short-finned Pilot Whale	0.0021	0.0021	LGL, 2011.
Sperm Whale	0.0022	0.0022	LGL, 2011.
Spinner Dolphin	0.0019	0.0019	LGL, 2011.
Striped Dolphin	0.0058	0.0058	LGL, 2011.

Species-specific information on marine mammals potentially occurring in at least one of the nine provinces of the western North Pacific Ocean is provided in ONR's application (*http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*). Refer to section 4.0 of their application for detailed information regarding biological characteristics, natural phenomenon, and interaction with anthropogenic activity.

Potential Effects of the Specified Activity on Marine Mammals

Acoustic stimuli generated by underwater signals from no more than four acoustic sources have the potential to cause Level B harassment of marine mammals in the proposed action area. The impacts to marine mammals from these sources are expected to be limited to some masking effects and behavioral responses in the areas ensonified by the acoustic sources.

Permanent hearing impairment, in the unlikely event that it occurrs, would constitute injury, but temporary threshold shift (TTS) is considered a type of Level B harassment (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the proposed demonstration would result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is possible, but NMFS expects the disturbance to be localized and short-term.

Tolerance to Sound

Studies on marine mammal tolerance to sound in the natural environment are relatively rare. Richardson *et al.* (1995) defines tolerance as the occurrence of marine mammals in areas where they are exposed to human activities or man-made noise. In many cases, tolerance develops by the animal habituating to the stimulus (i.e., the gradual waning of responses to a repeated or ongoing stimulus) (Richardson *et al.,* 1995; Thorpe, 1963), but because of ecological or physiological requirements, many marine animals may need to remain in areas where they are exposed to chronic stimuli (Richardson *et al.,* 1995).

Masking of Natural Sounds

The term masking refers to the inability of a subject to recognize the occurrence of an acoustic stimulus as a result of the interference of another acoustic stimulus (Clark *et al.,* 2009). Marine mammals are highly dependent on sound, and their ability to recognize sound signals amid other noise is important in communication, predator and prey detection, and, in the case of toothed whales, echolocation. Introduced underwater sound may, through masking, reduce the effective communication distance of a marine mammal species if the frequency of the source is close to that used as a signal by the marine mammal, and if the anthropogenic sound is present for a significant fraction of the time (Richardson *et al.,* 1995). Even in the absence of manmade sounds, the sea is usually noisy. Background ambient noise often interferes with or masks the ability of an animal to detect a sound signal even when that signal is above its absolute hearing threshold. Natural ambient noise includes contributions from wind, waves, precipitation, other animals, and (at frequencies above 30 kHz) thermal noise resulting from molecular agitation (Richardson *et al.,* 1995). Background noise can also include sounds from human activities. Masking of natural sounds can result when human activities produce high levels of background noise. Conversely, if the background level of underwater noise is high, (e.g., on a day with strong wind and high waves), an anthropogenic noise source will not be detectable as far away as would be possible under quieter conditions and will itself be masked.

Acoustic masking from low-frequency ocean noise is increasingly being considered as a threat, especially to low-frequency hearing specialists such as baleen whales (Clark *et al.,* 2009). It is not currently possible to determine with precision the potential consequences of temporary or local background noise levels. However, Parks *et al.* (2007) found that right whales altered their vocalizations, possibly in response to background noise levels. For species that can hear over a relatively broad frequency range, as is presumed to be the case for mysticetes, a narrow band source may only cause partial masking. Richardson *et al.* (1995a) note that a bowhead whale 20 km from a human sound source might hear strong calls from other whales within approximately 20 km, and a whale 5 km from the source might hear strong calls from whales within approximately 5 km. Additionally, masking is more likely to occur closer to a sound source, and distant anthropogenic sound is less likely to mask short-distance acoustic communication (Richardson *et al.,* 1995a).

Redundancy and context can also facilitate detection of weak signals. These phenomena may help marine mammals detect weak sounds in the presence of natural or manmade noise. Most masking studies in marine mammals present the test signal and the masking noise from the same direction. The sound localization abilities of marine mammals suggest that, if signal and noise come from different directions, masking would not be as severe as the usual types of masking studies might suggest (Richardson *et al.,* 1995). The dominant background noise may be highly directional if it comes from a particular anthropogenic source such as a ship or industrial site. Directional hearing may significantly reduce the masking effects of these noises by improving the effective signal-to-noise ratio. In the cases of high-frequency hearing by the bottlenose dolphin, beluga whale, and killer whale, empirical evidence confirms that masking depends strongly on the relative directions of arrival of sound signals and the masking noise (Penner *et al.,* 1986; Dubrovskiy, 1990; Bain *et al.,* 1993; Bain and Dahlheim, 1994).

Toothed whales, and probably other marine mammals as well, have additional capabilities besides directional hearing that can facilitate detection of sounds in the presence of background noise. There is evidence that some toothed whales can shift the dominant frequencies of their echolocation signals from a frequency range with a lot of ambient noise toward frequencies with less noise (Au *et al.,* 1974, 1985; Moore and Pawloski, 1990; Thomas and Turl, 1990; Romanenko and Kitain, 1992; Lesage *et al.,* 1999). A few marine mammal species are known to increase the source levels or alter the frequency of their calls in the presence of elevated sound levels (Dahlheim, 1987; Au, 1993; Lesage *et al.,* 1993, 1999; Terhune, 1999; Foote *et al.,* 2004; Parks *et al.,* 2007, 2009; Di Iorio and Clark, 2009; Holt *et al.,* 2009).

These adaptations for reduced masking pertain mainly to the very high-frequency echolocation signals of toothed whales. There is less information about the existence of corresponding mechanisms at moderate or low frequencies or in other types of marine mammals. For example, Zaitseva *et al.* (1980) found that, for the bottlenose dolphin, the angular separation between a sound source and a masking noise source had little effect on the degree of masking when the sound frequency was 18 kHz, in contrast to the pronounced effect at higher frequencies. Directional hearing has been demonstrated at frequencies as low as 0.5–2 kHz in several marine mammals, including killer whales (Richardson *et al.,* 1995). This ability may be useful in reducing masking at

these frequencies. In summary, high levels of noise generated by anthropogenic activities may act to mask the detection of weaker biologically important sounds by some marine mammals. This masking may be more prominent for lower frequencies.

Behavioral Disturbance

Behavioral disturbance includes a variety of effects, including subtle to conspicuous changes in behavior, movement, and displacement. Marine mammal reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors (Richardson *et al.,* 1995; Wartzok *et al.,* 2004; Southall *et al.,* 2007; Weilgart, 2007). If a marine mammal does react briefly to an underwater sound by changing its behavior or moving a small distance, the impacts of the change are unlikely to be significant to the individual, let alone the stock or population. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on individuals and populations could be significant (e.g., Lusseau and Bejder, 2007; Weilgart, 2007). Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many marine mammals would be present within a particular proximity to activities and/or exposed to a particular level of sound. In most cases, this approach likely overestimates the numbers of marine mammals that would be affected in some biologically-important manner. A summary of observed marine mammal behavioral changes to sonar and low-frequency sound sources are provided below. They potential effects to marine mammals described in this section of the document do not take into consideration the proposed monitoring and mitigation measures described later in this document (see the ''Proposed Mitigation'' and ''Proposed Monitoring and Reporting'' sections).

Low-frequency signals of the Acoustic Thermometry of Ocean Climate sound source were not found to affect dive times of humpback whales in Hawaiian waters (Frankel and Clark, 2000). Balaenopterid whales exposed to moderate SURTASS LFA sonar demonstrated no responses or change in foraging behavior that could be attributed to the low-frequency sounds (Croll *et al.,* 2001), whereas five out of six North Atlantic right whales exposed to an acoustic alarm interrupted their foraging dives (Nowacek *et al.,* 2004). Although the received sound pressure level was similar in the latter two studies, the frequency, duration, and temporal pattern of signal presentation were different. These factors, as well as differences in species sensitivity, are likely contributing factors to the differential response. A determination of whether foraging disruptions incur fitness consequences will require information on or estimates of the energetic requirements of the individuals and the relationship between prey availability, foraging effort and success, and the life history of the animal.

Social interactions between mammals can be affected by noise via the disruption of communication signals or by the displacement of individuals. In one study, sperm whales responded to military sonar, apparently from a submarine, by dispersing from social aggregations, moving away from the sound source, remaining relatively silent, and becoming difficult to approach (Watkins *et al.,* 1985). In contrast, sperm whales in the Mediterranean that were exposed to submarine sonar continued calling (J. Gordon pers. comm. cited in Richardson *et al.,* 1995). Social disruptions must be considered, however, in context of the relationships that are affected. While some disruptions may not have deleterious effects, long-term or repeated disruptions of mother/calf pairs or interruption of mating behaviors have the potential to affect the growth and survival or reproductive effort/success of individuals.

Vocal changes in response to anthropogenic noise can occur across the repertoire of sound production modes used by marine mammals, such as whistling, echolocation click production, calling, and singing. Changes may result in response to a need to compete with an increase in background noise or may reflect an increased vigilance or startle response. For example, in the presence of low-frequency active sonar, humpback whales have been observed to increase the length of their ''songs'' (Miller *et al.,* 2000; Fristrup *et al.,* 2003), possibly due to the overlap in frequencies between the whale song and the low-frequency active sonar. A similar compensatory effect for the presence of low-frequency vessel noise has been suggested for right whales; right whales have been observed to shift the frequency content of their calls upward while reducing the rate of calling in areas of increased anthropogenic noise (Parks *et al.,* 2007). Killer whales off the northwestern coast of the United States have been observed to increase the duration of primary calls once a threshold in observing vessel density (e.g., whale watching) was reached, which has been suggested as a response to increased masking noise produced by the vessels (Foote *et al.,* 2004). In contrast, both sperm and pilot whales potentially ceased sound production during the Heard Island feasibility test (Bowles *et al.,* 1994), although it cannot be absolutely determined whether the inability to acoustically detect the animals was due to the cessation of sound production or the displacement of animals from the area.

Avoidance is the displacement of an individual from an area as a result of the presence of a sound. Richardson *et al.* (1995) noted that avoidance reactions are the most obvious manifestations of disturbance in marine mammals. Oftentimes, avoidance is temporary and animals return to the area once the noise has ceased. However, longer term displacement is possible and can lead to changes in abundance or distribution patterns of the species in the affected region if animals do not become acclimated to the presence of the chronic sound (Blackwell *et al.,* 2004; Bejder *et al.,* 2006; Teilmann *et al.,* 2006). Acute avoidance responses have been observed in captive porpoises and pinnipeds exposed to a number of different sound sources (Kastelein *et al.,* 2001; Finneran *et al.,* 2003; Kastelein *et al.,* 2006a; Kastelein *et al.,* 2006b). Short-term avoidance of seismic surveys, low-frequency emissions, and acoustic deterrents have also been noted in wild populations of odontocetes (Bowles *et al.,* 1994; Goold, 1996; 1998; Stone *et al.,* 2000; Morton and Symonds, 2002) and to some extent in mysticetes (Gailey *et al.,* 2007), while long-term or repetitive/chronic displacement for some dolphin groups and for manatees has been suggested to result from the presence of chronic vessel noise (Haviland-Howell *et al.,* 2007; Miksis-Olds *et al.,* 2007).

In 1998, the Navy conducted a Low Frequency Sonar Scientific Research Program (LFS SRP) to investigate avoidance behavior of gray whales to low-frequency sound signals. The objective was to determine whether whales respond more strongly to received levels, sound gradient, or distance from the source, and to compare whale avoidance responses to a low-frequency source in the center of the migration corridor versus in the offshore portion of the migration corridor. A single source was used to broadcast LFA sonar sounds up to 200 dB. The Navy reported that the whales showed some avoidance responses when the source was moored 1.8 km offshore, in the migration path, but

returned to their migration path when they were a few kilometers from the source. When the source was moored 3.7 km offshore, responses were much less, even when the source level was increased to 200, to achieve the same received level for most whales in the middle of the migration corridor. Also, the researchers noted that the offshore whales did not seem to avoid the louder offshore source.

Also during the LFS SRP, researchers sighted numerous odontocete and pinniped species in the vicinity of the sound exposure tests with LFA sonar. The mid-frequency and high-frequency hearing specialists present in the study area showed no immediately obvious responses or changes in sighting rates as a function of source conditions. Consequently, the researchers concluded that none of these species had any obvious behavioral reaction to LFA signals at received levels similar to those that produced only minor but short-term behavioral responses in the baleen whales (Clark and Southall, 2009).

Under some circumstances, marine mammals that are exposed to active sonar transmissions will continue their normal behavioral activities; in other circumstances, individual animals will respond to sonar transmissions at lower received levels and move to avoid additional exposure or exposures at higher received levels (Richardson *et al.,* 1995). It is difficult to distinguish between animals that continue their pre-disturbance behavior without stress responses, animals that continue their behavior but experience stress responses (that is, animals that cope with disturbance), and animals that habituate to disturbance (that is, they may have experienced low-level stress responses initially, but those responses abated over time).

Aicken *et al.* (2005) monitored the behavioral responses of marine mammals to a new low-frequency active sonar system that was being developed for use by the British Navy. During those trials, fin whales, sperm whales, Sowerby's beaked whales, long-finned pilot whales, Atlantic white-sided dolphins, and common bottlenose dolphins were observed and their vocalizations were recorded. These monitoring studies detected no evidence of behavioral responses that the investigators could attribute to exposure to the low-frequency active sonar during these trials.

Hearing Impairment and Other Physical Effects

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (TTS) (Southall *et al.,* 2007).

Temporary Threshold Shift—TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. At least in terrestrial mammals, TTS can last from minutes or hours to (in cases of strong TTS) days, can be limited to a particular frequency range, and can be in varying degrees (i.e., a loss of a certain number of dBs of sensitivity). For sound exposures at or somewhat above the TTS threshold, hearing sensitivity in both terrestrial and marine mammals recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound. Available data on TTS in marine mammals are summarized in Southall *et al.* (2007). For the ONR ATE, all cetaceans exposed to underwater sound greater than or equal to 195 dB re 1 μPa^2-second sound exposure level (SEL) are considered to experience TTS (Level B harassment). All pinnipeds exposed to underwater sound greater than or equal to 204 dB re 1 μPa^2-second SEL are considered to experience TTS (Level B harassment). This is consistent with how previous Navy military readiness activities have been analyzed, with the exception of SURTASS LFA/CLFA.

Researchers have derived TTS information for odontocetes from studies on the bottlenose dolphin and beluga. For baleen whales, there are no data, direct or indirect, on levels or properties of sound that are required to induce TTS. The frequencies to which baleen whales are most sensitive are assumed to be lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales (Southall *et al.,* 2007).

Marine mammal hearing plays a critical role in communication with conspecifics and in interpretation of environmental cues for purposes such as predator avoidance and prey capture. Depending on the degree (elevation of threshold in dB), duration (i.e., recovery time), and frequency range of TTS and the context in which it is experienced, TTS can have effects on marine mammals ranging from discountable to serious. For example, a marine mammal may be able to readily compensate for a brief, relatively small amount of TTS in a non-critical frequency range that takes place during a time when the animal is traveling through the open ocean, where ambient noise is lower and there are not as many competing sounds present. Alternatively, a larger amount and longer duration of TTS sustained during a time when communication is critical for successful mother/calf interactions could have more serious impacts if it were in the same frequency band as the necessary vocalizations and of a severity that it impeded communication. The fact that animals exposed to levels and durations of sound that would be expected to result in this physiological response would also be expected to have behavioral responses of a comparatively more severe or sustained nature is also notable and potentially of more importance than the simple existence of a TTS. For this proposed study, TTS is considered unlikely given: (1) The slow speed of the vessel during activities (less than 5 knots); (2) the motility of free-ranging marine mammals in the water column; (3) the propensity for marine mammals to avoid obtrusive sounds; and (4) the relatively low densities of marine mammals in the proposed nine provinces of the western North Pacific Ocean.

Permanent Threshold Shift—When PTS occurs, there is physical damage to the sound receptors in the ear. In severe cases, there can be total or partial deafness, whereas in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges (Kryter, 1985). There is no specific evidence that exposure to low-frequency active sonar can cause PTS in marine mammals; instead the possibility of PTS has been inferred from studies of TTS on captive marine mammals

(Richardson *et al.,* 1995). Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage, but repeated or (in some cases) single exposures to a level well above that causing TTS onset might elicit PTS.

Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise times. Based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds is at least 6 dB higher than the TTS threshold on a peak-pressure basis, and probably greater than six dB (Southall *et al.,* 2007).

Given the higher level of sound necessary to cause PTS as compared with TTS, it is considerably less likely that PTS would occur during the demonstration. ONR's underwater acoustical modeling showed that none of the cumulative energy values exceeded the 215 dB threshold. Therefore, Level A takes of marine mammals are not expected during the ONR ATE.

Non-auditory Physiological Effects—Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance, and other types of organ or tissue damage (Cox *et al.,* 2006; Southall *et al.,* 2007). Studies examining such effects are limited. However, because ONR's modeling shows no exposure to sound levels at or above 215 dB, non-auditory injuries are considered highly unlikely and not discussed further.

Stranding and Mortality

Specific sound-related processes that lead to strandings and mortality are not well documented, but may include:

- Swimming in avoidance of a sound into shallow water;
- A change in behavior (such as a change in diving behavior) that might contribute to tissue damage, gas bubble formation, hypoxia, cardiac arrhythmia, hypertensive hemorrhage or other forms of trauma;
- A physiological change such as a vestibular response leading to a behavioral change or stress-induced hemorrhagic diathesis; leading in turn to tissue damage; and
- Tissue damage directly from sound exposure, such as through acoustically-mediated bubble formation and growth or acoustic resonance of tissues.

Some of these mechanisms are unlikely to apply in the case of impulse sounds. However, there are increasing indications that gas-bubble disease (analogous to the bends), induced in supersaturated tissue by a behavioral response to acoustic exposure, could be a pathologic mechanism for the strandings and mortality of some deep-diving cetaceans exposed to sonar. The cause or causes of most strandings are unknown (Geraci *et al.,* 1976; Eaton, 1979; Odell *et al.,* 1980; Best, 1982). Numerous studies suggest that the physiology, behavior, habitat relationships, age, or condition of cetaceans may cause them to strand or might pre-dispose them to strand when exposed to another phenomenon. These suggestions are consistent with the conclusions of numerous other studies that have demonstrated that combinations of dissimilar stressors commonly combine to kill an animal or dramatically reduce its fitness, even though one exposure without the other does not produce the same result (Chroussos, 2000; Creel, 2005; DeVries *et al.,* 2003; Fair and Becker, 2000; Foley *et al.,* 2001; Moberg, 2000; Relyea, 2005a; 2005b, Romero, 2004; Sih *et al.,* 2004).

Several sources have published lists of mass stranding events of cetaceans in an attempt to identify relationships between those stranding events and military active sonar (Hildebrand, 2004; IWC, 2005; Taylor *et al.,* 2004). For example, based on a review of stranding records between 1960 and 1995, the International Whaling Commission (2005) identified ten mass stranding events and concluded that, out of eight stranding events reported from the mid-1980s to the summer of 2003, seven had been coincident with the use of mid-frequency active sonar and most involved beaked whales. However, there is no empirical evidence of strandings of marine mammals associated with low-frequency active sonar.

Cox *et al.* (2006) provided a summary of common features shared by the strandings events in Greece (1996), Bahamas (2000), and Canary Islands (2002). These included deep water close to land (such as offshore canyons), presence of an acoustic waveguide (surface duct conditions), and periodic sequences of transient pulses (i.e., rapid onset and decay times) generated at depths less than 10 m by sound sources moving at speeds of 5.1 knots or more during sonar operations (D'Spain *et al.,* 2006). These features do not relate to the proposed activities.

Anticipated Effects on Marine Mammal Habitat

No ESA-designated critical habitats of any marine mammal species are located in or near the waters of the nine western North Pacific Ocean provinces in which the proposed ONR ATE may be conducted. There are also no international marine mammal protected areas located within the vicinity of the experiment area. During the ONR ATE, only acoustic transducers and receivers as well as standard oceanographic equipment would be deployed. Experimental systems are planned to be retrieved after data collection has been completed. The acoustic and oceanographic instrumentation that would be deployed operates in accordance with all applicable international rules and regulations related to environmental compliance, especially for discharge of potentially hazardous materials. Therefore, no discharges of pollutants would result from the deployment and operation of the acoustic and oceanographic instruments and systems.

During the ONR ATE, deployment and operation of the sound sources would result in no physical alterations to the marine environment other than addition of elevated underwater sound levels, which may have some effect on marine mammals. Any increase in underwater sound levels would be temporary (lasting no more than 2 weeks) and limited in geographic scope. A small number of marine mammals present near the proposed activity may be temporarily displaced due to sound source transmissions. However, concentrations of marine mammals and/or marine mammal prey species are not expected to be encountered in or near the vicinity of the waters in the western North Pacific provinces in which the ONR ATE may occur. There are no critical feeding, breeding, or migrating areas for any marine mammal species that may occur in the proposed action area. No long-term impacts associated with the increase in ambient noise levels are expected.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must prescribe, where applicable, the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such

species or stock for taking for certain subsistence uses (where relevant).

The NDAA of 2004 amended the MMPA as it relates to military-readiness activities and the ITA process such that ''least practicable adverse impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the ''military readiness activity.'' The training activities described in ONR's application are considered military readiness activities.

ONR has proposed the following mitigation measures to be implemented during the ONR ATE:

Vessel Movement

ONR would maneuver the research vessel, as feasible, to avoid closing within 457 m (1,499 ft) of a marine mammal. Standard operating procedures for the research vessel would be to avoid collision with marine mammals, including maintaining a minimum safe maneuvering distance from detected animals.

Mitigation Zone

ONR proposes to use a 1-km mitigation zone to avoid take by Level A harassment and reduce the potential impacts to marine mammals from ONR ATE. Mitigation zones are measured as the radius from a source and represent a distance that visual observers would monitor during daylight hours to ensure that no marine mammals enter the designated area. The mitigation zone would be monitored for 30 minutes before the active acoustic source transmissions begin and would continue until 30 minutes after the active acoustic source transmissions are terminated, or 30 minutes after sunset, whichever comes first. Visual detections of marine mammals would be communicated immediately for information dissemination and appropriate action, as described directly below.

Delay and Shut-down Procedures

During daytime transmissions, ONR proposes to immediately delay or shut down active acoustic source transmissions if a marine mammal is visually detected within the 1 km exclusion zone. NMFS further proposes that transmissions would not commence/resume for 15 minutes (for small odontocetes and pinnipeds) or 30 minutes (for mysticetes and large odontocetes) after the animal has moved out of the exclusion zone or there has been no further visual detection of the animal. During nighttime transmissions, ONR proposes to immediately delay or shut down active acoustic source transmissions if a marine mammal is detected using passive acoustic monitoring. NMFS further proposes that transmissions would commence/resume 15 minutes (for small odontocetes and pinnipeds) or 30 minutes (for mysticetes and large odontocetes) after there has been no further detection of the animal.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of assuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Based on our evaluation of the applicant's proposed measures and those proposed by NMFS, we have preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Proposed Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth, where applicable, ''requirements pertaining to the monitoring and reporting of such taking.'' The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring

ONR proposes to conduct marine mammal monitoring during the proposed activity for the purpose of implementing required mitigation and to provide information on species presence and abundance in the action area. ONR proposes that protected species observers (both visual and acoustic) would maintain a log that includes duration of time spent searching/listening for marine mammals; numbers and species of marine mammals detected; any unusual marine mammal behavior; and the date, time, and location of the animal and any sonobuoy deployments. ONR's proposed Monitoring Plan is described below this section.

Vessel-based Visual Monitoring—ONR proposes to continuously monitor for marine mammals when active acoustic sources are being used during daylight hours. Two visual observers would be on effort during active ATE source transmissions occurring during daylight hours. One observer would be positioned on the deck level above the bridge, about 12 m above the water line, while the second observer would be located on the bridge level, about 9.8 m above the water line. Protected species observers would be trained for visually detecting and identifying marine mammal species. Observers would begin monitoring 30 minutes before the active acoustic source transmissions are scheduled to begin and would continue until 30 minutes after the active acoustic source transmissions are terminated, or 30 minutes after sunset, whichever comes first.

Passive Acoustic Monitoring—ONR proposes to conduct passive acoustic monitoring from the vessel when active acoustic sources are deployed during nighttime (i.e., no more than 35 hours total) and other periods of decreased visual observation capabilities. Passive acoustic monitoring would include listening for vocalizations and visually inspecting spectrograms of radio frequency-transmitted signals from a deployed AN/SSQ–53 DIFAR sonobuoy by personnel trained in detecting and identifying marine mammal sounds. Passive acoustic monitoring would begin 30 minutes before transmissions are scheduled to begin and continue until 30 minutes after transmissions are terminated, or 30 minutes after sunrise, whichever occurs first.

If a passively detected sound is estimated to be from a marine mammal, the acoustic observer would notify the appropriate personnel and shutdown procedures would be implemented. For any marine mammal detection, the Test

Director would order the immediate delay/suspension of the active acoustic source transmissions and/or deployment. NMFS further proposes that transmissions may commence/resume 15 minutes (for small odontocetes) or 30 minutes (for mysticetes and large odontocetes) after there has been no further detection of the animal.

Reporting

ONR proposes that protected species observers (both visual and acoustic) would maintain a log that includes duration of time spent searching/listening for marine mammals; numbers and species of marine mammals detected; any unusual marine mammal behavior; and the date, time, and location of the animal and any sonobuoy deployments. Data would be used to estimate numbers of animals potentially 'taken' by harassment (as defined in the MMPA). NMFS further proposes that protected species observers record the behavioral state of all marine mammals observed and the status of the active acoustic source when observers see an animal.

ONR would submit two reports to NMFS within 90 days after the end of the proposed activity: one unclassified report and one classified report. The reports would describe the operations that were conducted and sightings of marine mammals near the operations. The reports would provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day reports would summarize the dates and locations of active acoustic source transmissions, and all marine mammal sightings (dates, times, locations, activities, associated active acoustic transmissions). The reports would also include estimates of the number and nature of exposures that could result in 'takes' of marine mammals.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury (Level A harassment), serious injury, or mortality (e.g., ship-strike, gear interaction, and/or entanglement), ONR would immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source use in the 24 hours preceding the incident;
- Water depth;
- Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- Description of all marine mammal observations in the 24 hrs preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with ONR to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ONR may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), ONR would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS. The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS would work with ONR to determine whether modifications in the activities are appropriate.

In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ONR would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS within 24 hours of the discovery. ONR would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS.

Estimated Take by Incidental Harassment

With respect to military readiness activities, section 3(18)(B) of the MMPA defines ''harassment'' as: any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B harassment].

Only take by Level B harassment is anticipated and proposed for authorization as a result of the proposed activity. Acoustic stimuli (i.e., increased underwater sound) generated during the transmission of active acoustic sources have the potential to cause temporary, short-term changes in marine mammal behavior. There is no evidence that the planned activities would result in injury, serious injury, or mortality within the specified geographic area for which ONR seeks the IHA. The mitigation and monitoring measures proposed for implementation are expected to minimize any potential risk for injury or mortality.

To estimate the potential risk of physical auditory or behavioral effects due to the transmissions from the no more than four acoustic sources deployed in one of the nine provinces of the western North Pacific Ocean during the ONR ATE, the Navy performed underwater acoustical modeling and associated analyses. Historically, acoustic exposure thresholds for marine mammal behavior have been just that, fixed thresholds or step functions. However, step functions do not accurately represent most animal behavior. Accurately representing animal behavior was one of the driving factors in the creation of the behavior risk function (BRF, also known as the risk continuum function), where the probability of significant behavioral response is considered a function of received sound pressure level. This is described in more detail and illustrated in section 6 of the Navy's application. While behavioral response is almost certainly determined by more factors than exposure level, it is also likely that in the limited situation of exposure to acoustic energy when all other contextual factors are known and held constant, received sound level can be used as a proxy for behavioral response.

To estimate the acoustic exposure an animal is likely to receive while the active sources employed in ONR ATE during spring or summer are transmitting, the movement of potentially occurring marine mammals and the acoustic field to which they may be exposed were modeled. The sound fields around the active acoustic

sources were estimated based on the details of the active source transmissions and the BELLHOP underwater acoustic propagation model. These data were convolved with simulated marine mammals (''animats'') in the Acoustic Integration Model©. Marine mammal species potentially occurring in the nine provinces of the western North Pacific Ocean in which ONR ATE may be conducted were assigned diving and movement behaviors, including dive depth, surfacing time, dive duration, swimming speed, and heading change. Once the animals' behavior was defined, animats were created and randomly distributed over the simulation area determined for each active source. The Acoustic Integration Model© was used to simulate the acoustic exposure for each marine mammal species over the proposed transmissions of each of the active acoustic sources.

To estimate the risk of harassment from each acoustic source, which includes behavior and TTS effects, potentially resulting from exposure to the active acoustic sources employed in ONR ATE, both the maximum received level and the cumulative energy level (sound exposure level) for each animat from each source were determined. The maximum received level for each animat was inputed into the risk continuum function to estimate Level B harassment. Note that there are two BRFs, one for mysticetes and one for odontocetes and pinnipeds. To determine the potential for TTS and PTS in the marine mammal species potentially occurring in the nine western North Pacific provinces, the modeled sound exposure level values were compared to the appropriate sound exposure level threshold (Table 13). Since TTS is recoverable and is considered to result from the temporary, non-injurious fatigue of hearing-related tissues, it represents the upper bound of the potential for Level B effects. PTS, however, is non-recoverable and, by definition, results from the irreversible impacts on auditory sensory cells, supporting tissues, or neural structures within the auditory system. PTS is thus considered within the potential for Level A effects.

TABLE 13—ACOUSTIC CRITERIA AND THRESHOLDS USED FOR PREDICTING PHYSIOLOGICAL EFFECTS ON MARINE MAMMALS FROM EXPOSURE TO ACTIVE ACOUSTIC SOURCES DURING THE ONR ATE

Marine mammal species	Physiological effects	
	Onset TTS (MMPA Level B)	Onset PTS (MMPA Level A)
Cetaceans	195 dB re 1 μPa^2-sec	215 dB re 1 μPa^2-sec
Pinnipeds	204 dB re 1 μPa^2-sec	224 dB re 1 μPa^2-sec

In determining the potential effects of the marine mammal species possibly occurring in the nine provinces during spring or summer in which ONR ATE may occur, the Navy made the following assumptions regarding modeling on the underwater acoustic sources:

- Each of the ONR ATE sources was modeled individually and its potential effects computed independent of other experiment activities;
- Acoustic propagation model BELLHOP was used to model the acoustic environment;
- Spring and summer sound velocity profiles from GDEM 2.5 database, the Navy standard database for sound velocity profiles, were used;
- Bathymetry was derived from the ETOP02 database;
- A surface wind speed of 7.7 m/sec (15 knots) was used in the Bechmann-Spezzichino model to estimate surface loss;
- Seafloor properties, including bottom loss, were derived from the Navy standard CBLUG and MGS databases;
- Animal movement parameters for the species occurring in the proposed test area were extracted from the database created by Marine Acoustics, Inc.;
- Densities for marine mammals in the nine provinces of the western North Pacific Ocean were derived using the best available data;
- Animats that encountered the geographic boundaries of the model area ''reflected'' back into the model area, maintaining a constant overall animat model density; and
- No mitigation was applied to the analysis results.

The precision with which environmental effects can be calculated is largely determined by the accuracy with which the marine mammal densities are estimated for the selected geographic area and season. While the marine mammal densities used in this analysis represent the best available data in spring and summer for the waters of the nine provinces in which the ONR ATE may be conducted, few dedicated marine mammal surveys for the purpose of deriving densities have been undertaken in these waters and only rarely are data available for estimating seasonal populations.

The Navy's analysis conducted on the ONR ATE activities to assess the potential for effects on marine mammals has shown that the possibility of marine mammals being exposed to Level A harassment is not likely. Any impacts to marine mammals are expected to be limited to some masking effects and behavioral responses (Level B harassment) in the areas temporarily ensonified by the active acoustic sources. For all ESA-listed species, the probability of Level B harassment occurring is low, with the highest potential for fin whales; with an estimated 1.7 fin whales potentially experiencing behavioral reactions or TTS from exposure to the active acoustic sources. For non ESA-listed species, the maximum amount of take by Level B harassment for a single species is estimated to be 87 short-beaked common dolphins. The modeled takes for each of the nine provinces are provided in section 6 of the Navy's LOA application. Below is the maximum amount of take expected for any of the nine provinces in the western North Pacific Ocean.

TABLE 14—MAXIMUM ESTIMATED TAKE FROM EXPOSURE TO ACOUSTIC SOURCES EMPLOYED DURING THE ONR ATE BY MARINE MAMMAL SPECIES POTENTIALLY OCCURRING IN THE NINE PROVINCES OF THE WESTERN NORTH PACIFIC OCEAN

Marine mammal species	Maximum MMPA Level A harassment	Maximum MMPA Level B harassment	Proposed take by Level B harassment
Mysticetes			
Blue Whale	0.0000	0.0156	1
Bryde's Whale	0.0000	1.9562	2
Common Minke Whale	0.0000	7.70636	8
Fin Whale	0.0000	1.70956	2
Gray Whale	0.0000	0.0038	1
Humpback Whale	0.0000	1.6395	2
North Pacific Right Whale	0.0000	0.0214	1
Sei Whale	0.0000	1.0446	2
Odontocetes			
Baird's Beaked Whale	0.0000	0.6882	1
Blainville's Beaked Whale	0.0000	0.5985	1
Common Bottlenose Dolphin	0.0000	23.7805	24
Cuvier's Beaked Whale	0.0000	2.2811	3
Dall's Porpoise	0.0000	53.0706	54
Dwarf Sperm Whale	0.0000	4.2209	5
False Killer Whale	0.0000	7.3891	8
Fraser's Dolphin	0.0000	5.7854	6
Ginkgo-toothed Beaked Whale	0.0000	0.5985	1
Hubbs' Beaked Whale	0.0000	0.1928	1
Killer Whale	0.0000	0.1600	1
Kogia spp.	0.0000	2.2840	3
Longman's Beaked Whale	0.0000	0.2993	1
Melon-headed Whale	0.0000	15.4891	16
Mesoplodon spp.	0.0000	0.1928	1
Pacific White-sided Dolphin	0.0000	7.5305	8
Pantropical Spotted Dolphin	0.0000	35.8584	36
Pygmy Killer Whale	0.0000	4.3103	5
Pygmy Sperm Whale	0.0000	1.7203	2
Risso's Dolphin	0.0000	11.3736	12
Rough-toothed Dolphin	0.0000	5.8877	6
Short-beaked Common Dolphin	0.0000	86.3962	87
Short-finned Pilot Whale	0.0000	18.7461	19
Sperm Whale	0.0000	1.6701	2
Spinner Dolphin	0.0000	2.1661	3
Stejneger's Beaked Whale	0.0000	0.2855	1
Striped Dolphin	0.0000	23.9042	24
Pinnipeds			
Hawaiian Monk Seal	0.0000	0.0067	1

ONR developed density estimates for every species possibly occurring in the demonstration area through a multi-step procedure. Direct density estimates from line-transect surveys in or near the demonstration area were used first. When survey-based density estimates were not available, then density estimates for individual species were extrapolated from a region with similar oceanographic characteristics to the demonstration area. For example, the eastern tropical Pacific has been extensively surveyed and provides a comprehensive understanding of the marine mammal populations in temperate oceanic waters (Ferguson and Barlow, 2001 and 2003). If sufficient data were not available, even by extrapolation, then density estimates were pooled for species of the same genus (i.e., *Kogia* spp.).

Negligible Impact Analysis and Preliminary Determination

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including, but not limited to:

- The number of anticipated mortalities;
- The number and nature of anticipated injuries;
- The number, nature, intensity, and duration of Level B harassment; and
- The context in which the takes occur.

As mentioned previously, NMFS estimates that 34 species of marine mammals could be affected by Level B harassment during the ONR ATE. No injuries, serious injuries, or mortalities are anticipated to occur as a result of the demonstration, and none are proposed to be authorized. Additionally, for reasons presented earlier in this document, temporary or permanent hearing impairment is not anticipated to occur during the proposed specified activity. Only short-term behavioral disturbance is anticipated to occur due to the limited duration of active acoustic sonar transmissions and the estimated

marine mammal densities in the area. ONR's proposed activity would occur for a maximum of 13 days and active acoustic sources would operate intermittently during this time. Due to the nature, degree, and context of behavioral harassment anticipated, the activity is not expected to impact rates of recruitment or survival.

NMFS has preliminarily determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting the ONR ATE, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of certain species of marine mammals.

Of the ESA-listed marine mammals that may potentially occur in the proposed survey area, North Pacific right whale populations lack sufficient data on trends in abundance and sperm whale populations are not well known in the southern hemisphere. There is no designated critical habitat for marine mammals in the proposed survey area. There are also no known important habitat areas (e.g., breeding, calving, feeding, etc.) for marine mammals known around the area that would overlap with the proposed demonstration. While behavioral modifications, including temporarily vacating the area during the transmission of active acoustic sonar, may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas and the short and sporadic duration of the demonstration, have led NMFS to preliminary determine that this action will have a negligible impact on the species in the specified geographic region.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that ONR's proposed demonstration would result in the incidental take of marine mammals, by Level B harassment only, and that the total taking from the demonstration would have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act

Of the species of marine mammals that may occur in the proposed demonstration area, eight are listed as endangered under the ESA: blue whale, fin whale, gray whale, humpback whale, North Pacific right whale, sei whale, sperm whale, and Hawaiian monk seal. Under section 7 of the ESA, ONR has initiated formal consultation with NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this proposed demonstration. NMFS' Office of Protected Resources, Permits and Conservation Division, has also initiated formal consultation under section 7 of the ESA with NMFS' Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, to obtain a Biological Opinion evaluating the effects of issuing the IHA on threatened and endangered marine mammals and, if appropriate, authorizing incidental take. NMFS will conclude formal section 7 consultation prior to making a determination on whether or not to issue the IHA. If the IHA is issued, ONR, in addition to the mitigation and monitoring requirements included in the IHA, would be required to comply with the Terms and Conditions of the Incidental Take Statement corresponding to NMFS' Biological Opinion issued to both ONR and NMFS' Office of Protected Resources, Permits and Conservation Division.

National Environmental Policy Act (NEPA)

ONR has prepared a draft Overseas Environmental Assessment (OEA) to address the potential environmental impacts that could occur as a result of the proposed activity. To meet NMFS' National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) requirements for the issuance of an IHA to ONR, NMFS will prepare an independent NEPA analysis. This analysis will be completed prior to issuance of a final IHA.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to ONR for conducting the ONR ATE in one of nine provinces in this western North Pacific Ocean, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The proposed IHA language is provided below:

The Office of Naval Research (2000 Navy Pentagon, Washington, DC 20350–2000), is hereby authorized under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1371(a)(5)(D)) to harass marine mammals incidental to the Office of Naval Research (ONR) Acoustic Technology Experiments (ATE) in the western North Pacific Ocean, contingent upon the following conditions:

1. This Authorization is valid from May XX, 2013, through May XX, 2014.

2. This Authorization is valid only for ONR's activities associated with the ATE occurring in the western North Pacific Ocean.

3. *Species Impacted and Level of Takes*

(a). The incidental taking of marine mammals, by Level B harassment only, is limited to the following species:

(i). Blue whale (*Balaenoptera musculus*)—1

(ii). Bryde's whale (*Balaenoptera edeni*)—2

(iii). Minke whale (*Balaenoptera acutorostrata*)—8

(iv). Fin whale (*Balaenoptera physalus*)—2

(v). Gray whale (*Eschrichtius robustus*)—1

(vi). Humpback whale (*Megaptera novaeangliae*)—2

(vii). North Pacific right whale (*Eubalaena japonica*)—1

(viii). Sei whale (*Balaenoptera borealis*)—2

(ix). Baird's beaked whale (*Berardius bairdii*)—1

(x). Blainville's beaked whale (*Mesoplodon densirostris*)—1

(xi). Bottlenose dolphin (*Tursiops truncatus*)—24

(xii). Cuvier's beaked whale (*Ziphius cavirostris*)—3

(xiii). Dall's porpoise (*Phocoenoides dalli*)—54

(xiv). Dwarf sperm whale (*Kogia sima*)—5

(xv). False killer whale (*Pseudorca crassidens*)—8

(xvi). Fraser's dolphin (*Lagenodelphis hosei*)—6

(xvii). Gingko-toothed beaked whale (*Mesoplodon ginkgodens*)—1

(xviii). Hubb's beaked whale (*Mesoplodon ginkgodens*)—1

(xix). Killer whale (*Orcinus orca*)—1

(xx). *Kogia* spp.—3

(xxi). Longman's beaked whale (*Indopacetus pacificus*)—1

(xxii). Melon-headed whale (*Peponocephala electra*)—16

(xxiii). *Mesoplodon* spp.—1

(xxiv). Pacific white-sided dolphin (*Lagenorhynchus obliquidens*)—8

(xxv). Pantropical spotted dolphin (*Stenella attenuata*)—36

(xxvi). Pygmy killer whale (*Feresa attenuata*)—5

(xxvii). Pygmy sperm whale (*Kogia breviceps*)—2

(xxviii). Risso's dolphin (*Grampus griseus*)—12

(xxix). Rough-toothed dolphin (*Steno bredanensis*)—6

(xxx). Short-beaked common dolphin (*Delphinus delphis*)—87

(xxxi). Short-finned pilot whale (*Globicephala macrorhynchus*)—19

(xxxii). Sperm whale (*Physeter macrocephalus*)—2

(xxxiii). Spinner dolphin (*Stenella longirostris*)—3

(xxxiv). Stejneger's beaked whale (*Mesoplodon stejnegeri*)—1

(xxxv). Striped dolphin (*Stenella coeruleoalba*)—24

(xxxvi). Hawaiian monk seal (*Monachus schauinslandi*)—1

(xxxvii). If any marine mammal species are encountered during ONR ATE activities that are not listed here for authorized taking and are likely to be exposed to sound pressure levels (SPLs) greater than or equal to 160 dB re 1 μPa (rms), then the Holder of this Authorization must alter speed or course, or shut-down equipment to avoid take.

(b). The taking by injury (Level A harassment), serious injury, or mortality of any of the species listed in Condition 3(a) above or the taking of any other species of marine mammal is prohibited and may result in the modification, suspension, or revocation of this Authorization.

4. The methods authorized for taking, by Level B harassment only, are limited to four underwater acoustic sources with transmission frequencies below 1.5 kHz and sound pressure levels less than 220 dB.

5. The taking of any marine mammal in a manner prohibited under this Authorization must be reported immediately to the Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service (NMFS) or his designee, at 301–427–8401.

6. *Mitigation Requirements:* The Holder of this Authorization is required to implement the following mitigation requirements when conducting the specified activities to achieve the least practicable impact on affected marine mammal species or stocks:

(a). Vessel movement—The Holder shall maneuver the research vessel, as feasible, to avoid closing within 457 m (1,499 ft) of a marine mammal.

(b). Mitigation zone—During operation of active acoustic sources, a 1-km mitigation zone shall be established around the sound source. This area will be continuously monitored by visual observers during daylight hours for marine mammals 30 minutes before transmissions begin, during transmissions, and for 30 minutes after transmissions are terminated, or 30 minutes after sunset (whichever comes first). Shutdown procedures will occur if a marine mammal is visually detected within the 1-km zone.

(c). Delay and shutdown procedures—During daytime transmissions, active acoustic source transmissions shall be immediately delayed or shut down if a marine mammal is visually detected within the 1-km mitigation zone. Transmissions would not commence/resume for 15 minutes (for small odontocetes and pinnipeds) or 30 minutes (for large whales) after the animal has moved out of the mitigation zone or there has been no further visual detection of the animal.

During nighttime transmissions, active acoustic source transmissions shall be immediately delayed or shutdown if a marine mammal is detected using passive acoustic monitoring. Transmissions would not commence/resume for 15 minutes (for small odontocetes and pinnipeds) or 30 minutes (for large whales) after there has been no further detection of the animal.

7. *Monitoring Requirements:* The Holder of this Authorization is required to implement the following monitoring requirements when conducting the specified activities to result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the action area.

(a). Visual monitoring—During daylight hours, two protected species observers shall continuously monitor for marine mammals when active acoustic sources are being used. One observer shall be positioned on the deck level above the bridge and the second observer shall be positioned on the bridge level. Monitoring shall begin 30 minutes before active acoustic source transmissions are scheduled to commence and shall continue until 30 minutes after active acoustic source transmissions are terminated, or 30 minutes after sunset (whichever comes first).

(b). Passive acoustic monitoring—During nighttime hours (and any other periods of decreased visual observation capabilities), the Holder shall conduct continuous passive acoustic monitoring when active acoustic sources are being used. Passive acoustic monitoring shall include listening for vocalizations and visually inspecting spectrograms of radio frequency-transmitted signals from a deployed sonobuoy by personnel trained in detecting and identifying marine mammal sounds. Monitoring shall begin 30 minutes before active acoustic source transmissions are scheduled to commence and shall continue until 30 minutes after active acoustic source transmissions are terminated, or 30 minutes after sunrise (whichever comes first).

If a passively detected sound is estimated to be from a marine mammal, the acoustic observer shall notify the appropriate personnel and shutdown procedures shall be implemented. For any marine mammal detection, the appropriate personnel shall order the immediate delay/suspension of the active acoustic source transmissions and/or deployment. Transmissions may commence/resume 15 minutes (for small odontocetes and pinnipeds) or 30 minutes (large whales) after there has been no further detection of the animal.

8. *Reporting Requirements:* The Holder of this Authorization is required to:

(a). Submit two reports on all activities and monitoring results to the Office of Protected Resources, NMFS, within 90 days after the end of the specified activity: one unclassified report and one classified report. This report must contain and summarize the following information for when a marine mammal sighting is made:

(i). Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and associated activities during all active acoustic transmissions and marine mammal sightings;

(ii). Species, group size, age, individual size, sex (if determinable) of all marine mammal sightings;

(iii). Behavior of animal when first sighted, subsequent behaviors, and status of active acoustic sources;

(iv). Bearing and distance of observation from the vessel, sighting cue, and exhibited reaction to the active acoustic transmission or vessel (e.g., none, avoidance, approach, etc.), behavioral pace, and depth at time of detection;

(v). Fin/fluke characteristics and angle of fluke when an animal submerges to determine if the animal executed a deep or surface dive;

(vi). Type and nature of sounds heard;

(vii). Any other relevant information;

(viii). An estimate of the number (by species) of marine mammals that are known to have been exposed to active acoustic transmissions (based on visual observation and passive acoustic monitoring) at received levels greater than or equal to 195 dB re 1 μPa^2-second SEL with a discussion of any specific

behaviors those individuals exhibited; and

(ix). A description of the implementation and effectiveness of the mitigation measures of the Incidental Harassment Authorization.

(b). When shutdown is required for mitigation purposes, the following information will also be recorded:

(i). The basis for decisions resulting in shutdown of active acoustic transmissions;

(ii). Information needed to estimate the number of marine mammals potentially taken by harassment;

(iii). Information on the frequency of occurrence, distribution, and activities of marine mammals in the demonstration area;

(iv). Information on the behaviors and movements of marine mammals during and without operation of active acoustic sources; and

(v). Any adverse effects the shutdown had on the demonstration.

(c). Submit a final report to the Chief, Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East West Highway, Silver Spring, Maryland, 20910, within 30 days after receiving comments from NMFS on the draft report. If NMFS decides that the draft report needs no comments, the draft report shall be considered the final report.

(d). In the unanticipated event that the specified activity clearly cause the take of a marine mammal in a manner prohibited by this Authorization, such as an injury (Level A harassment), serious injury, or mortality (e.g., ship-strike, gear interaction, and/or entanglement), ONR shall immediately cease operations and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401 and/or by email to *Michael.Payne@noaa.gov* and *Michelle.Magliocca@noaa.gov.* The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) The name and type of vessel involved;

(iii) The vessel's speed during and leading up to the incident;

(iv) Description of the incident;

(v) Status of all sound source use in the 24 hours preceding the incident;

(vi) Water depth;

(vii) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(viii) Description of marine mammal observations in the 24 hours preceding the incident;

(ix) Species identification or description of the animal(s) involved;

(x) The fate of the animal(s); and

(xi) Photographs or video footage of the animal (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with ONR to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. ONR may not resume their activities until notified by NMFS via letter, email, or telephone.

(e). In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the cause of the injury or death is unknown and the death is relatively recent (i.e., in less than a moderate state of decomposition as described in the next paragraph), ONR shall immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Michelle.Magliocca@noaa.gov.* The report shall include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with ONR to determine whether modifications in the activities are appropriate.

(f). In the event that ONR discovers an injured or dead marine mammal, and the lead protected species observer determines that the injury or death is not associated with or related to the activities authorized in Condition 2 of this Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), ONR shall report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to *Michael.Payne@noaa.gov* and *Michelle.Magliocca@noaa.gov* within 24 hours of the discovery. ONR shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

9. The Holder of this Authorization is required to comply with the Terms and Conditions of the Incidental Take Statement (ITS) corresponding to NMFS' Endangered Species Act Biological Opinion issued to both the Office of Naval Research and NMFS' Office of Protected Resources.

10. A copy of this Authorization must be in the possession of all contractors and protected species observers operating under the authority of this Incidental Harassment Authorization.

11. *Penalties and Permit Sanctions*

Any person who violates any provision of this Incidental Harassment Authorization is subject to civil and criminal penalties, permit sanctions, and forfeiture as authorized under the MMPA.

Dated: March 28, 2013.

Helen M. Golde,

Acting Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–07606 Filed 4–1–13; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

RIN 3038–AE01

Order Exempting, Pursuant to Authority of the Commodity Exchange Act, Certain Transactions Between Entities Described in the Federal Power Act, and Other Electric Cooperatives

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is exempting certain transactions between entities described in section 201(f) of the Federal Power Act (''FPA''), and/or other electric utility cooperatives, from the provisions of the Commodity Exchange Act (''CEA'' or ''Act'') and the Commission's regulations, subject to certain anti-fraud, anti-manipulation, and record inspection conditions. Authority for this exemption is found in section 4(c) of the CEA.

DATES: *Effective date:* April 2, 2013.

FOR FURTHER INFORMATION CONTACT: David Van Wagner, Chief Counsel, (202) 418–5481, *dvanwagner@cftc.gov,* or Graham McCall, Attorney-Advisor, (202) 418–6150, *gmccall@cftc.gov,* Division of Market Oversight; or David Aron, Counsel, (202) 418–6621, *daron@cftc.gov,* Office of General Counsel; Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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I. Background

A. Petition for Relief

On June 8, 2012, the Commission received a petition (''Petition'') from a group of trade associations and other organizations representing the interests of government and/or cooperatively-owned electric utilities [1] requesting relief from the requirements of the CEA [2] and Commission's regulations issued thereunder,[3] pursuant to its exemptive authority under CEA section 4(c),[4] for certain ''Electric Operations-Related Transactions'' entered into between certain ''NFP Electric Entities.''

Section 4(c) of the CEA provides the Commission with broad authority to exempt certain transactions and market participants from the requirements of the Act in order to ''provid[e] certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.'' [5] Importantly, the legislative history notes that the Commission need not determine whether the product for which an exemption is sought is within the Commission's jurisdiction prior to issuing 4(c) relief.[6] The Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') [7] added section 4(c)(6) to the CEA, which builds upon the Commission's existing 4(c) exemptive authority by providing that the Commission ''shall, in accordance with sections 4(c)(1) and 4(c)(2), exempt from the requirements of th[e] Act an agreement, contract, or transaction that is entered into * * * between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)),'' but only ''[i]f the Commission determines that the exemption would be consistent with the public interest and the purposes of th[e] Act.'' [8]

Petitioners represented that section 201(f) of the Federal Power Act (''FPA''), administered by the Federal Energy Regulatory Commission (''FERC''), provides broad-based relief from most provisions of Part II of the FPA [9] for certain government and cooperatively-owned electric utility companies.[10] According to Petitioners, Congress recognized that the same rampant abuses which existed with investor-owned public utilities and that the Public Utility Act of 1935 and Rural Electrification Act of 1936 (''REA'') were enacted to combat simply did not exist with government and consumer-owned electric utilities.[11] Rather, Petitioners maintain that Congress understood these utilities to exist as self-regulating, not-for-profit entities with a shared public service mission of providing reliable, low-cost electric energy service through the management and operational oversight of elected or appointed government officials or

[1] The Petition was submitted by the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Transmission Access Policy Study Group and the Bonneville Power Administration (collectively, ''Petitioners''), and is available on the Commission's Web site at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/nrecaetalltr060812.pdf.*

[2] 7 U.S.C. 1 *et seq.*

[3] The Commission's regulations are set forth in title 17 of the Code of Federal Regulations (''CFR'').

[4] 7 U.S.C. 6(c).

[5] House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 (''4(c) Conf. Report'').

[6] The 4(c) Conference Report provides in relevant part that

[t]he Conferees do not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption is sought is subject to the [CEA]. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward. Rather than making a finding as to whether a product is or is not a futures contract, the Commission in appropriate cases may proceed directly to issuing an exemption.

Id. at 3214–15.

[7] Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm.*

[8] 7 U.S.C. 6(c)(6)(C) (as added by section 722(f) of the Dodd-Frank Act).

[9] Per the Petition, Part II of the FPA governs the transmission of electric energy in interstate commerce, the sale at wholesale of electric energy in interstate commerce, and the facilities used for such transmission or sale. *See* Petition at 15 (citing FPA section 201(b)); Petition Exhibit 1, at 1 (providing the full text of 16 U.S.C. 824 *et seq.*). Petitioners represented that section 201(f) does not, however, provide an exemption from FPA parts I or III. Part I of the FPA deals with the establishment and functioning of FERC and the regulation of hydroelectric resources. *See* Petition at 15 n.31 (citing 16 U.S.C. 792 *et seq.*). Part III of the FPA deals with recordkeeping and reporting requirements and FERC's procedural rules concerning complaints, investigations, and hearings. *See id.* (citing 16 U.S.C. 825 *et seq.*). Additionally, section 201(f) does not provide an exemption from FERC's refund authority, 16 U.S.C. 824e, reliability standards, 16 U.S.C. 824o(b)(1), or jurisdiction over transmission facilities and services, 16 U.S.C. 824(i)–(j). *See* Petition at 16–17.

[10] FPA section 201(f) provides in relevant part that

[n]o provision in [Part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 *et seq.*) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Petition at 16 (quoting 16 U.S.C. 824(f)).

[11] *See* Petition at 17–18. Petitioners explained that the FPA was enacted originally ''to remedy rampant abuses in the investor-owned electric utility industry.'' *See Salt River Project Agric. Improvement and Power District* v. *Fed. Power Comm'n,* 391 F. 2d 470, 475 (D.C. Cir. 1968). Petitioners maintained that of all the major abuses considered by Congress as the impetus for enacting the FPA, ''virtually none could be associated with the [electric] cooperative structure where ownership and control is vested in the consumer-owners.'' *Id.* at 475. Per the Petition, while FPA section 201(f), as originally enacted, exempted only government entities, the Federal Power Commission (''FPC''), FERC's predecessor at the time, determined that Congress had intended also to exempt electric cooperatives financed under the REA from the FPC's jurisdiction over ''public utilities.'' *See Dairyland Power Coop. et al.* v. *Fed. Power Comm'n,* 37 F.P.C. 12, 27 (1967). Finally, Petitioners explained that Congress codified the FPC's interpretation as part of the Energy Policy Act of 2005 (''EPAct 2005''), as articulated in *Dairyland* and affirmed in *Salt River,* 391 F.2d 470, and further expanded the scope of FPA section 201(f) by also exempting electric cooperatives that sell less than 4,000,000 megawatt hours of electricity per month, regardless of financing under the REA. *See* Public Law 109–58, 1291, 119 Stat. 594, 985 (2005). Counsel for Petitioners represented that while Congress did not exempt electric cooperatives that sell in excess of 4,000,000 megawatt hours of electricity per month due to EPAct 2005 attempting to focus on issues with large electricity providers that had caused the 2003 blackouts in the northeast United States, FERC nonetheless often has allowed non-FPA 201(f) cooperatives additional regulatory flexibility, subject to ''self-regulation'' by the cooperatives' member/owner boards.

cooperative member/consumers, and thus excluded them from the same degree of federal oversight as investor-owned public utilities by promulgating FPA section 201(f).[12]

While CEA section 4(c)(6) prompted the Petitioners to request relief for FPA section 201(f) entities, Petitioners also sought to include in their definition of NFP Electric Entities, in accordance with CEA sections 4(c)(1) and 4(c)(2), any Federally-recognized Indian tribe and the very small number of electric cooperatives that are not described by FPA section 201(f). Petitioners argued that FERC has precedent for treating Federally-recognized Indian tribes as FPA 201(f) government entities.[13] Additionally, Petitioners argued that regardless of whether an electric cooperative is recognized under FPA section 201(f) by virtue of receiving funding from the Rural Utilities Service (''RUS'') [14] or selling less than 4 million megawatt hours of electricity per year, all cooperatively-owned electric utilities share certain distinguishing features—a common not-for-profit public service mission and self-regulating governance model—that form the underlying rationale for the FPA section 201(f) exemption.[15]

Petitioners limited the relief requested to certain Electric Operations-Related Transactions that meet defined criteria. The Petition described seven specific categories of transactions that traditionally occur between NFP Electric Entities and provided examples of each: Electric energy delivered, generation capacity, transmission services, fuel delivered, cross-commodity transactions, other goods and services, and environmental rights, allowances or attributes.[16] Under the Petitioners' proposed definition, Electric Operations-Related Transactions would not reference any ''commodity'' in the financial asset class or ''Other Commodity'' asset class that is based upon or derived from a metal, agricultural product or fuel of any grade not used for electric energy generation.[17] In general, Petitioners represented that all transactions described by the seven categories fit within their proposed definition of Electric Operations-Related Transactions and were ''intrinsically related'' to the needs of NFP Electric Entities ''to hedge or mitigate commercial risks'' which arise from the entities' public service obligations.[18] Notably, however, Petitioners requested categorical relief for ''any other electric operations-related agreement, contract or transaction to which the NFP Electric Entity is a party,'' even if such transaction was not described by one of the Petition's categories, but could be developed as a new category in the future.[19]

B. Summary of Proposed Order

The Commission published for comment in the **Federal Register** a ''Proposal To Exempt Certain Transactions Involving Not-for-Profit Electric Utilities; Request for Comment'' (''Proposed Order'').[20] The Proposed Order identified (i) the entities eligible to rely on the exemption for purposes of entering into an exempt transaction (''Exempt Entities'');[21] (ii) the agreement, contract, or transaction for which the exemption could be relied upon (''Exempt Non-Financial Energy Transactions'');[22] and (iii) the provisions of the CEA and Commission regulations that would continue to apply to Exempt Entities entering into Exempt Non-Financial Energy Transactions with one another.[23]

The Commission proposed a definition of Exempt Entities intended to capture the same scope of entities for which relief was requested by Petitioners. Generally, these entities included (i) electric facilities owned by government entities described in FPA section 201(f), (ii) electric facilities owned by Federally-recognized Indian tribes, (iii) any cooperatively-owned electric utility treated as a cooperative under Federal tax laws, and (iv) any other not-for-profit entity wholly-owned by one or more of the foregoing.[24] The Proposed Order provided the caveat that no Exempt Entity could qualify as a ''financial entity'' as such term is defined in CEA section 2(h)(7)(C).[25]

The Commission's proposed definition of Exempt Non-Financial Energy Transaction was narrower in scope than the transaction definition proposed by Petitioners. Namely, the Commission declined to propose categorical relief for any transaction not described by one of the seven categories included in the Petition because the broader transaction definition is too vague for the Commission to conduct a considered and robust public interest and CEA purposes analysis under CEA section 4(c).[26] Additionally, due to overlap between certain transaction categories for which both Petitioners requested relief and the Commission's joint final rule and interpretation with the Securities Exchange Commission (''SEC'') determined not to be swaps,[27] the Commission believed it was unnecessary to provide additional relief pursuant to CEA section 4(c) for those

[12] *See* Petition at 17–18, 22 (FPA section 201(f) entities are ''effectively self-regulating'' (quoting *Salt River,* 371 F.2d at 473)).

[13] *See id.* at 20 (citing *City of Paris, KY* vs. *Fed. Power Comm'n,* 399 F.2d 983 (D.C. Cir. 1968); *Sovereign Power Inc.,* 84 FERC ¶ 61,014 (1998); *Confederated Tribes of the Warm Springs Reservation of Or., a Federally Recognized Indian Tribe, and Warm Springs Power Enterprises, a Chartered Enter. of the Confederated Tribes of the Warm Springs Reservation of Or.,* 93 FERC ¶ 61,182 at 61,599 (2000) (concluding that ''the Tribes are an instrumentality of the 'United States, a State or any political subdivision of a state''' and that Warm Springs Power Enterprises, a Chartered Enterprise of the Tribes, was entitled to Tribes' Section 201(f) exemption)).

[14] Per the Petition, the REA established the RUS as the federal agency to administer financing to rural utilities. *See* 7 U.S.C. 901 *et seq.*

[15] Per the Petition, to be treated as a ''cooperative'' under Federal tax law, regardless of FPA section 201(f) status, an electric cooperative must operate on a cooperative basis. *See* 26 U.S.C. 501(c)(12), 1381(a)(2)(C). Petitioners explained that the United States Tax Court, in the seminal case of *Puget Sound Plywood, Inc.* v. *Comm'r of Internal Revenue,* held that operating on a cooperative basis means operating according to the cooperative principles of (i) democratic member control, (ii) operation at cost, and (iii) subordination of capital. *See* 44 T.C. 305 (1965); *see* also Internal Revenue Manual § 4.76.20.4 (2006). Additionally, for any electric cooperative to be exempt from Federal income taxation pursuant to IRC 501(c)(12), it must collect annually ''85 percent or more of [its] income * * * from members for the sole purpose of meeting losses and expenses.'' 26 U.S.C. 501(c)(12)(A). Accordingly, Petitioners argued that an electric cooperative, regardless of FPA section 201(f) status, lacks incentive or motivation to manipulate prices, disrupt market integrity, engage in fraudulent or abusive sales practices, or misuse customer assets because it: (i) Is a consumer cooperative; (ii) is controlled by its members; (iii) must operate at cost and ''not operate either for profit or below cost;'' (iv) may not benefit its individual members financially; and (v) if exempt from Federal income taxation, must collect at least 85 percent of its income from members.

[16] *See generally* Petition at 6–12, and Exhibit 2.

[17] *See id.* at 13.

[18] *See id.* at 12.

[19] *See id.* at 5, 13.

[20] 77 FR 50998 (August 23, 2012).

[21] Exempt Entities are defined in Section IV.A of the Proposed Order. *See id.* at 51012.

[22] Exempt Non-Financial Energy Transactions are defined in Section IV.B of the Proposed Order. *See id.* at 51012–13.

[23] The conditions the Commission proposed to impose on the Proposed Order are described in Section IV.C thereof. *See id.* at 51013.

[24] *See id.* at 51012.

[25] *See id.*

[26] *Id.* at 51006, n.63. The Commission also declined to propose Petitioners' secondary requests for i) an additional exempted transaction category for ''trade options'' and/or ii) delegated authority to Commission staff to review and approve new categories of exempted transactions, for the reasons set forth in the Petition. *See id.* Also, because the Commission has promulgated a trade option exemption in Commission regulation 32.3, there was no need to promulgate a separate trade option exemption for Petitioners, who, like all other persons whose transactions satisfy the terms of the trade option exemption, can rely thereon.

[27] 77 FR 48208 (August 13, 2012) (''Products Release'').

overlapping transaction categories.[28] Otherwise, the Commission proposed a definition for Exempt Non-Financial Energy Transactions that was intended to capture a similar scope of transactions as described in the Petition, limited in the Proposed Order to Electric Energy Delivered, Generation Capacity, Transmission Services, Fuel Delivered, Cross-Commodity Pricing, and Other Goods and Services.[29]

Pursuant to CEA section 4(c)(1), the Commission also proposed conditioning its relief. First, the Commission proposed to reserve its general anti-fraud, anti-manipulation, and enforcement authority.[30] Second, the Commission proposed to reserve its general authority to inspect books and records of Exempt Non-Financial Energy Transactions already kept in the normal course of business.[31] The overarching goal of these proposed conditions would be to allow the Commission to gain greater visibility with respect to Exempt Non-Financial Energy Transactions to ensure Exempt Entities' compliance with the terms of the order, provide a means to ensure that the relief provided in the order remains appropriate and in the public interest given the potential that Exempt Non-Financial Energy Transactions may continue to evolve and their usage otherwise change, and to maintain the ability to initiate enforcement proceedings against Exempt Entities' found to be engaged in manipulative, fraudulent, or otherwise abusive trading schemes when executing Exempt Non-Financial Energy Transactions with other Exempt Entities.[32]

Given the scope of the relief contemplated by the Proposed Order as just described, the Commission was able to make the public interest determinations required under CEA sections 4(c)(1) and 4(c)(2). In the Proposed Order, the Commission determined that (i) Exempt Non-Financial Energy Transactions were innovative products necessary to meet the unique production, distribution, and usage needs of Exempt Entities that were constantly changing due to factors beyond their control;[33] (ii) CEA section 4(a) should not apply to Exempt Non-Financial Energy Transactions, which were bespoke in nature and conducted in a closed loop between Exempt Entities, therefore making them unsuitable for exchange trading and less likely to affect price discovery in Commission-regulated markets;[34] (iii) relief for Exempt Non-Financial Energy Transactions between Exempt Entities was not inconsistent with the public interest because the transactions were used to ''manage'' commercial risks arising from electric operations and facilities, and therefore were not speculative in nature;[35] (iv) Exempt Entities were self-regulating, not-for-profit public utilities with no outside investors or shareholders to profit from transactions, and as such, were less vulnerable to fraudulent or manipulative trading activity in accordance with the purposes of the CEA;[36] (v) Exempt Entities were ''appropriate persons'' for purposes of 4(c) relief either by virtue of having been identified explicitly by Congress in CEA section 4(c)(6)(C) as being eligible for a 4(c) exemption, by being a government-sponsored entity, and/or otherwise being appropriate due to sufficient financial soundness and operational capabilities;[37] and (vi) because of the foregoing, nothing would prevent the Commission or any contract market from discharging its respective regulatory or self-regulatory duties under the CEA.[38]

In addition to requesting comment on the scope of the relief and the Commission's 4(c) determinations, the Commission posed specific questions[39] related to different aspects of the Proposed Order and provided a 30-day comment period to respond.

II. Comments Received and Commission Response

In response to the Proposed Order's Request for Comments, the Commission received two responses, both of which were generally supportive. The Electric Power Supply Association and the Edison Electric Institute, writing together (''Joint Associations''), voiced general support for the Proposed Order and the Commission's determinations that the exemption would be in the public interest, and did not request any clarification or propose any changes.[40] The Petitioners also submitted a comment letter which, while approving overall of the Proposed Order and the Commission's ''appropriate[ ] implement[ation] [of] Congressional intent,'' requested that any final relief be clarified ''in certain minor respects to align more closely with the Congressional intent,'' and that responded directly to the Commission's specific questions.[41]

Upon careful consideration of the comments received, the Commission has determined to finalize the Proposed Order, with certain revisions to the ''Final Order,''[42] the majority of which are in response to comments discussed below and subject to the following interpretive guidance used to clarify the Commission's intent. Unless noted below, the Commission is finalizing the Proposed Order without change because it continues to believe that the scope of the Proposed Order is consistent with the public interest and purposes of the Act.[43]

A. Clarification With Respect to the Definition of ''Exempt Entity''

Generally, Petitioners agreed with the scope of entities included in the definition of Exempt Entity. In response to a question posed by the Commission,[44] Petitioners commented that the scope of the Exempt Entities definition should not be limited further to include only those electric cooperatives with tax-exempt status under Federal tax law because ''[t]here is no operational or governance difference between electric cooperatives

[28] *See* Proposed Order at 51008–09. Specifically, the Commission noted that certain ''Fuel Delivered'' transactions, as described in Exhibit B of the Petition, would be covered by the forward exclusion from the swap definition. *Id.* at 51008 (citing Products Release, 77 FR 48236). Additionally, the Commission noted that agreements, contracts, and transaction involving the category of Environmental Rights, Allowances or Attributes, as specifically described by the Petition, would be covered by the forward exclusion from the swap definition. *Id.* (citing Products Release, 77 FR 48233–34).

[29] *See id.* at 51012–13. Generally, the description of each category mirrored the descriptions provided in the Petition.

[30] *Id.* at 51013 (reserving authority including, but not limited to, CEA sections 2(a)(1)(B), 4b, 4c(b), 4o, 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13, and Commission rules 32.4 and Part 180).

[31] *Id.*

[32] *Id.* at 51009.

[33] *See id.*

[34] *See id.* at 51010.

[35] *See id.*

[36] *See id.* at 51011.

[37] *See id.* at 51011–12.

[38] *See id.* at 51012.

[39] *See id.* at 51013–14.

[40] Letter from the Electric Power Supply Association and the Edison Electric Institute, at 1–2 (September 24, 2012) (''Joint Associations' Letter'') (''The Joint Associations support the Commission's Proposed 201(f) Exemption and agree that the Proposed 201(f) Exemption is in the public interest.'').

[41] Letter from the National Rural Electric Cooperative Association, the American Public Power Association, the Large Public Power Council, the Transmission Access Policy Study Group and the Bonneville Power Administration, at 1–2 (September 24, 2012) (''Petitioners' Letter''). As discussed below, the Petitioners did not respond directly to the Commission's ''Request for Public Comment on Costs and Benefits'' of the Proposed Order.

[42] *See infra* Section V.

[43] *See* Proposed Order at 51006–09.

[44] Specifically, the Commission asked whether it should ''limit the scope of Exempt Entities to only those electric utilities described by FPA section 201(f),'' and even if not, ''should the Commission still limit the scope of electric cooperatives included as Exempt Entities to only those cooperatives with tax exempt status[?]'' Proposed Order at 51013.

that are tax exempt under IRC Section 501(c)(12) and those that are taxable under IRC Section 1381(a)(2)(C).'' [45] Similarly, in response to a different question,[46] Petitioners reiterated their support for including Federally-recognized Indian tribes within the scope of the relief for the same reasons that they provided in the Petition.[47]

The Proposed Order defined Exempt Entities to include not only those entities described in FPA section 201(f),[48] but federally-recognized Indian tribes and non-FPA section 201(f) electric cooperatives. The Commission accepted Petitioners' representations that FERC has traditionally treated federally-recognized Indian tribes as FPA section 201(f) entities due to the similarities they share with government entities.[49] The Commission also accepted Petitioners' representations that non-FPA section 201(f) electric cooperatives, so long as they are treated as cooperatives under Federal tax law but regardless of whether they have tax-exempt status, are owned and operated in the same not-for-profit, self-regulated manner as FPA section 201(f) cooperatives, and their source of financing or amount of monthly electricity sold does not affect their sharing with FPA section 201(f) electric cooperatives the same underlying public service mission of providing affordable, reliable electric energy service to customers.[50] Having received no comments challenging the Commission's determination based upon these representations, the Commission continues to believe that the scope of Exempt Entities included in the Proposed Order is consistent with the public interest and purposes of the Act, and thus is adopting the same general scope of Exempt Entities in the Final Order.[51]

Petitioners suggested a number of minor revisions to the language used in defining Exempt Entities in the Proposed Order in order ''to clearly encompass the appropriate categories of electric entities discussed in the Petition and elsewhere in the Proposal.'' [52] For example, Petitioners suggested clarifying that Exempt Entities can own either a facility ''or utility'' that is subject to exemption under FPA section 201(f), and that such a facility or utility should be ''wholly-owned'' instead of partially-owned by entities that qualify under FPA section 201(f).[53] The Commission agrees that the proposed revisions would help align the Final Order with the Commission's intent as expressed in the adopting release of the Proposed Order, and has modified the definition of ''Exempt Entity'' accordingly.[54]

Petitioners also requested that the Commission remove the reference to ''lowest cost possible'' from clause (iii) in the Proposed Order's definition of electric ''cooperatives'' that qualify as Exempt Entities in order ''to recognize that electric cooperatives have operational objectives in addition to low cost, *e.g.,* electric service reliability and environmental stewardship.'' [55] The Petitioners represented that these are additional public service objectives that all Exempt Entities share as part of their collective public service mission, in addition to providing affordable electric energy service.[56] Additionally, Petitioners originally maintained that providing electric energy service at the lowest cost possible may be an operational goal of a cooperative, and that Federal tax law requires cooperatives to operate ''at cost,'' as opposed to the lowest cost possible.[57] The Commission agrees that this is a worthwhile clarification and, accordingly, has revised the language in clause (iii) of the Proposed Order describing electric cooperatives included in the definition of Exempt Entity to make clear that such cooperatives must provide electric energy service to their member/owner customers ''at cost,'' which the Commission intends to reflect the lowest cost possible in light of certain reliability and environmental standards and objectives, among others.

Lastly, Petitioners requested that the Commission delete the qualifier, ''not-for-profit,'' from clause (iv) of the Exempt Entity definition describing entities that are wholly-owned by one or multiple other Exempt Entities.[58] The Petitioners noted that ''[e]ach of these subsidiary or aggregated entities are FPA 201(f) entities because they are wholly-owned by other FPA 201(f) entities, without regard to tax status,'' and therefore ''their activities do not benefit entities outside the 'closed loop' of entities'' described in CEA section 4(c)(6)(C).[59] The Commission agrees that Petitioners' interpretation is consistent with FPA section 201(f) and CEA section 4(c)(6)(C). FPA section 201(f) provides that ''any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing [entities described in FPA section 201(f)]'' is exempted under the statute as well.[60] Under the Proposed Order, relief is provided for transactions entered into solely between Exempt Entities, meaning that all exempted transactions, whether they generate profit or not, are

[45] Petitioners' Letter at 9.

[46] Specifically, the Commission sought comment ''on every aspect of the Proposed Order as it relates to Indian tribes.'' Proposed Order at 51013.

[47] Petitioners' Letter at 10–11.

[48] *See* Proposed Order at 51006–07.

[49] *See id.* at 51007.

[50] *See id.*

[51] With regard to the Commission asking whether an Exempt Entity should be required to notify the Commission of any change in status under FPA section 201(f), Proposed Order at 51013, the Commission notes that the question was only relevant to electric cooperatives that fall in-and-out of FPA section 201(f) status based upon the amount of electricity they sell or from whom they receive financing. The Petitioners stated that such a change in status ''would have no effect on outstanding Exempt Non-Financial Energy Transactions entered into with Exempt Entities prior to the change in status.'' Petitioners' Letter at 9. Having further considered the issue, the Commission confirms its belief that, for the reasons stated in the adopting release to the Proposed Order, an electric cooperative's FPA 201(f) status should not be determinative of its inclusion in the relief provided herein as long as it continues to meet the criteria for cooperatives as noted herein. Furthermore, the Commission does not believe that being notified of an electric cooperative's change in FPA 201(f) status would further any regulatory purposes under the Act, and therefore is not imposing any new reporting condition. The Commission is cognizant that any incentive provided by the Final Order for electric cooperatives to sell additional electricity and still be covered by the relief could be negated by the consequence of becoming fully regulated by FERC. The Commission stresses, however, that to the extent an electric cooperative no longer meets the criteria for cooperatives provided in the definition of an Exempt Entity, such electric cooperative may no longer rely on the relief provided in the Final Order.

[52] *Id.* at 3.

[53] *Id.*

[54] The Commission understands that a ''facility'' refers to an asset used in relation to the generation, transmission and/or delivery of electricity, whereas a ''utility'' refers to the entity that owns and/or operates the facility. Additionally, to qualify under FPA section 201(f) and, by extension, CEA section 4(c)(6)(C), an electric facility or utility cannot be partially-owned by an entity not described by FPA section 201(f). Furthermore, the Commission has clarified in the Final Order that, consistent with FPA section 201(f), an aggregated entity such as a Joint Power Administration can own facilities or utilities covered by the relief, subject to the caveat that the aggregated entity must consist solely of entities otherwise described as Exempt Entities. While not explicitly requested, the Commission has deleted the requirement that Federally-recognized Indian tribes must be ''otherwise subject to regulation as a 'public utility' under the FPA'' to account for the possibility that Indian tribes recognized by the U.S. government may someday be recognized explicitly under FPA section 201(f), at which point it could be confusing as to whether they are covered by the Final Order due to status with FERC as a public utility.

[55] Petitioners' Letter at 4.

[56] *See id.*

[57] *See* Petition at 26 (defining ''at cost'' as ''return[ing] excess operating revenues to [the cooperative's] member-patrons,'' which means the cooperative ''must not operate either for profit or below cost'' (citing *Puget Sound Plywood* v. *Comm'r,* 44 T.C. 305, 307–308 (1965)).

[58] Petitioner's Letter at 4.

[59] *Id.* (noting, as an example, that some Exempt Entities may have subsidiaries that provide their consumer-members with propane, on top of the subsidiary's primary electric service obligations).

[60] *See* FPA section 201(f), *supra* note 10.

for the benefit of facilitating the closed loop's public service mission. Because it has determined the qualifier to not be necessary, the Commission has struck the reference to ''not-for-profit'' status in clause iv) of the Exempt Entity definition.

B. Clarification With Respect to the Definition of ''Exempt Non-Financial Energy Transaction''

Similar to their suggested revisions to the definition of Exempt Entity, Petitioners suggested a number of minor revisions to the definition of Exempt Non-Financial Energy Transaction in order to align the Final Order more closely with Congressional intent. First, Petitioners requested that the Commission substitute the words ''public service obligations'' for ''contractual obligations'' in Section IV.B of the proposed definition to account for the fact that ''Exempt Entities' obligations to electric customers arise in some cases under Federal or state law, or under local municipal ordinances or city charters, under Tribal laws or, for electric cooperatives, under organizational charters or by-laws, rather than under individual customer contracts.'' [61] Next, for the same reasons applicable to the requested revision of the definition of Exempt Entity, Petitioners requested that the Commission delete the phrase, ''at the lowest cost possible,'' when referring to the purpose of engaging in Exempt Non-Financial Energy Transactions.[62] Finally, Petitioners requested that the Commission delete the word ''only'' from the sentence immediately preceding enumerated transaction categories in Section IV.B of the proposed definition because it is industry practice to include these transactions as part of larger commercial agreements or arrangements that also encompass components not covered by the relief.[63] Petitioners requested that the Commission not impose upon Exempt Entities the new burden of having to compartmentalize their commercial relationships in such a way as to limit certain arrangements to only those six exempted transaction categories.[64]

The Commission agrees with these suggestions and has revised the definition of Exempt Non-Financial Energy Transaction accordingly. The Commission notes, however, that by allowing Exempt Non-Financial Energy Transactions to be included as part of larger commercial agreements, it is not providing relief to any other type of transaction or component of the agreement that is not explicitly defined in the Final Order. That is, the inclusion of an Exempt Non-Financial Energy Transaction within a broader commercial agreement does not thereby provide relief to every transaction included within the entire agreement.

Petitioners also requested certain other clarifications with respect to the definition of Exempt Non-Financial Energy Transaction. First, the Commission is confirming that any ''agricultural product or diesel fuel or [other] grade of crude oil that is used as fuel for electric generation may be the underlying commodity upon which an 'Exempt Non-Financial Energy Transaction' is based.'' [65] Next, the Commission is clarifying that there is no requirement that Exempt Non-Financial Energy Transactions ''involve only fixed amounts of goods or services, or fixed time frames or only fixed measures.'' [66] Rather, the Commission confirms that the price, duration, quantity and any other aspect of these transactions may be variable, adjusted or adjustable during the term of an agreement, contract or transaction, as is customary for Exempt Non-Financial Energy Transactions.[67] The definition in the Final Order has been revised to reflect these two points.

Next, the Petitioners' requested certain changes to the proposed definition of Exempt Non-Financial Energy Transactions regarding what ultimate purpose the transactions must serve. First, Petitioners requested that the Commission substitute the words ''related to'' for ''to facilitate'' in Section IV.B of the proposed definition because in some cases, such as with an agreement to share a generation asset in order to more cost-effectively comply with environmental standards, the transaction may ''limit rather than facilitate electric generation, transmission or distribution operations.'' [68] Second, Petitioners requested that the Commission not include the proposed requirement that Exempt Non-Financial Energy Transactions must be ''intended for making or taking physical delivery of the commodity upon which the agreement, contract or transaction is based.'' [69] Petitioners reiterated their original request that in issuing any 4(c) relief, the Commission not determine the regulatory status of any transaction or whether any transaction involves a ''commodity,'' including a ''nonfinancial commodity,'' as those terms are defined in the CEA.[70] Specifically, Petitioners provided examples of certain transactions that fall within the defined ''Other Goods and Services'' transaction category in the Proposed Order, but that ''do not always involve an identifiable, tangible commodity intended for 'delivery,' '' or where it would be objectively impractical for counterparties, who under an agreement jointly own and operate transmission facilities, to objectively monitor ''intent'' because there is not a ''single, comprehensive operating agreement that embodies the relationship.'' [71]

The Commission has determined to revise the purpose language to address Petitioners' concerns with the ''intent to physically deliver'' requirement. The amended definition no longer directly modifies an Exempt Entity's public service obligation as ''facilitating'' generation, transmission and/or delivery of electric energy service, and no longer includes the ''intent to physically deliver'' language. Rather, the amended definition provides that an Exempt Non-Financial Energy Transaction ''would not have been entered into, but for an Exempt Entities' need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers.'' [72]

The effect of the Commission's revisions to the definition should make it clear that Exempt Non-Financial Energy Transactions do not necessarily result in an immediate net increase in generation, transmission, and/or delivery of electric energy for each Exempt Entity involved. The Commission interprets the Final Order definition, as amended, in the larger context of an Exempt Entity's public service obligations, which can include certain reliability, conservation, and environmental considerations related to their operations and facilities. Thus,

[61] Petitioners' Letter at 4.

[62] *Id.* at 5.

[63] *Id.* at 7 (citing fuel delivery contracts and environmental commodity and other nonfinancial commodity transactions as examples of larger agreements, and noting that some such agreements may include governance or employee sharing provisions that have nothing to do with operational goods and services).

[64] *Id.*

[65] *See* Petitioners' Letter at 6–7.

[66] *See id.* at 7.

[67] The Commission notes that the definition of Exempt Non-Financial Energy Transaction is being revised in the Final Order to allow for price-hedging transactions, and that contrary to what was stated in the Proposed Order, some agreements may be variable price instead of fixed price. *See infra* Section II.E.1 and note 114 and accompanying text.

[68] *Id.* at 5.

[69] *Id.*

[70] *See id.*

[71] *See id.*

[72] *See supra* Section IV.B.

under the examples posed in Petitioners' Letter, the need to enter into a demand-side management agreement or generation facility-sharing arrangement would still arise from the Exempt Entity's public service obligations, even if one Exempt Entity is required under the terms of the agreement to scale back its generation output to comply with demand-side management programming criteria, or the agreement itself does not directly result in physical generation, transmission, or delivery of electric energy service, but instead enables the fulfillment of physical obligations going forward.

These revisions are based on the Commission's recognition that not all Exempt Non-Financial Energy Transactions necessarily result in making or taking physical delivery of the ''commodity'' upon which the transaction is based, although many will.[73] As described in the Final Order, all categories of Exempt Non-Financial Energy Transactions represent agreements entered into by Exempt Entities in order to manage price[74] and/or supply risk resulting from the public service role they play in *physical* electricity markets. The Commission stresses that the revised definition still does not allow for Exempt Non-Financial Energy Transactions to be purely financial arrangements lacking any essential relationship to a physical generation, transmission, and/or delivery obligation of electric energy service to customers.[75] The proposed 4(c) public interest determination was premised on Exempt Non-Financial Energy Transactions not being speculative transactions.[76] Without requiring more than the ''closed loop'' limitation as advocated for by Petitioners, the Commission believes that the Exempt Non-Financial Energy Transaction definition could be interpreted to cover purely financial transactions capable of being used for speculative purposes, which would not be in the public interest for the Commission to exempt.[77] Thus, the Commission has revised the Final Order definition to include the ''but for'' language.

Lastly, while not requested by commenters, the Commission has further revised the Exempt Non-Financial Energy Transaction definition. The descriptions of ''Fuel Delivered'' and ''Cross-Commodity Pricing'' transactions have been modified by replacing the operative verb ''include'' with ''consist of.'' While the category description is not necessarily closed, the Commission notes that the change is intended to reflect that there are certain characteristics that must be present for these types of transactions. The ''consist of'' language is consistent with the other four Exempt Non-Financial Energy Transaction category descriptions. Additionally, the Commission has added the qualification that Exempt Non-Financial Energy Transactions are not entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization (''DCO''), and/or reported to a swap data repository (''SDR''). This modification is based on Petitioners' representation that Exempt Non-Financial Energy Transactions are not standardized instruments suitable for exchange trading, clearing, or reporting.[78] If persons otherwise able to claim the relief in the Final Order choose to (i) enter into an agreement, contract or transaction on or subject to the rules of a registered entity, (ii) submit an agreement, contract or transaction for clearing to a DCO or (iii) report an agreement, contract or transaction to an SDR, such an agreement, contract or transaction will be not be an Exempt Non-Financial Energy Transaction and will be outside the scope of the Final Order. In such circumstances, such persons, agreements, contracts or transactions will be subject to the applicable regulatory regime.

C. Clarification With Respect to the Commission's Right To Revisit the Terms of the Relief

Regarding the condition that the Commission reserves the right to revisit any of the terms and conditions of the exemptive relief,[79] the Petitioners requested that the Commission clarify that any such reconsideration would be subject to notice and comment under the Administrative Procedure Act (''APA'').[80] The Commission clarifies that exemptive orders issued pursuant to section 4(c) of the CEA are subject to ''notice and opportunity for hearing.''[81]

D. Request That Relief Not Be Conditioned Upon a Reservation of Jurisdiction Under the Commission's Authority Over Options Transactions

Petitioners requested that the Commission remove references in the Proposed Order to CEA section 4c(b) and Commission regulation 32.4 as non-exclusive provisions being reserved for purposes of conditioning the relief on the Commission's general anti-fraud, anti-manipulation, and enforcement authority.[82] Petitioners noted that the two ''provisions are not part of the general anti-fraud, anti-market manipulation and enforcement authority, but instead articulate the Commission's jurisdiction over option transactions.''[83] Specifically, Petitioners expressed concern that the references were an attempt by the Commission ''to

[73] With respect to Petitioners' comment that they specifically requested the Commission to not make any determination as to whether any Exempt Non-Financial Energy Transaction involves a ''commodity,'' the Commission notes that Petitioners originally proposed that ''Electric Operations-Related Transactions'' be defined as ''involving a 'commodity' (as such term is defined in the CEA) * * *.'' *See* Petition at 4.

[74] *See supra* Section II.E.1 (discussing the Commission's determination to clarify that an Exempt Non-Financial Energy Transaction can be used to manage the price risk of a commodity underlying the transaction).

[75] To emphasize the requirement that Exempt Non-Financial Energy Transactions be tied to obligations in physical electricity markets, the Commission has qualified the language in the Final Order definition to state that Exempt Entities' ''public service obligations'' are ''to *physically* generate, transmit, and/or deliver electric energy service to customers.'' *See supra* Section IV.B (emphasis added).

[76] *See* Proposed Order at 51010. The Commission explained that the scope of the proposed definition required that the transaction would ''contemplate 'delivery' of the underlying good or service,'' but that settlement of the transaction could occur in some circumstances through a financial book-out transaction so long as the transaction was not intended for speculative purposes. *Id.* at 51008, n.83 and accompanying text. Without the physical delivery requirement, the Commission notes that price management transactions under the Final Order can be financially settled, so long as the underlying physical commodity is being procured through a corresponding physical delivery agreement.

[77] In response to the Commission asking whether the Proposed Order's definitions would foreclose the possibility of exempt speculative trading, the Petitioners responded that ''Exempt Entities do not execute Exempt Non-Financial Energy Transactions for speculative purposes, but only to hedge or mitigate commercial risks arising from electric operations.'' Petitioners' Letter at 10. While the Commission appreciates that Petitioners represent their intent never will be to use the transactions to speculate, the Commission also believes it is in the public interest to foreclose the possibility of such exempt speculative trading activity through additional limiting language in the definition of Exempt Non-Financial Energy Transactions.

[78] *See, e.g.,* Petition at 6–7 (noting that ''Electric Energy Delivered'' contracts are not fungible and cannot be described in electronically reportable formats); Petition at 31 (explaining that ''it is highly unlikely that any [ ] standardized derivatives trading contracts would contain the same customized economic terms of any particular [Exempt Non-Financial Energy Transactions]''). The Commission notes that Petitioners' original proposed transaction definition stated that the exempted transactions ''shall not include agreements, contracts or transactions executed, traded, or cleared on a registered entity * * *.'' *See* Petition at 5.

[79] Proposed Order at 51013.

[80] *Id.* at 7–8 (citing the APA, 5 U.S.C. 500 *et seq.*)

[81] CEA section 4(c)(1); 7 U.S.C. 6(c)(1) (providing that the Commission may exempt certain transactions ''after notice and opportunity for hearing'').

[82] Petitioners' Letter at 8.

[83] *Id.*

reserve the right to decide later that it has jurisdiction over [a ''Generation Capacity'' transaction between ''Exempt Entities''] as an option.'' [84]

The Commission has declined to remove the reference to CEA section 4c(b) and Commission regulation 32.4 from the Conditions of the Final Order. As is standard practice with past exemptive orders issued pursuant to CEA section 4(c), the Commission reserves its general anti-fraud and anti-manipulation authority, as well as the ability to revisit the terms and conditions of the relief at any time and determine that certain transactions are jurisdictional in order to execute the Commission's duties and advance the public interests and purposes of the CEA. The Commission also believes it prudent to reserve certain scienter-based prohibitions in the Act and Commission regulations (without finding it necessary in this particular context to preserve other enforcement authority), and has modified the language in the Final Order to make the scope of this reservation clear. While Petitioners are correct that the provisions in question do not articulate the Commission's general anti-fraud, anti-manipulation and enforcement authority directly, the provisions exemplify a possible statutory basis for bringing an enforcement action, were a need to arise for the Commission to do so, and notes that the inclusion of these provisions is not intended to bring any transactions under CFTC jurisdiction for purposes other than enforcement.

The Commission also has determined to add new CEA sections 4s(h)(1)(A) and 4s(h)(4)(A) [85] and Commission regulations 32.410(a) and (b) [86] to the non-exclusive list of provisions that could provide a possible statutory basis for an enforcement action, as it has done in a similar proposed exemption for certain regional transmission organizations (''RTO'') and independent system operators (''ISO'').[87] The inclusion of CEA sections 4c(b), 4s(h)(1)(A) and 4s(h)(4)(A), and Commission regulation 32.4, as examples of reserved authority in no way indicates the Commission's belief that a certain Exempt Non-Financial Energy Transaction is or could be a commodity option or other type of swap; to the contrary, consistent with the Commission's interpretation of the authority contained in section 4(c), the Commission has taken no position in issuing the Final Order as to the product category or jurisdictional or non-jurisdictional nature of any of the exempted transactions.

Finally, the Commission is adding CEA section 4(d) to the non-exclusive list of reserved enforcement authority. The Commission believes it is important to highlight that, as with all exemptions issued pursuant to CEA section 4(c), the exemption ''shall not affect the authority of the Commission under any other provision of [the CEA] to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of [the CEA] or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.'' [88]

E. Other Clarification and Comments

The Commission is providing further clarification with respect to the appropriate uses of Exempt Non-Financial Energy Transactions and responding to other comments made by the Petitioners.

1. Clarification With Respect to the Ability of Exempt Entities To Use Exempt Non-Financial Energy Transactions To Manage Price Risks

The Commission requested comment on whether Exempt Non-Financial Energy Transactions, as defined in the Proposed Order, could be used to hedge price risk in an underlying commodity, and if so, whether the Commission explicitly should exclude such price-hedging transactions.[89] Petitioners responded that they use Exempt Non-Financial Energy Transactions to '' 'hedg[e] or mitigat[e] commercial risks' arising from electric operations,'' and that commercial risks include ''both price and availability risks of the nonfinancial commodities required as fuel for generation or the goods or services that the entity sells or anticipates selling.'' [90] If the Commission explicitly were to exclude price hedging transactions from the scope of relief, Petitioners argued they would be required to rely on the more limited end-user exception to clearing for such transactions,[91] which Congress could not have intended because it added additional relief specifically for FPA section 201(f) entities in section 4(c)(6) of the CEA.[92]

The Commission is persuaded that Congress intended for the Commission to consider providing relief for transactions managing price risk entered into between FPA section 201(f) entities that goes beyond the relief available through the end-user exception for price hedging transactions, if in the public interest. Therefore, the Commission has made explicit in the Final Order definition that the scope of relief covers transactions entered into not only to manage supply risk arising from an Exempt Entity's public service obligation to physically generate, transmit, and/or deliver electric energy service, but also any price risk associated with an underlying commodity used to facilitate the public service obligation. The Commission believes that the overall effect of the revisions to the definition of Exempt Non-Financial Energy Transaction

[84] *See id.*

[85] 7 U.S.C. 6s(h)(1)(A), 6s(h)(4)(A) (as added by the Dodd-Frank Act section 731). CEA section 4s(h)(1)(A) requires a swap dealer (''SD'') or major swap participant (''MSP'') to comply with all Commission rules and regulations related to fraud, manipulation, and other abusive practices involving swaps, while CEA section 4s(h)(4)(A) makes it unlawful for any SD or MSP acting as an advisor to employ any deceptive device or scheme to defraud a Special Entity.

[86] These regulations prohibit an SD or MSP from perpetrating fraud, manipulation, or other abusive trading practices on ''Special Entities,'' as such term is defined in Commission regulation 23.401(c), and provide an affirmative defense against charges of perpetrating such abusive schemes. *See* 77 FR 9822–23 (Feb. 17, 2012).

[87] *See* 77 FR 52138, 52166 (August 28, 2012) (''Proposed RTO/ISO Order''). The Proposed RTO/ISO Order exempted certain electric energy transactions that occur pursuant to a RTO/ISO tariff approved by the Federal Energy Regulatory Commission, subject to the Commission's general anti-fraud, anti-manipulation, and enforcement authority. Similar to the FPA section 201(f) Petitioners, the RTO/ISO petitioners requested relief pursuant to the Commission's new authority in CEA section 4(c)(6).

[88] *See* 7 U.S.C. 6(d).

[89] Proposed Order at 51014. In making its public interest determination in the Proposed Order, the Commission represented that it understood Exempt Entities to use Exempt Non-Financial Energy Transactions mainly to manage supply risk, and not price risk, of an underlying commodity. *See id.* at 51010. Therefore, the Commission declined to adopt Petitioners' proposed definition incorporating the phrase, '' 'to hedge or mitigate commercial risks' (as such phrase is used in CEA Section 2(h)(7)(A)(ii),'' because the Commission generally did not interpret this phrase to refer to the full scope of transactions described in the Petition and incorporated into the Proposed Order through enumerated categories of Exempt Non-Financial Energy Transactions. *Id.* at 51007–08, n.81.

[90] *See* Petitioners' Letter at 12.

[91] CEA section 2(h)(7)(A), 7 U.S.C. 2(h)(7)(A) (providing relief from the clearing and trade execution mandate for swap transactions entered into where at least one counterparty is not a financial entity and uses the swap to hedge or mitigate commercial risk). As Petitioners note, while the end-user exception would provide some relief for Exempt Non-Financial Energy Transactions, the transactions ''nonetheless [would be] subject to other regulatory requirements.'' Petitioners' Letter at 12.

[92] *See id.* Petitioners argue that by providing both the ''general end-user exception'' and the ''specific 4(c)(6) public interest waiver,'' ''Congress clearly intended that that the Commission waive its jurisdiction over [transactions entered into between FPA section 201(f) entities], not merely that such entities would have the end-user exception.'' *Id.*

previously discussed [93] also helps to clarify that the Final Order clearly covers price-risk management transactions directly related to an Exempt Entity's public service obligation. The Commission notes, however, that because these transactions cannot be used for speculative purposes,[94] any Exempt Non-Financial Energy Transaction used to manage the price risk of an underlying commodity must always be associated with an obligation to make or take physical delivery of that underlying commodity.[95]

2. Request That Relief Be Retroactive to the Date of Enactment of the Dodd-Frank Act

The Commission sought comment on whether it should grant Petitioners' original request for the effective date of any 4(c) relief issued to be retroactive to the date of enactment of the Dodd-Frank Act.[96] Petitioners reiterated their rationale from the Petition that certain transactions covered by the proposed definition of Exempt Non-Financial Energy Transactions ''might otherwise require analysis as to whether they are 'historical swaps,' and might otherwise require reporting by one or the other of the Exempt Entities, both of which are non-SDs/MSPs under the Dodd-Frank Act.'' [97] In order to prevent Exempt Entities from passing along the costs of such historical swap analysis and reporting to electric energy consumers, the Commission has provided that the relief in the Final Order applies retroactively to the date of enactment of the Dodd-Frank Act.[98] The Commission is persuaded that the representations made by Petitioners with respect to the public service obligations of government and cooperatively-owned not-for-profit electric utility companies and the transactions entered into to satisfy such obligations apply equally to the period between the enactment of the Dodd-Frank Act and the issuance of the Final Order contained herein, and thus the same public interest determinations support retroactive 4(c) relief.

3. Request That Relief Be Categorical

In response to the Commission's specific request for comments on the topic,[99] Petitioners reiterated their support for the Commission issuing categorical relief that would apply to all Electric Operation-Related Transactions, regardless of whether a transaction was described by one of the six defined categories.[100] Petitioners interpreted the ''public interest waiver'' codified in CEA section 4(c)(6) as a mandate to the Commission to exempt all transactions that occur between the ''closed loop'' of FPA section 201(f) entities, and that ''[n]othing in the statute require[d] the Commission to analyze or categorize [such] transactions * * * .'' [101] The Commission rejects this interpretation of Congressional intent.

As acknowledged by Petitioners elsewhere in their comment letter, Congress intended for all transactions occurring within the closed-loop of FPA section 201(f) entities to be ''eligible for'' an exemption,[102] rather than automatically exempt without further Commission consideration or action. First, the plain language of CEA section 4(c)(6) added by the Dodd-Frank Act is unambiguous: Categorical relief is not mandatory and any relief provided requires an analysis of, and possible limitation to, the transactions being exempted. The provision begins with an explicit ''if'' clause pre-conditioning any relief upon the Commission ''determin[ing] that the exemption would be consistent with the public interest and purposes of [the] Act.'' [103] If this determination can be made, the provision then instructs the Commission to issue relief ''in accordance with'' CEA sections 4(c)(1) and 4(c)(2), implying that additional analysis and limitations may be necessary and/or appropriate in the judgment of the Commission.[104] Second, the Commission notes that the Dodd-Frank Act also amended CEA section 2(a)(1)(A) to codify the Commission's exclusive jurisdiction with respect to swap transactions.[105] Had Congress intended for any transaction entered into between FPA section 201(f) entities to be exempt from this exclusive jurisdiction, it could have explicitly carved out these entities and any transactions occurring between them as categorically exempt.[106] Instead, the Commission believes that Congress explicitly recognized transactions between entities described in FPA section 201(f) as *eligible for* a mandatory exemption, subject to those pre-conditions which the Commission deems appropriate.

Accordingly, as stated in the Proposed Order, the Commission does not believe it can determine conclusively that it would be in the public interest to exempt any transaction entered into between Exempt Entities. Even if a transaction were to meet the requirements of the Exempt Non-Financial Energy Transactions definition, but not be described by one of the six enumerated transaction categories, the Commission would lack the necessary information about the specific nature of the transaction in order to make the requisite public interest determination.

[93] *See supra* Section II.B.

[94] As previously noted, the Commission's public interest determination was premised on an Exempt Entity's inability to use Exempt Non-Financial Energy Transactions as purely financial transactions for speculative purposes only. *See supra* Section II.B.

[95] The Commission also confirms its determination, as expressed in the Proposed Order, that Exempt Non-Financial Energy Transactions entered into solely between Exempt Entities do not materially impair price discovery in Commission-regulated markets. *See supra* Section III.C. In response to the Commission asking whether there could be any circumstances where it should revisit this determination and require reporting of swap transactions to a swap data repository for price transparency purposes, Petitioners responded by reiterating their argument that because Exempt Non-Financial Energy Transactions are bespoke and occur within a ''closed loop'' of Exempt Entities, they do not affect price discovery in Commission-regulated markets. Petitioners' Letter at 9–10. Petitioners also argued that were FERC to require regulatory reporting of electric energy transactions entered into by FPA section 201(f) entities, the nature of the reporting and regulatory purposes behind requiring such reporting would be very different from those behind price transparency reporting of swaps as required by the CEA and Commission regulations. *See id.* At this time, the Commission agrees that any incremental regulatory benefit that might be gained from requiring regulatory reporting of Exempt Non-Financial Energy Transactions entered into between Exempt Entities is not necessary for purposes of making the required public interest determinations in issuing the Final Order, regardless of whether FERC requires reporting for FPA 201(f) entities in the future.

[96] Proposed Order at 51013.

[97] Petitioners' Letter at 11.

[98] CEA section 4(c)(1) provides that the Commission may exempt any agreement, contract, or transaction ''either retroactively or prospectively, or both * * *.'' 7 U.S.C. 6(c)(1).

[99] Proposed Order at 51013.

[100] *Id.* at 11–12.

[101] *Id.* Petitioners specifically noted their disagreement with the Commission's interpretation of CEA section 4(c)(6) ''as requiring an analysis of, or a limitation on, the transactions or class of transactions to be exempted * * *.'' *Id.* at 2, n.5.

[102] *See id.* at 5.

[103] CEA section 4(c)(6), 7 U.S.C. 6(c)(6).

[104] *Id.*

[105] *See* 7 U.S.C. 2(a)(1)(A), as amended by the Dodd-Frank Act section 722(a). The provision already codified the Commission's exclusive jurisdiction with respect to commodity futures and options transactions.

[106] The Commission notes that such a carve-out would not be without precedent. *See, e.g.,* CEA section 2(c)(1), 7 U.S.C. 2(c)(1) (providing that, subject to certain exceptions, the CEA does not govern or apply to an agreement, contract, or transaction in foreign currency, government securities, security warrants, security rights, resales of installment loan contracts, repurchase transaction in an excluded commodity, or mortgages or mortgage purchase commitments); CEA section 2(a)(1)(C)(i), 7 U.S.C. 2(a)(1)(C)(i) (providing that the CEA shall not apply to, and the Commission shall not have jurisdiction with respect to, designating a contract market for any transaction in which a party to such transaction acquires a put, call, or other option on one or more securities).

III. CEA Section 4(c) Determinations

The Commission is issuing the Final Order pursuant its authority in CEA sections 4(c)(1) and 4(c)(6).[107] As required under both sections, the Commission must make certain determinations prior to issuing exemptive relief.[108] Generally, the Commission confirms the determinations it made in the Proposed Order because it believes that such determinations continue to support adopting the Final Order.[109] Where substantive changes have been made to the scope of the Final Order, the Commission is addressing such changes with additional discussion. In some instances, the Commission is expanding upon its proposed determinations to further support adoption of final exemptive relief for Exempt Non-Financial Energy Transactions entered into between Exempt Entities.

A. Applicability of CEA Section 4(a)

Due to the bespoke nature of Exempt Non-Financial Energy Transactions, the Commission does not believe that the exchange-trading requirement of CEA section 4(a) should apply. Generally, the exchange-trading requirement is meant to facilitate the price discovery and price transparency processes. Because (i) exchange-traded contracts are less effective at adequately performing as risk management substitutes for Exempt Non-Financial Energy Transactions; and (ii) Exempt Non-Financial Energy Transactions are executed within a closed-loop of Exempt Entities, and thus are not market facing, Exempt Non-Financial Energy Transactions do not materially impair price discovery in Commission-regulated markets and can continue to be executed bilaterally. For that reason, the Commission is limiting the Final Order to Exempt Non-Financial Energy Transactions entered into between Exempt Entities.

B. Public Interest and Purposes of the CEA

The Commission continues to believe that the scope of the Final Order is consistent with the public interest supported by the CEA.[110] As previously noted, Exempt Non-Financial Energy Transactions are bespoke and not suitable for trading as standardized products on a board of trade. Furthermore, the Final Order applies only to Exempt Non-Financial Energy Transactions entered into between Exempt Entities, which are transacting within a closed loop, and therefore do not materially impair price discovery in Commission-regulated markets.[111] Therefore, exempting these types of transactions from the Commission's jurisdiction will not materially impair price discovery of electricity-related commodities in Commission-regulated markets.[112]

As discussed previously in response to Petitioners' comments, the Commission has clarified in the Final Order that Exempt Non-Financial Energy Transactions can be used to hedge prices of underlying commodities, so long as the transaction meets the other definitional criteria and falls into one of the delineated transaction categories.[113] The Commission believes that exempting price hedging transactions is still in the public interest because of Exempt Entities' unique public service mission and not-for-profit operational structure. Like all public utilities, Exempt Entities have a need to manage the risk associated with fluctuations in both the supply *and price* of a commodity underlying a transaction.[114] While managing supply risk goes to the reliability aspect of Exempt Entities' public service mission, hedging price risk goes to providing electric energy service that is low-cost as well. Therefore, it is in the public interest to allow Exempt Entities to continue engaging in price hedging transactions with one another, such that they can continue to provide both reliable and affordable electric energy service to customers.[115]

The Commission also believes that the Final Order is consistent with the purposes of the CEA.[116] As recognized by Congress in passing FPA section 201(f),[117] the not-for-profit structure and governance model—elected or appointed government officials or citizens, or cooperative members or consumers—of all Exempt Entities reduce the incentives and other conditions that traditionally lead to fraudulent or manipulative trading activity, and thus should mitigate the need for prescriptive federal oversight.[118] As previously noted, the Commission has clarified in the Final Order that some Exempt Entities may have a corporate for-profit form, but must nonetheless be wholly owned by other not-for-profit Exempt Entities. The Commission takes notice of the petitioner's representation that a for-profit subsidiary of an Exempt Entity, when engaged in Exempt Non-Financial Energy Transactions with other Exempt Entities, is less likely to engage in abusive trading practices than other entities, particularly in light of the non-profit, public service nature of the parent Exempt Entity (or Exempt Entities).[119]

[107] To the extent that the Final Order applies to entities not explicitly described in FPA section 201(f), the Commission is using its general exemptive authority found in CEA section 4(c)(1).

[108] These determinations include that (i) CEA section 4(a)—the exchange trading requirement—should not apply; (ii) the exemption is consistent with the public interest and purposes of the CEA; (iii) the exemption is available only for ''appropriate persons,'' as such term is defined in CEA section 4(c)(3); and (iv) the exemption will not have a materially adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA. *See* 7 U.S.C. 6(c)(2).

[109] *See generally* Proposed Order at 51009–12 (proposing the Commission's CEA section 4(c) determinations).

[110] These public interests include ''providing a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.'' CEA section 3(a), 7 U.S.C. 5(a).

[111] Given that Petitioners represented that exchange-traded instruments are, by their nature, primarily standardized, and therefore in many or most cases may be less effective for purposes of hedging the risks that Exempt Non-Financial Energy Transactions are specifically tailored to offset (*e.g.,* due to the contract sizes not matching the risk being hedged, inconvenient delivery points, and/or unavailability of a contract overlying the specific commodity, the risk of which a market participant seeks to hedge), the Commission likewise presently considers any price link between Exempt Non-Financial Energy Transactions and transactions executed on exchange-traded derivative markets too attenuated to materially impair price discovery of exchange-traded derivatives.

[112] The Joint Associations agreed with this determination in the Proposed Order. *See* Joint Associations' Letter at 3.

[113] *See supra* Section II.E.1.

[114] In the Proposed Order, the Commission noted that Exempt Non-Financial Energy Transactions generally are variable-priced transactions, as opposed to fixed-price, and therefore are entered into for the purposes of hedging supply risk resulting from unpredictable fluctuations in demand for electric energy. *See* Proposed Order at 51010. The Commission understands this to still be true, but also understands that in limited circumstances, fixed-price arrangements exist such that Exempt Entities can hedge price risk.

[115] The Final Order, however, still does not exempt transactions that are speculative. Unlike price and supply risk management, speculative swap activity is not necessary to allow Exempt Entities to carry out their public service mission.

[116] In order to foster the public interests, it is the purpose of the CEA ''to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to [the CEA] and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sale practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.'' CEA section 3(b), 7 U.S.C. 5(b).

[117] *See supra* note 11 and accompanying text.

[118] The Joint Associations agreed with this determination in the Proposed Order. *See* Joint Associations' Letter at 2.

[119] The Commission notes that the Final Order retains the Commission's general anti-fraud and

Continued

C. Appropriate Persons

The Commission believes that Exempt Entities, as defined in the Final Order, are all ''appropriate persons'' for purposes of satisfying the CEA section 4(c)(2) requirement.[120] As a starting point, the Commission believes that there is a presumption that entities explicitly described in FPA section 201(f) are appropriate persons because of Congress' mandate to the Commission to exempt, in accordance with CEA sections 4(c)(1) and 4(c)(2) (which precludes the Commission from granting a CEA section 4(c) exemption to persons other than appropriate persons), transactions entered into between such entities if it is in the public interest and consistent with the purposes of the Act.[121] That is, the Commission infers that Congress would not have added CEA section 4(c)(6)(C), which explicitly identifies FPA section 201(f) entities as eligible for an exemption, unless it had presumed such entities were appropriate beneficiaries of an exemption for purposes of the CEA section 4(c)(2) requirement, and subjected CEA section 4(c)(6) to CEA section 4(c)(2) simply so that the Commission would verify that presumption. For the reasons discussed throughout this release, the Commission believes that FPA section 201(f) entities are appropriate persons.[122]

The Commission believes that Exempt Entities not explicitly described in FPA section 201(f) are also appropriate persons.[123] First, the Commission interprets Federally-recognized Indian tribes as appropriate persons under CEA section 4(c)(3)(H) because they are analogous to governmental entities.

Next, some non-FPA section 201(f) electric cooperatives may qualify as appropriate persons under the CEA section 4(c)(3)(F) criteria by having a net worth exceeding $1,000,000 or total assets exceeding $5,000,000. For any non-FPA section 201(f) cooperative that does not otherwise qualify as an appropriate person under the specific provisions of section 4(c)(3), the Commission believes that such entities are at least as financially sophisticated and operationally capable as FPA section 201(f) cooperatives. Such cooperatives would not qualify as FPA section 201(f) entities because they sell in excess of 4,000,000 megawatt hours of electricity per month, and/or receive financing from lenders other than the RUS. In either case, such cooperatives likely would have greater assets due to the increased sales, which could qualify them for better financing terms than those offered by the RUS. Additionally, the Commission notes that such cooperatives are not exempt from FERC's jurisdiction, and thus subject to more regulatory oversight than FPA section 201(f) electric cooperatives. The Commission interprets such FERC oversight of non-FPA section 201(f) electric cooperatives as the type of ''appropriate regulatory protections'' within the meaning of CEA section 4(c)(3)(K) that Congress had in mind when promulgating new exemptive authority for FPA 201(f) entities in CEA section 4(c)(6)(C).[124] Therefore, under the Commission's discretionary authority in CEA section 4(c)(3)(K) to determine non-enumerated entities as appropriate persons based upon financial or other qualifications, or the applicability of other appropriate regulatory protections, the Commission believes that such non-FPA section 201(f) cooperatives are appropriate persons.[125]

D. Ability to Discharge Regulatory or Self-Regulatory Duties

As stated previously, Exempt Non-Financial Energy Transactions are bespoke and executed within the closed-loop of Exempt Entities, meaning they do not materially affect trading or pricing of transactions involving the same underlying commodity in Commission-regulated markets. Additionally, the Commission has retained its anti-fraud and anti-manipulation authority, as well as certain scienter-based prohibitions. Accordingly, the Commission does not believe that the exemptive relief provided in the Final Order will have a materially adverse effect on the ability of the Commission or any contract market to discharge their regulatory or self-regulatory duties under the CEA. As noted above, the Commission is limiting the Final Order to Exempt Non-Financial Energy Transactions entered into other than on or subject to the rules of a registered entity, submitted for clearing to a DCO, and/or reported to a SDR.

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that Federal agencies consider whether proposed rules will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.[126] The relief provided in the Final Order may be available to some small entities, because they may fall within standards established by the Small Business Administration (''SBA'') defining entities with electric energy output of less than 4,000,000 megawatt hours per year as a ''small entity.''[127]

anti-manipulation authority, and certain scienter-based prohibitions, in addition to all public utilities, regardless of FPA section 201(f) status, being subject to FERC's market manipulation authority. *See* FPA section 222v, 16 U.S.C. 824v.

[120] CEA section 4(c)(2)(B)(i) requires that the Commission exercise its 4(c) exemptive authority with respect to transactions entered into solely between ''appropriate persons.'' *See* 7 U.S.C. 6(c)(2)(B)(i). CEA section 4(c)(3) provides various criteria an entity can meet for purposes of qualifying as an appropriate person. 7 U.S.C. 6(c)(3). The Joint Associations supported the Commission's proposed determination and underlying rationale that all Exempt Entities were appropriate persons. *See* Joint Associations' Letter at 2.

[121] CEA section 4(c)(6)(C), 7 U.S.C. 6(c)(6)(C). Under CEA section 4(c)(3)(K), the Commission can determine other persons not explicitly enumerated in section 4(c)(3) ''to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.'' 7 U.S.C. 6(c)(3)(K). The Commission believes that Congress' explicit recognition of FPA section 201(f) entities as being eligible for exemptive relief under CEA section 4(c)(6) constitutes an ''other qualification'' in support of such entities being appropriate persons, regardless of whether they otherwise would qualify under one of the enumerated appropriate person categories in CEA sections 4(c)(3)(A)–(J).

[122] The Commission notes that many FPA section 201(f) entities would qualify as appropriate persons under other CEA section 4(c)(3) criteria. *See, e.g.,* CEA section 4(c)(3)(F) (providing that a business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000 is an appropriate person); CEA section 4(c)(3)(H) (providing that a government entity or political subdivision thereof, or any instrumentality, agency, or department of a government entity or political subdivision thereof, is an appropriate person).

[123] The Commission notes that such entities are being exempted pursuant to the Commission's general exemptive authority in CEA section 4(c)(1).

[124] Compared to 201(f) cooperatives, non-201(f) electric cooperatives are still treated as ''public utilities'' for purposes of Part II of the FPA, and thus must receive FERC authorization under FPA section 203 to sell, merge or consolidate their electric facilities, or to purchase, acquire, or take any security of any other public utility. *See* Petition at 16 (citing 18 CFR Parts 2 and 33, Transactions Subject to FPA Section 203). Additionally, such cooperatives must seek approval under FPA sections 205 and 206 when altering rates and charges to be collected in transmitting or selling electric energy service in interstate commerce. *See id.* (citing *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* 78 FERC ¶ 61,315 at 62,270 (2005)).

[125] To the extent that an electric cooperative would not otherwise qualify as an appropriate person, regardless of whether it qualifies as an FPA section 201(f) entity, the Commission notes that its determination that such cooperatives are appropriate persons applies only in the context of the Final Order, and should not be interpreted to mean that all electric cooperatives are appropriate for purposes of any existing or future exemptions issued by the Commission pursuant to CEA section 4(c).

[126] 5 U.S.C. 601 *et seq.*

[127] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North*

In response to the Proposed Order, the Commission received several comments from the Petitioners relevant to the RFA. The Petitioners requested that the Commission conduct future analyses of the impact on small entities the Petitioners represent if the Commission ever were to revisit the terms and conditions of the relief, and that the Commission provide relief retroactively to the enactment of the Dodd-Frank Act in the Final Order. In response to the request that the Commission conduct a future Small Business Regulatory Enforcement Fairness Act (''SBREFA'') analysis,[128] the Commission notes that it does not conduct RFA analyses based upon requests; rather, all Commission rulemaking are subject to the legal requirements of the RFA, which provides that a RFA analysis shall not apply if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[129] In response to the request that the Commission conduct a full RFA analysis if it were to decide not to grant the relief provided herein retroactively to the enactment of the Dodd-Frank Act,[130] the Commission has addressed this comment by providing retroactive relief in the Final Order.[131] To the extent that these comments are preemptive in nature or have been addressed in the Final Order, the Commission is of the view that the Final Order would not have a significant economic impact on a substantial number of small entities, including any Exempt Entities that may qualify as a small entity.

With regards to the Petitioners' general conclusion that the organizations that they represent fall within the definition of ''small entity,'' [132] the Commission notes that it has considered carefully the potential effect of this Final Order on small entities and has determined that it will not have a significant economic impact on any Exempt Entity, including any entities that may be small. Rather, the Final Order relieves the economic impact that the Exempt Entities, including any small entities that may opt to take advantage of the Final Order, by exempting certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Significantly, the Final Order prevents new requirements for swaps, such as clearing, trade execution and regulatory reporting, from affecting transactions that Exempt Entities traditionally have engaged in to serve their unique public service mission of providing reliable, affordable electric energy service to customers. Absent such relief and to the extent Exempt Non-Financial Energy Transactions would qualify as swaps, small entities covered by the Final Order could be subject to compliance with all aspects of the CEA and its implementing regulations. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Final Order will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

Under the Paperwork Reduction Act (''PRA''), 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 from the Office of Management and Budget (''OMB''). The Commission determined that the Proposed Order did not contain any new information collection requirements, and did not receive any comments regarding this determination. As the Commission has left the conditions that were contained in the Proposed Order unchanged, the Final Order therefore also does not contain any new information collection requirements that would require approval of OMB under the PRA.[133] While the Commission reserves its authority to inspect books and records kept in the normal course of business that relate to Exempt Non-Financial Energy Transactions between Exempt Entities pursuant to the Commission's regulatory inspection authorities, the Commission is not imposing a recordkeeping burden with respect to the books and records of Exempt Non-Financial Energy Transactions that already are kept in the normal course of business. Moreover, any inspection of books and records typically only will occur in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions and to ensure compliance with the terms of this Final Order. Accordingly, each inquiry would be specific to the facts triggering the inquiry, and thus will not involve ''answers to identical questions posed to * * * ten or more persons,'' as the term ''collection of information'' is defined in the PRA in pertinent part.[134]

C. Consideration of Costs and Benefits

Prior to the passage of the Dodd-Frank Act, swap market activity was largely unregulated. In the wake of the financial crisis of 2008, Congress adopted the Dodd-Frank Act, in part, to address conditions with respect to swap market activities. Among other things, the Dodd-Frank Act amends the CEA to expand its scope beyond regulation of ''contract[s] of sale of a commodity for future delivery'' [135] (commonly referred to as futures) and options,[136] by establishing a comprehensive regulatory framework for swaps as well.[137] In amending the CEA, however, the Dodd-Frank Act preserved the Commission's authority under CEA section 4(c)(1) to exempt any transaction or class of transactions, including swaps, from select provisions of the CEA.[138] It also added new subparagraph 4(c)(6)(C) to the CEA specifically directing the Commission, in accordance with 4(c)(1) and 4(c)(2), to exempt agreements, contracts, or transactions entered into between FPA 201(f) entities if doing so ''is consistent with the public interest

American Industry Classification System Codes, footnote 1 (effective March 26, 2012), *available at http://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.*

[128] Petitioners' Letter at 8. The SBREFA amended the RFA.

[129] *See* 5 U.S.C. 605.

[130] Petitioners' Letter at 11.

[131] *See supra* Section II.E.2.

[132] Petitioners highlighted that the majority of the entities their respective organizations represent fall within the definition of ''small entity'' under the SBREFA, which incorporates by reference the SBA definition. Petitioners' Letter at 2.

[133] 44 U.S.C. 3501 *et seq.*

[134] 44 U.S.C. 3502(3)(a)(1). *See also* 44 U.S.C. 3518(c)(1)(B)(i) and (ii) (excluding collections of information related to administrative investigations against specific individuals or entities, and any subsequent civil actions).

[135] CEA section 4(a). *See also* CEA sections 1a(19) (''the term 'future delivery' does not include any sale of a cash commodity for deferred shipment or delivery''); 1a(47)(B)(ii) (excluding from the swap definition ''any sale of a nonfinancial commodity * * * for deferred shipment or delivery, so long as the transaction is intended to be physically settled'').

[136] CEA section 1a(36).

[137] Public Law 111–203, 124 Stat. 1376 (2010). More specifically, Title VII of the Dodd-Frank Act amended the CEA to establish a comprehensive new regulatory framework for swaps, a term defined by the statute. *See* Section 4(c)(1) of the CEA. The legislative framework seeks to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (''SDs'') and major swap participants (''MSPs''); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Futures, options, and swaps are referred to collectively herein as ''derivatives.''

[138] Section 4(c)(1) of the CEA.

and the purposes of'' the CEA.[139] The Commission, through this Final Order, is exercising its exemptive authority under CEA section 4(c)(1) and 4(c)(6) with respect to ''Exempt Non-Financial Energy Transactions'' [140] entered into solely between ''Exempt Entities,'' [141] subject to certain conditions.[142] These conditions are, among others, that the relief provided in the Final Order is subject to (i) the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and Commission rules 32.4, 23.410(a) and (b), and Part 180; and, ii) the Commission's reserved authority to inspect the books and records related to Exempt Non-Financial Energy Transactions kept by Exempt Entities in the normal course of business pursuant to the Commission's regulatory inspection authorities.

1. The Statutory Mandate To Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a) of the CEA [143] requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The Commission considers the costs and benefits of the Final Order to the public and market participants, including Exempt Entities, against the backdrop of the CEA regulatory regime for derivatives, as amended by the Dodd-Frank Act, and absent the relief provided by the Final Order.[144] Under the post-Dodd-Frank Act regulatory regime, Exempt Entities that, as represented in the Petition, are ''nonfinancial end-users of [Exempt Non-Financial Energy Transactions entered into] only to hedge or mitigate commercial risks,'' [145] are subject to the Commission's general anti-fraud and anti-manipulation authority, as well as certain scienter-based prohibitions under the CEA.[146] Absent the Final Order, to the extent that Exempt Non-Financial Energy Transactions are futures transactions within the meaning of the CEA, they would be subject to the statute's exchange-trading requirement and a comprehensive regulatory scheme.[147] Similarly, absent the Final Order, to the extent that Exempt Non-Financial Energy Transactions are swaps as defined in the CEA, the Exempt Entity counterparties to these transactions would be subject to requirements for swap data reporting [148] and recordkeeping; [149] in addition, unless both Exempt Entity counterparties to a swap transaction are eligible contract participants (''ECPs''),[150] CEA section 2(e) would prohibit them from executing the swap other than on or subject to the rules of a registered DCM.[151]

[139] CEA sections 4(c)(2) and 4(c)(3) further articulate the conditions precedent to granting an exemption under CEA section 4(c)(1), including that the exempted agreements, contracts, or transactions be entered into between ''appropriate persons,'' as that term is defined in CEA section 4(c)(3).

[140] Section V.B., *infra.* ''Exempt Non-Financial Energy Transactions'' consist of ''any agreement, contract, or transaction based upon a 'commodity,' as such term is defined and interpreted by the CEA and regulations thereunder, that would not have been entered into, but for an Exempt Entity's need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers. The term 'Exempt Non-Financial Energy Transaction' excludes agreements, contracts, and transactions based upon, derived from, or referencing any interest rate, credit, equity or currency asset class, or any grade of a metal, or any agricultural product, or any grade of crude oil or gasoline that is not used as fuel for electric energy generation. The term 'Exempt Non-Financial Energy Transaction' also excludes agreements, contracts, or transactions entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization, and/or reported to a swap data repository. Exempt Non-Financial Energy Transactions are limited to the following categories, which may exist as stand-alone agreements or as components of larger agreements that combine the following categories of transactions: [electric energy delivered, generation capacity, transmission services, fuel delivered, cross-commodity pricing, and other goods and services].''

[141] Section IV.A., *infra.* An Exempt Entity is: (i) Any electric facility or utility that is wholly owned by a government entity, as described in Federal Power Act (''FPA'') section 201(f), 16 U.S.C. 824(f); (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994, 25 U.S.C. 479a–1; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative's status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing. A ''financial entity'' as defined in CEA section 2(h)(7)(C) is not an Exempt Entity.

[142] Section V.C., *infra.*

[143] 7 U.S.C. 19(a).

[144] As discussed earlier, to exempt transactions under CEA section 4(c), the Commission need not first determine—and is not determining—whether the transactions subject to the exemption fall within the CEA. However, to capture potential costs and benefits, this consideration assumes that the transactions may now or in the future be jurisdictional.

[145] Petition at 33.

[146] *See, e.g.,* CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4o, 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and Commission rules 32.4, 23.410(a) and (b), and Part 180. CEA section 2(h)(7) (the ''end-user exception''), excepts a swap from the swap clearing requirement of CEA section 2(h)(1)(A) (it ''shall be unlawful for any person to engage in a swap unless that person submits such swap for clearing * * * if the swap is required to be cleared'') and the trade execution requirement of CEA section 2(h)(8) (transactions subject to the clearing requirement of CEA section 2(h)(1) must be executed on either a designated contract market (''DCM'') or a swap execution facility (''SEF'')). The end-user exception applies if one counterparty is ''not a financial entity; * * * is using swaps to hedge or mitigate commercial risk; and * * * notifies the Commission, in a manner set forth by the Commission, how it generally meets its financial obligations associated with entering into non-cleared swaps.''

[147] CEA section 4(a). The same is true for options on futures. *See* 17 CFR 33.3(a). The discussion of cost-benefit implications of this Final Order with respect to futures contracts applies equally to options on futures.

[148] The CEA as amended by the Dodd-Frank Act contemplates two types of reporting to SDR. First, is real-time reporting: For every swap executed, certain transaction information, including price and volume, is to be reported to an SDR'') ''as soon as technologically practicable.'' CEA section 2(a)(13)(A) & (C); *see also* Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012) (adopting 17 CFR part 43 regulations to implement real-time reporting). For swaps executed off of a DCM or SEF and for which neither counterparty is an SD or MSP—as the Commission expects Exempt Non-Financial Energy Transactions engaged in between Exempt Entities would be—the real-time reporting obligation for the transaction falls to one of the counterparties, as agreed between themselves. 17 CFR 43.3(a)(3) Second, for each swap, additional information beyond that required in real-time reports must be reported to an SDR in a ''timely manner as may be prescribed by the Commission.'' CEA section 2(a)(13)(G); *see also* Swap Data Recordkeeping and Reporting Requirements 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 F.R. 35200 (June 12, 2012) (adopting 17 CFR part 46).

[149] Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 F.R. 35200 (June 12, 2012) (adopting 17 CFR part 46).

[150] *See* Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant,'' and ''Eligible Contract Participant,'' 77 FR 30596 (May 23, 2012).

[151] 7 U.S.C. 2(e). Additionally, absent the Final Order, in the event that executing Exempt Non-financial Energy Transactions required an Exempt Entity to register as an SD or MSP, additional regulatory requirements would apply. *See, e.g.,* Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and

The Commission remains cognizant of the regulatory landscape as it existed before the enactment of Dodd-Frank. As such, the Commission notes that any Exempt Non-Financial Energy Transactions engaged in between Exempt Entities that are swaps (excluding options) under the statutory definition and Commission rules were not regulated prior to Dodd-Frank. Thus, measured against a pre-Dodd-Frank Act reference point, Exempt Entities engaging in such swaps could experience costs attributable to the conditions placed upon the Final Order. For example, Exempt Entities were not subject to the Commission's routine regulatory inspection authorities with respect to records of Exempt Non-Financial Energy Transactions transacted bilaterally away from a trading facility prior to the enactment and effectiveness of the Dodd-Frank Act. The same was not true to the extent Exempt Non-Financial Energy Transactions are futures contracts, as such contracts have always been regulated by the Commission and Dodd-Frank did not fundamentally alter the futures regulatory scheme.

The Proposed Order expressly requested public comment on the Commission's cost-benefit considerations, including with respect to reasonable alternatives; the magnitude of specific costs and benefits (including data or other information to estimate a dollar valuation); and any impact on the public interest factors specified in CEA section 15(a).[152] Neither of the two comments received specifically addressed the Proposed Order's consideration of costs and benefits or otherwise provided data or other information to enable the Commission to better quantify the expected costs and benefits attributable to the Final Order. While, as a general matter, the Commission endeavors to quantify estimated costs and benefits where reasonably feasible, it considers the costs and benefits of this Final Order in qualitative terms only given that commenters did not provide data or information necessary for quantification.[153]

In the discussion that follows, the Commission considers the costs and benefits of the Final Order to the public and market participants, generally, and to Exempt Entities, specifically. As discussed above, the Commission has refined the Final Order to clarify several issues identified in the Petitioners' comment letter.[154] To the extent these refinements reflect a substantive choice among alternatives with potential cost-benefit significance, they are included in the discussion of alternatives, below. Finally, the Commission considers the Final Order's costs and benefits relative to the public interest factors enumerated in CEA section 15(a).

2. Costs

To Exempt Entities

The Final Order provides Exempt Entities with relief from regulatory requirements of the CEA for the narrow category of Exempt Non-Financial Energy Transactions engaged in between them. As with any exemption, this order is permissive, meaning that potentially eligible entities are not required to avail themselves of the relief it offers. Accordingly, the Commission presumes that an entity would rely on the Final Order only if the anticipated benefits warrant the costs. Here, the Final Order provides for the continued application of the Commission's general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, under the CEA and its implementing regulations, and additionally reserves the Commission's inspection authority for books and records that the Exempt Entities currently prepare and retain.[155] Accordingly, and to the extent Exempt Non-Financial Energy Transactions are jurisdictional agreements, contracts or transactions, the incorporation of these conditions within the Final Order generates no incremental costs beyond those that currently exist under the CEA, a point that no commenter disputed.

To Market Participants and the Public

The Commission has considered whether an exemption from the CEA for Exempt Non-Financial Energy Transactions engaged in between Exempt Entities will expose market participants and the public to the risks that the CEA guards against—a potential cost. For a variety of reasons, the Commission believes that it does not. These reasons—which were identified in the Proposed Order and not disputed by commenters—include the following:

- Exempt Non-Financial Energy Transactions are ill-suited for exchange trading, as evidenced by their bespoke nature to manage Exempt Entities' operational risks, and thus do not serve a material price discovery function.[156]
- The incentive structure for Exempt Entities—as generally limited to not-for-profit governmental, tribal, and IRC section 501(c)(12) or section 1381(a)(2)(c) electric cooperative entities [157]—is different than that of investor-owned entities and, according to Petitioners, mitigates incentives for fraud, manipulation, or other abusive practices against which Commission oversight and trading facility rules guard.[158]
- Exempt Non-Financial Energy Transactions are executed bilaterally

Major Swap Participants, 77 FR 55904 (Sept. 11, 2012); Swap Dealer and Major Swap Participant Recordkeeping, Reporting, and Duties Rules; Futures Commission Merchant and Introducing Broker Conflicts of Interest Rules; and Chief Compliance Officer Rules for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 77 FR 20128 (Apr. 3, 2012); Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012).

[152] 77 FR 50988, 51019 (Aug. 23, 2012).

[153] In the Proposed Order, the Commission noted that it could not quantify the costs and benefits of the relief provided therein because it did not have such information available to it; accordingly, the Commission requested commenters provide specific figures for its consideration. *See* Proposed Order at 51019. Because the core requirements of the Dodd-Frank Act are currently being implemented, the Commission's ability to quantify the costs and benefits of the Final Order is unchanged from when it published the Proposed Order.

[154] More specifically, as discussed above in section II, these refinements include several modifications to clarify: The definition of ''Exempt Entity,'' the definition of ''Exempt Non-Financial Energy Transaction,'' the Commission's right to revisit the terms of relief, the ability to manage price risk, retroactivity, and the categorical nature of relief.

[155] For example, Exempt Entities that receive financing from the RUS are required to keep records of all master agreements and term contracts for the procurement of goods and services. *See* 18 CFR 125.3 (Schedule of records and periods of retention); RUS Bulletin 180–2. Under the books and records inspection authority contained in the Proposed Order, the Commission could request any of these procurement agreements that document an Exempt Non-Financial Energy Transaction for the purchase or sale of ''electric energy delivered,'' as such term is defined in the Proposed Order.

[156] In the Proposed Order, the Commission noted its belief that the commercial risks that Exempt Non-Financial Energy Transactions face generally are not related to fluctuations in the price of a commodity, but are rather related to ensuring Exempt Entities' ability to meet production, transmission, and/or distribution obligations. Proposed Order at 51010. As previously discussed, however, the Commission has determined in the Final Order that Exempt Non-Financial Energy Transactions can also be used to hedge price risk of an underlying commodity, but only if ''arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers.'' *See supra* Section II.E.1; section B of the Final Order. The additional cost/benefit implications of this clarification are discussed in context of the Commission's Consideration of Alternatives, *infra* Section IV.C.4.

[157] As discussed in section II.A, above, to avoid confusion, the Commission has struck the explicit ''non-profit'' modifier from the fourth clause of the definition of Exempt Entity in the Final Order. As explained, FPA section 201(f) utilities may include for-profit subsidiaries that are wholly-owned by other not-for profit FPA section 201(f) utilities. Subsequent short-hand references in this Consideration of Costs and Benefits to ''not-for-profit electric utility entities'' or ''not-for-profit Exempt Entities'' are intended to include all subsidiary entities captured by Final Order, including those for-profit subsidiaries.

[158] *See* Proposed Order, 77 FR 51011.

within a closed-loop of non-financial, not-for-profit electric utility entities, are not market facing, and therefore have little, if any, ability to materially impact liquidity, fairness or financial security of derivative products trading on regulated exchanges.[159]

Besides carefully defining the boundaries for Exempt Non-Financial Energy Transactions between Exempt Entities, the Final Order incorporates conditions designed to protect the markets subject to the Commission's jurisdiction. Specifically, the Commission retains its general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, contained in the CEA and its implementing regulations. Additionally, the Commission retains authority to inspect books and records kept in the normal course of business, pursuant to its regulatory inspection authorities, in the event that circumstances warrant greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions and compliance with this Final Order. This retained authority to inspect books and records also provides a tool for the Commission to monitor any evolution and/or change in the usage of Exempt Non-Financial Energy Transactions to ensure that they conform to the expectations described in this order and that the relief provided herein remains appropriate and in the public interest. Accordingly, for the narrow subset of electric industry transactions covered by this Final Order, the Commission believes that the risk potential, at most, is remote and the prescribed conditions appropriate to contain it. The Final Order, therefore, should not give rise to any costs attributable to increased risk.

Next, the Commission considered the potential that price discovery in jurisdictional, non-exempt markets could be diminished because Exempt Entities, acting under the relief provide in this Final Order, eschewed such markets in favor of performing production and price risk management via Exempt Non-Financial Energy Transactions with one another. The Commission deems the risk of this occurring to be insignificant. While an underlying commodity may be similar or identical to that which underlies a standardized product available for trading in a non-exempt, jurisdictional market, the bespoke nature of Exempt Non-Financial Energy Transactions is such that it is unlikely that non-exempt market transactions would be an effective substitute for Exempt Entities going forward. As such, and in addition to the Commission's anticipation that the number of Exempt Entity transactions will be small relative to the total number of transactions in related non-exempt markets, any distortive impact on price discovery in Commission-regulated markets would be immaterial.

Similarly, the Commission considered whether the Final Order would have any impact on the efficiency, competitiveness,[160] and financial integrity of markets regulated under the CEA. Since Exempt Non-Financial Energy Transactions are executed bilaterally between non-financial entities primarily in order to satisfy existing or expected operations-related public service obligations, and since they are bespoke transactions, the Commission expects the exemptive relief provided herein to have little, if any, negative effect on market efficiency, competitiveness, or financial integrity of markets regulated by the CFTC.

The Commission does not view the various refinements that it incorporated in the Final Order in response to comments as altering the continuing logic or validity of these reasons; rather, as explained above,[161] these refinements are mostly technical in nature and clarify the Commission's intended scope and operation of the relief as necessitated by certain practical issues highlighted by commenters. Substantive changes are addressed below in the ''Consideration of Alternatives.'' [162]

3. Benefits

To Exempt Entities

Relative to no exemption, the Final Order will benefit Exempt Entities by lessening the likelihood that compliance with the CEA and Commission regulations would diminish their ability and/or incentives to continue to engage in Exempt Non-Financial Energy Transactions that, as described in the Petition, the Proposed Order, and above, are an operational tool relied upon by Exempt Entities to effectively execute their public service mission. The exemption will benefit Exempt Entities by providing assurances that these Exempt Non-Financial Energy Transactions upon which they rely are not subject to the CEA and Commission regulations.[163]

To the extent Exempt Non-Financial Energy Transactions are swaps, as a threshold matter, absent Commission action, CEA section 2(e) would prohibit Exempt Entities from executing them away from a registered DCM unless both Exempt Entity counterparties qualify as ECPs. The relevant criteria for determining ECP status varies for Exempt Entities that are governmental entities (or political subdivisions of governmental entities) and those that are not. For the former, governmental Exempt Entities must meet certain line of business requirements,[164] or ''own * * * and invest * * * on a discretionary basis $50,000,000 or more in investments.[165] For the latter, non-governmental Exempt Entities either must have: (a) Assets exceeding $10,000,000; (b) a guarantee for obligations; or, (c) greater than $1,000,000 net worth and ''enter * * * into an agreement, contract, or transaction in connection with the conduct of the entity's business or to manage the risk associated with an asset or liability owned or incurred or reasonably likely to be owned or incurred by the entity in the conduct of the entity's business.'' [166] While some of the larger Exempt Entities in particular may meet the definitional requirements to be ECPs, the Petition does not provide information evidencing that all Exempt Entities for all types of Exempt

[159] *See* Proposed Order, 77 FR 51010.

[160] More specifically with respect to competition, absent the exemptive relief provided herein, it is unclear whether Exempt Entities otherwise would qualify as ECPs, and thus be able to continue transacting Exempt Non-Financial Energy Transactions bilaterally with one another at all. Because many of the transactions exempted under the Final Order relate to longstanding and exclusive agreements between Exempt Entities, the limited relief provided in the exemption is not likely, in and of itself, to cause Exempt Entities to change the nature or frequency of conducting Exempt Non-Financial Energy Transaction with one another; rather, they will continue to carry out their public service obligations under standard industry practices, as was intended by Congress in adding CEA section 4(c)(6)(c).

[161] *See supra* Section II.

[162] *See supra* Section IV.C.4.

[163] The refinements that the Commission has made in the Final Order to clarify its terms and application reinforce these benefits. As discussed below with respect to benefits to market participants and the public, Exempt Entities' members and other customers should be the indirect beneficiaries of these avoided costs. The Commission is aware, however, that the Final Order stops short of providing the categorical relief requested by Petitioners, and thus does not give Exempt Entities exact certitude that any electric energy transactions not specifically covered under the terms of this Order entered into between Exempt Entities will not be subject to the requirements of the CEA.

[164] That is, have ''a demonstrable ability, directly or through separate contractual arrangements, to make or take delivery of the underlying commodity [or] incur * * * risks, in addition to price risk, related to the commodity.'' CEA section 1a(17)(A)(i) & (2) (as referenced in CEA section 1a(18)(A)(vii)(aa)). CEA section 1a(18)(A)(vii) specifies alternative criteria to qualify for governmental-entity ECP status that do not appear relevant given that Exempt Entities are not SDs, MSPs, or financial entities.

[165] CEA section 1a(18)(A)(vii)(bb).

[166] CEA section 1a(18)(A)(v).

Non-Financial Energy Transaction clearly would.[167]

If Exempt Entities are not ECPs, and given that Petitioners have represented that Exempt Non-Financial Energy Transactions are bespoke and therefore unsuitable for exchange trading, absent Commission action, non-ECP Exempt Entities would be unable to engage bilaterally in any Exempt Non-Financial Energy Transactions that are swaps. Relative to a circumstance that would preclude non-ECP Exempt Entities from continuing to engage in Exempt Non-Financial Energy Transactions that are swaps, the Final Order allows for the continued use of transactions that are closely related to Exempt Entities' public service mission to provide affordable, reliable electricity—a benefit. The Final Order also saves Exempt Entities the time and expense necessary to determine if they are ECPs. While under the Final Order, ECP status becomes largely irrelevant, without it, Exempt Entities may have to concern themselves with ECP status determinations as a threshold for engaging in certain transactions.

Even assuming, *arguendo,* that all Exempt Entities are ECPs, absent this Final Order, Exempt Non-Financial Energy Transactions engaged in by Exempt Entities in the normal course of carrying out their public service obligations would count towards the *de minimis* swap dealing threshold, and thus impact whether an Exempt Entity would need to register with the Commission as an SD or MSP.[168] The Final Order eliminates this possibility and any attendant compliance costs it might entail.[169]

Lastly, to the extent that Exempt Non-Financial Energy Transactions are swaps, the Final Order also avoids potential costs that Exempt Entities might incur to comply with swap data reporting and recordkeeping requirements as articulated in Commission regulations.[170]

Even for Exempt Non-Financial Energy Transactions that are not swaps, if Exempt Entities perceived some potential that they could be swaps (now or as they evolve in the future), Exempt Entities would likely need to expend resources to monitor contemplated transactions and make status determinations as to them. Moreover, the bespoke nature of these transactions could complicate the ability to generalize conclusions across transactions, potentially resulting in a need for more frequent, individualized assessments that could multiply determination costs. While the Commission lacks a basis to meaningfully project any such benefit in dollar terms, qualitatively it expects that the benefit would include the avoided costs of training staff to differentiate between swap and non-swap transactions and, in some cases at least, to obtain an expert legal opinion to support a determination. Additionally, uncertainty about whether a certain transaction would or would not be deemed a swap could prompt an Exempt Entity to forego a beneficial transaction or to substitute a transaction that served the operational needs less effectively. The Commission considers avoiding a result that would diminish the use of operationally-efficient Exempt Non-Financial Energy Transactions to be an important benefit.

To Market Participants and the Public

For reasons similar to those discussed in the Commission's analysis of the Proposed Order under CEA sections 4(c)(1) and 4(c)(6), the Commission asserts that this Final Order will benefit the public, generally.[171]

First, in that the Exempt Entities share the same public-service mission of providing affordable, reliable electricity to their customers, those aspects of the Final Order that benefit Exempt Entities directly should benefit their customers indirectly as well. For example, the Final Order would enable non-ECP Exempt Entities to engage in Exempt Non-Financial Energy Transactions, to the extent they are swaps, that would be barred to them under CEA section 2(e), or facilitate the likelihood that they would continue to engage in Exempt Non-Financial Energy Transactions that they might choose to forego for regulatory uncertainty or cost reasons absent the exemption. In these circumstances, Exempt Entity customers likely would be the ultimate beneficiaries (via supply reliability and affordability) of the operational risk-management and efficiencies that Exempt Non-Financial Energy Transactions afford. Similarly, to the extent that the Final Order enables Exempt Entities to avoid compliance and/or monitoring costs they would otherwise incur, the non-profit structure, conformance with requisite Internal Revenue Code guidelines, and public service mission that Exempt Entities share means that the cost savings should be passed through to members and other customers in the form of lower electricity prices.

Second, the public also benefits by the promotion of economic and financial innovation that this Final Order facilitates.[172] The unique environment in which these electric utilities must operate to reliably serve their customer load in the face of constantly fluctuating demand—compounded by the fact that many of these Exempt Entities do not enjoy the same economies of scale as investor-owned utilities—places a premium on innovative solutions to operational issues. Exempt Non-Financial Energy Transactions represent one such innovation. The Commission intends for the Final Order, as contemplated by Congress,[173] to provide Exempt Entities with regulatory certainty important to their ability to continue to develop and deploy innovative solutions through bespoke, closed-loop agreements, contracts, and transactions.

Accordingly, the Final Order provides an overall benefit to the public.

4. Consideration of Alternatives

The chief alternatives to this Final Order are for the Commission to (i)

[167] Furthermore, a comment letter submitted by two of the Petitioners in connection with the Commission rulemaking on the Further Definition of ''Swap Dealer,'' ''Security-Based Swap Dealer,'' ''Major Swap Participant,'' ''Major Security-Based Swap Participant,'' and ''Eligible Contract Participant,'' states that some not-for-profit consumer-owned electric utilities ''may not meet the financial tests listed in the definition of ECP due to the relatively small size of their physical assets.'' Letter from NRECA, APPA and LPPC dated February 22, 2011, RIN 3235–AK65, at 12.

[168] 77 FR 30596, 30744–45 (May 23, 2012).

[169] Further, to the extent the potential for triggering a registration requirement might otherwise deter Exempt Entities from engaging in Exempt Non-Financial Energy Transactions with one another, the Final Order benefits Exempt Entities by maintaining the current number of available counterparties for such transactions and exempting Exempt Entities from otherwise applicable reporting and recordkeeping requirements applicable to non-SDs/MSPs.

[170] *See* Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, 1232–40 (Jan. 9, 2012) (adopting 17 CFR part 43 regulations to implement real-time reporting). Swap Data Recordkeeping and Reporting Requirements 77 FR 2136, 2176–93 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 FR 35200, 35217–25 (June 12, 2012) (adopting 17 CFR part 46).

Swap Data Recordkeeping and Reporting Requirements 77 FR 2136 (Jan. 13, 2012) (adopting 17 CFR part 45); Swap Data Recordkeeping and Reporting Requirements: Pre-enactment and Transition Swaps 77 FR 35200 (June 12, 2012) (adopting 17 CFR part 46); *see also supra* Section II.E.3 (clarifying that exemptive relief is granted retroactively to the date of Dodd-Frank Act enactment to avoid costs associated with the reporting requirements for historical swaps).

[171] In that the impacted transactions are undertaken exclusively in a closed-loop environment from which financial participants are absent, the Commission does not foresee that derivative market participants beyond Exempt Entities will realize either a cost (as earlier discussed) or benefit impact.

[172] *See* Proposed Order, 77 FR 51009–10.

[173] *See* House Conf. Report No. 102–978, 1992 U.S.C.C.A.N. 3179, 3213 (''4(c) Conf. Report'').

decline to exercise its exemptive authority; (ii) adopt the Proposed Order without certain substantive changes made to the Final Order; or (iii) exercise its exemptive authority more broadly and without conditions as requested in the Petition or reiterated in the Petitioners' comment letter.

With respect to the first alternative—decline to exempt—the costs and benefit consideration is the mirror-image of that discussed above. A decision not to provide an exemption in this circumstance would preserve the current post-Dodd-Frank regulatory environment.

Relative to the second alternative—adopting the exemption as proposed—the Commission has made two substantive changes to the definition of Exempt Non-Financial Energy Transaction based upon Petitioners' comments. These are: i) Striking the requirement that Exempt Non-Financial Energy Transactions be ''intended for making or taking physical delivery of the commodity upon which the agreement, contract, or transaction is based'' (the ''physical delivery requirement''); and ii) consistent with the first change, explicitly clarifying that Exempt Non-Financial Energy Transactions can be used to ''manage supply and/or *price* risk.'' As explained above, the Commission premised these changes on the Petitioners' representation that, absent such changes, certain benefits sought through the exemption would be lost, namely regulatory certainty of knowing that price management transactions falling within one of the six defined transaction categories would be afforded greater regulatory relief than otherwise would be provided through the end-user exception.[174]

Eliminating the physical delivery requirement and clarifying that Exempt Non-Financial Energy Transactions may be used to manage price risk (as well as supply risk) arguably blurs the definitional distinction that the Proposed Order otherwise would have expressly provided between Exempt Non-Financial Energy Transactions and jurisdictional futures contracts.

However, even without the physical-delivery requirement and with the price-risk management clarification, the Commission does not expect the Final Order to undermine the exchange trading requirement for, or the Commission's oversight of, futures.[175] Indeed, the Commission intends the protection of the public interest affected through Commission oversight of such activity to be fully preserved. As clearly stated throughout the Final Order, a foundational basis for granting this exemptive relief is the Commission's understanding, based on Petitioners' representations, that Exempt Non-Financial Energy Transaction are undertaken solely to manage supply and/or price risks arising from Exempt Entities' public service obligation to supply electric energy to customers and are bespoke to meet the needs of particular Exempt Entities, and thus not suited to DCM trading (or DCO clearing).[176] The Commission expects this to continue to remain the case.[177] Accordingly, the Commission views the revised terms of the Final Order as preserving similar protections as the Proposed Order, while affording enhanced direct benefits for Exempt Entities.

The Commission also has revised the Final Order from what was proposed to accommodate Petitioners' request that final exemptive relief apply retroactively to the enactment of the Dodd-Frank Act. As a consequence, Exempt Entities will be saved any costs associated with determining whether certain Exempt Non-Financial Energy Transactions entered into prior to the effective date of the Final Order were historical swaps or not, and reporting those historical transactions to an SDR.[178] Given the Commission's understanding of the nature and volume of Exempt Non-Financial Energy Transactions between Exempt Entities, it believes that any diminution in benefit attributable to historical swap reporting will be *de minimis,* if any.

Relative to the third alternative of exercising its exemptive authority more broadly and in a manner that would provide categorical relief from all of the requirements of the CEA as requested by Petitioners in their original Petition, the Commission purposefully has defined the categories of exempt transactions more narrowly, and preserved certain aspects of CEA jurisdiction with respect to them. As reiterated in their comment letter,[179] Petitioners sought categorical relief for all Electric Operation-Related Transactions, regardless of whether the transactions fell within a specifically-defined category. The more open-ended categorical relief sought by Petitioners theoretically would lessen the burden on Exempt Entities to determine whether a transaction engaged in between them is or is not exempted compared to the more refined and limited definition of Exempt Non-Financial Energy Transactions that the Commission proposed. As stated previously in this release, however, while transactions may be relief-eligible under 4(c)(6), the Commission must ''determine that the exemption would be consistent with the public interest and purposes of [the] Act.'' [180] Commenters have not provided sufficient information for the Commission to make such a determination, or meaningfully quantify the costs and benefits that categorical relief, as distinguished from the relief provided in the Final Order, would confer on market participants and the public. Given the inability to foresee how these transactions may develop, the Commission considers it prudent and in the public interest to ring-fence the definition within stated parameters to restrict the potential for the transactions to evolve in a manner incompatible with the public interest and purposes of the CEA.

Finally, the exemption reserves the Commission's general anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, as well as the Commission's authority to review books and records already kept in the ordinary course of business in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions, and to ensure compliance with the terms of this Final Order.[181] Petitioners'

[174] *See* Petitioners' Letter at 5–6, 12.

[175] *See* CEA sections 2(h)(1) and 2(h)(8), 7 U.S.C. 2(h)(1), 2(h)(8). The same is true for swap clearing and DCM or SEF trade execution mandates.

[176] For the same reasons as represented by Petitioners, a foundational basis for exempting Exempt Non-Financial Energy Transactions that may be swaps is that they are not suited to SEF trading.

[177] The Final Order's reservation of authority to revisit terms and conditions serves as adequate protection that, over time, transactions subject to the exemption retain their foundational characteristics, including that they be (i) undertaken solely to manage supply and/or price risks arising from Exempt Entities' public service obligation to supply electric energy to customers and (ii) bespoke and are not otherwise suitable for exchange trading as futures. In the hypothetical event that, over time, this proves untrue, the Commission anticipates it would use its reserved authority to revisit the terms and conditions of this Final Order's exemptive relief to realign it with the Commission's understanding and expectations in this regard.

[178] *See supra* Section II.E.3.

[179] Petitioners' Letter at 11–12; *see also* Petition at 4–5.

[180] CEA section 4(c)(6), 7 U.S.C. 6(c)(6).

[181] As explained in the Proposed Order, the Commission believes that this reservation of authority serves important beneficial ends to ensure the integrity of commodity and commodity derivatives markets within its jurisdiction. To the extent Exempt Entities incur some cost to remain compliant with the CEA's anti-fraud and anti-manipulation regime, and the specified scienter-based prohibitions, the Commission considers such costs warranted by the importance of maintaining commodity market integrity. The Commission also

comment letter did not challenge the Proposed Order's imposition of these conditions on cost-benefit grounds, generally, though it did request that the Commission's reserved authority not explicitly include CEA section 4c(b) and regulation 32.4, as those provisions could be interpreted as a Commission determination that certain Exempt Non-Financial Energy Transactions constituted commodity options.[182] Reserving CEA section 4c(b) and regulation 32.4 should not be so interpreted. Furthermore, such reservations impose no additional costs on Exempt Entities, as currently they are subject to the Commission's authority under these provisions to the extent their transactions are options.

5. Consideration of CEA Section 15(a) Factors

a. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the Final Order will negatively affect the protection of market participants and the public. More specifically, Exempt Non-Financial Energy Transactions, as transacted bilaterally and in a closed loop between Exempt Entities in the highly specialized and unique electric-industry circumstances, do not appear to generate risks of the nature addressed by the CEA. The Commission has delineated the definitional boundaries for Exempt Entities and Exempt Non-Financial Energy Transactions in a manner that appropriately ring-fences against the possibility that they could generate such risks, either now or as they may evolve in the future. Moreover, the exemption incorporates conditions [183] to counter residual risk that conceivably, though unexpectedly, might survive notwithstanding the Final Order's definitional crafting.

b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission foresees little, if any, negative impact from the Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. This is because, to the extent any are jurisdictional, Exempt Non-Financial Energy Transactions entered into between Exempt Entities constitute only a narrow market segment limited to bespoke transactions, executed bilaterally between non-financial entities primarily in order to satisfy existing or expected operations-related public service obligations. Moreover, the Commission anticipates the Final Order will help to maintain the competitive landscape and efficiency of the market segment for Exempt Non-Financial Energy Transactions entered into between Exempt Entities. As previously discussed, the Final Order maintains the number of counterparties that Exempt Entities will be able to face—namely, other Exempt Entities with which they already conduct Exempt Non-Financial Energy Transactions—by exempting Exempt Non-Financial Energy Transactions between Exempt Entities from CEA section 2(e), and eliminates the possibility that entering into Exempt Non-Financial Energy Transactions will subject Exempt Entities to the full array of compliance costs arising from the Commission's ongoing oversight regime.[184] In addition, the Commission expects that the Final Order will contribute to operational efficiency in the market segment where Exempt Entities conduct Exempt Non-Financial Energy Transactions with one another by eliminating costs necessary to determine their regulatory status or the status of Exempt Non-Financial Energy Transactions.

Further, as an exercise of the Commission's CEA section 4(c) authority to provide legal certainty for novel instruments as Congress intended, the Final Order affords Exempt Entities transactional flexibility that the Commission understands to be valuable to their ability to efficiently deploy their limited resources.

c. Price Discovery

The Commission does not believe that the Final Order will materially impair price discovery in non-exempt, jurisdictional markets. The Commission recognizes that a desire to avoid regulation in theory could incentivize Exempt Entities to participate in Exempt Non-Financial Energy Transactions to a greater extent than they otherwise might choose to do, vis-à-vis related non-exempt markets. This is unlikely, however, due to the requirement that Exempt Non-Financial Energy Transactions be entered into only to manage supply and/or price risk arising from their public service obligations to physically supply electric energy service to customers, and only with other Exempt Entities. The relatively small size of trading in this market segment also renders it unlikely that the Final Order will materially impair price discovery in jurisdictional markets even were the Final Order to incentivize Exempt Entities to execute some of their customer-serving transactions pursuant to the Final Order instead of on a registered entity. Thus, against the backdrop of Congress' mandate to consider exempting transactions between FPA 201(f) entities, the Commission believes that the Final Order would not materially distort price discovery in non-exempt, jurisdictional markets.

d. Sound Risk Management Practices

The Final Order will promote the ability of Exempt Entities to manage the operational risks posed by unique electricity market characteristics, including the non-storable nature of electricity and demand that can and frequently does fluctuate dramatically within a short time-span. As discussed above, the Commission understands that Exempt Non-Financial Energy Transactions are an important tool facilitating the ability of Exempt Entities to efficiently manage operational risk in fulfillment of their public service mission to provide affordable, reliable electricity.

e. Other Public Interest Considerations

In exercising its exemptive authority under CEA sections 4(c)(1) and 4(c)(6) in the Final Order, the Commission is acting to promote the broader public interest in facilitating the generation, transmission, and delivery of affordable, reliable electric energy service as Congress contemplated.

V. Final Order

Based on the Petitioners' representations, and for the reasons set forth above, the Commission hereby

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believes that authority to inspect books and records kept in the ordinary course of business, pursuant to its regulatory inspection authority, as they relate to Exempt Non-Financial Energy Transactions is important to assure visibility into activity in such transactions on an as-needed basis. Further, as a general matter, the Commission expects to exert its regulatory inspection authority with respect to Exempt Non-Financial Energy Transactions infrequently; and, such authority would involve only records that Exempt Entities keep in the ordinary course of business, and only be exercised in the event that circumstances warrant the need to gain greater visibility with respect to Exempt Non-Financial Energy Transactions as they relate to Exempt Entities' overall market positions, and to ensure compliance with the terms of this Final Order. The Commission believes that any costs occasioned by this condition are de minimis.

[182] *See supra* Section II.D.

[183] These conditions include the reservation of the Commission's anti-fraud and anti-manipulation authority, and certain scienter-based prohibitions, as well as its authority to inspect books and records already kept in the normal course of business. Further, the Commission reserves the right to revisit the terms and conditions of the Final Order's relief and alter or revoke them as appropriate. *See* Section V.C.

[184] Exempt Entities may still incur minimal episodic compliance costs with respect to Exempt Non-Financial Energy Transactions if the Commission has a need to exercise its reserved authority.

exempts, pursuant to Commodity Exchange Act (''CEA'') sections 4(c)(1) and 4(c)(6), from all requirements of the CEA and Commission regulations issued thereunder, except those specified below, all Exempt Non-Financial Energy Transactions (as defined below) entered into solely between Exempt Entities (as defined below), retroactive to the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and subject to certain conditions (as detailed below):

A. *Exempt Entity* means (i) any electric facility or utility that is wholly owned by a government entity, as described in Federal Power Act (''FPA'') section 201(f), 16 U.S.C. 824(f); (ii) any electric facility or utility that is wholly owned by an Indian tribe recognized by the U.S. government pursuant to section 104 of the Act of November 2, 1994, 25 U.S.C. 479a–1; (iii) any electric facility or utility that is wholly owned by a cooperative, regardless of such cooperative's status pursuant to FPA section 201(f), so long as the cooperative is treated as such under Internal Revenue Code section 501(c)(12) or 1381(a)(2)(C), 26 U.S.C. 501(c)(12), 1381(a)(2)(C), and exists for the primary purpose of providing electric energy service to its member/owner customers at cost; or (iv) any other entity that is wholly owned, directly or indirectly, by any one or more of the foregoing. The term ''Exempt Entity'' does not include any ''financial entity,'' as defined in CEA section 2(h)(7)(C).

B. *Exempt Non-Financial Energy Transaction* means any agreement, contract, or transaction based upon a ''commodity,'' as such term is defined in CEA section 1a(9) and Commission regulation 1.3(e), that would not have been entered into, but for an Exempt Entity's need to manage supply and/or price risks arising from its existing or anticipated public service obligations to physically generate, transmit, and/or deliver electric energy service to customers. The term ''Exempt Non-Financial Energy Transaction'' excludes agreements, contracts, and transactions based upon, derived from, or referencing any interest rate, credit, equity or currency asset class, or any grade of a metal, or any agricultural product, or any grade of crude oil or gasoline that is not used as fuel for electric energy generation. The term ''Exempt Non-Financial Energy Transaction'' also excludes agreements, contracts, or transactions entered into on or subject to the rules of a registered entity, submitted for clearing to a derivatives clearing organization, and/or reported to a swap data repository. Exempt Non-Financial Energy Transactions are limited to the following categories, which may exist as stand-alone agreements or as components of larger agreements that combine the following categories of transactions:

1. *Electric Energy Delivered* transactions consist of arrangements in which a provider Exempt Entity agrees to deliver electric energy to a recipient Exempt Entity within a geographic service territory, load, or electric system over a period of time. Such transactions include ''full requirements'' contracts, under which one Exempt Entity becomes obligated to provide, and the recipient Exempt Entity becomes obligated to take, all of the electric energy the recipient needs to provide reliable electric service to its fluctuating electric load over a specified delivery period at one or multiple delivery points or locations, net of any electric energy the recipient is able to produce through generation assets that it owns.

2. *Generation Capacity* transactions consist of agreements in which a recipient Exempt Entity purchases from a provider Exempt Entity the right to call upon the provider Exempt Entity's electric energy generation assets to supply electric energy within a geographic area, regardless of whether such right is ever exercised for the purposes of the recipient Exempt Entity meeting its location-specific reliability obligations. Such transactions also may specify certain conditions that must exist prior to exercising the right to use an Exempt Entity's generation assets, or establish an agreement between Exempt Entities to share pooled electric generation assets in order to satisfy regionally-imposed demand side management program requirements.

3. *Transmission Services* transactions consist of arrangements in which a provider Exempt Entity owning transmission lines sells to a recipient Exempt Entity the right to deliver the recipient Exempt Entity's electric energy from one designated point on the transmission lines to another, at a price per wattage and over a period of time, in order for the recipient Exempt Entity to provide electric energy to its customers. Such transactions may include ancillary services related to transmission such as congestion management and system losses.

4. *Fuel Delivered* transactions consist of arrangements used to buy, sell, transport, deliver, or store fuel used in the generation of electric energy by an Exempt Entity. Additionally, Fuel Delivered transactions may include an agreement to manage the operational basis or exchange (*i.e.,* location or time of delivery) risk of an Exempt Entity that arises from its location-specific, seasonal or otherwise variable operational need for fuel to be delivered.

5. *Cross-Commodity Pricing* transactions consist of arrangements such as heat rate transactions and tolling agreements in which the price of electric energy delivered is based upon the price of the fuel source used to generate the electric energy. Cross-Commodity transactions also include fuel delivered agreements in which the price paid for fuel used to generate electric energy is based upon the amount of electric energy produced.

6. *Other Goods and Services* transactions consist of arrangements in which the Exempt Entities enter into an agreement to share the costs and economic benefits related to construction, operation, and maintenance of facilities for the purposes of generation, transmission, and delivery of electric energy to customers. In a full requirements contract between Exempt Entities that share ownership of generation assets, the provider Exempt Entity may determine how generation to meet the recipient Exempt Entity's full requirements will be allocated among the provider's independent generation assets, the jointly-owned generation assets, and the recipient's independent generation assets. Other Goods and Services transactions also may include agreements between Exempt Entities to operate each other's facilities, share equipment and employees, and interface on each other's behalf with third parties such as suppliers, regulators and reliability authorities, and customers, regardless of whether such agreements are triggered as contingencies in emergency situations only or are applicable during the normal course of operations of an Exempt Entity.

C. *Conditions.* The relief provided herein is subject to the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9 and 13, and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and Part 180. Additionally, the Commission reserves its authority to inspect books and records kept in the normal course of business that relate to Exempt Non-Financial Energy Transactions between Exempt Entities pursuant to the Commission's regulatory inspection authorities. The relief provided herein does not affect the jurisdiction of FERC or any other

government agency over the entities and transactions described herein. Furthermore, the Commission reserves the right to revisit any of the terms and conditions of the relief provided herein and alter or revoke such terms and conditions as necessary in order for the Commission to execute its duties and advance the public interests and purposes under the CEA, including a determination that certain entities and transactions described herein should be subject to the Commission's full jurisdiction.

Issued in Washington, DC, on March 28, 2013, by the Commission.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

Appendices to Order Exempting, Pursuant to Authority in Section 4(c) of the Commodity Exchange Act, Certain Transactions Between Entities Described in Section 201(f) of the Federal Power Act, and Other Electric Cooperatives—Commission Voting Summary and Statement of the Chairman

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final order regarding certain electricity and electricity-related energy transactions between rural electric cooperatives and/or federal, state, municipal, and tribal power authorities (as defined in section 201F of the Federal Power Act).

Congress authorized that these transactions be exempt from certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which is consistent with previous exemptions Congress has granted from the Federal Power Act. For decades, these entities have been generally recognized as performing a public service mission to provide their customers or cooperative members with reliable, affordable electric energy service. They have been largely exempt from regulation by the Federal Energy Regulatory Commission because of their government entity status or their not-for-profit cooperative status.

This final order responds to a petition filed by a group of these cooperatives and authorities and has benefitted from public input.

The scope of the final order is carefully tailored to physically backed electricity and electricity-related energy transactions that are necessary for the generation, transmission and delivery of electric energy services to customers.

[FR Doc. 2013–07633 Filed 4–1–13; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID DoD–2013–OS–0069]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Personnel and Readiness, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the *Paperwork Reduction Act of 1995,* the Office of the Under Secretary of Defense for Personnel and Readiness announces a proposed public information collection and seeks public comment on the provisions thereof. 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 information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by June 3, 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, docket number and title 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. Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Manpower Data Center, ATTN: Daniel McCarthy, 400 Gigling Road, Seaside, CA 93955, or call the DBIDS Office at 831–583–2400 x4744.

Title; Associated Form; and OMB Number: Application for Department of Defense Access Card—Defense Biometric Identification System (DBIDS) Enrollment; OMB Control Number 0704–0455.

Needs and Uses: This information collection requirement is needed to obtain the necessary data to verify eligibility for a Department of Defense physical access card for personnel who are not entitled to a Common Access Card or other approved DoD identification card. The information is used to establish eligibility for the physical access to a DoD installation or facility, detect fraudulent identification cards, provide physical access and population demographic reports, provide law enforcement data, and in some cases provide anti-terrorism screening.

Affected Public: Individuals or Households.

Annual Burden Hours: 195,929.

Number of Respondents: 1,621,487.

Responses per Respondent: 1.

Average Burden per Response: 7.25 Minutes.

Frequency: On Occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

Respondents are individuals who require physical access to DoD installations. Basic identifying information is collected from the individuals including several biometrics. Additional information may also be collected (such as contact information, vehicle information, organization affiliation, etc.) but is not required for that person to be registered and gain access to the controlled installation.

Dated: March 27, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–07508 Filed 4–1–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 49; OMB Control No. 9000–0102]

Submission for OMB Review; Prompt Payment

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension to a previously approved information collection requirement concerning prompt payment. A notice was published in the **Federal Register** at 78 FR 5450, on January 25, 2013. No comments were received.

DATES: Submit comments on or before May 2, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0102, Prompt Payment, by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0102, Prompt Payment''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0102, Prompt Payment'' on your attached document.

- *Fax:* 202–501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417. ATTN: Hada Flowers/IC 9000–0102, Prompt Payment.

Instructions: Please submit comments only and cite Information Collection 9000–0102, Prompt Payment, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Chambers, Procurement Analyst, Office of Acquisition Policy, GSA (202) 501–3221 or email *Edward.chambers@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Part 32 of the FAR and the clause at FAR 52.232–5, Payments Under Fixed-Price Construction Contracts, require that contractors under fixed-price construction contracts certify, for every progress payment request, that payments to subcontractors/suppliers have been made from previous payments received under the contract and timely payments will be made from the proceeds of the payment covered by the certification, and that this payment request does not include any amount which the contractor intends to withhold from a subcontractor/supplier. Part 32 of the FAR and the clause at 52.232–27, Prompt Payment for Construction Contracts, further require that contractors on construction contracts—

(a) Notify subcontractors/suppliers of any amounts to be withheld and furnish a copy of the notification to the contracting officer;

(b) Pay interest to subcontractors/suppliers if payment is not made by 7 days after receipt of payment from the Government, or within 7 days after correction of previously identified deficiencies;

(c) Pay interest to the Government if amounts are withheld from subcontractors/suppliers after the Government has paid the contractor the amounts subsequently withheld, or if the Government has inadvertently paid the contractor for nonconforming performance; and

(d) Include a payment clause in each subcontract which obligates the contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days after such amounts are paid to the contractor, include an interest penalty clause which obligates the contractor to pay the subcontractor an interest penalty if payments are not made in a timely manner, and include a clause requiring each subcontractor to include these clauses in each of its subcontractors and to require each of its subcontractors to include similar clauses in their subcontracts.

These requirements are imposed by Public Law 100–496, the Prompt Payment Act Amendments of 1988.

Contracting officers will be notified if the contractor withholds amounts from subcontractors/suppliers after the Government has already paid the contractor the amounts withheld. The contracting officer must then charge the contractor interest on the amounts withheld from subcontractors/suppliers. Federal agencies could not comply with the requirements of the law if this information were not collected.

B. Annual Reporting & Recordkeeping Burden

Data from the Federal Procurement Data System (FPDS) regarding fixed price construction contracts for Fiscal Year (FY) 2011 revealed that the number of affected contracts and, therefore, respondents has been reduced from the previously approved information collection. Based on the data, an estimated 2,679 contractors or respondents will provide an average of 18.27 responses per year to meet the requirements of this collection. The time required to assemble and prepare notification or certification regarding withhold is estimated at .11 hours per notice. This estimate is based on the assumption that some construction contractors will be required to notify the Government of withholding and others will have to provide their payment certification. This estimate also assumes automation of contractor records. The recordkeeping burden is based on the revised number of contracts for FY11 and the estimated hours from the previously approved collection.

Annual Reporting Burden

Respondents: 2,679.
Responses per Respondent: 18.27.
Total Responses: 48,950.
Hours per Response: .11.
Total Burden Hours: 5,384.

Annual Recordkeeping Burden

Recordkeepers: 4,450.
Hours per Recordkeeper: 18.
Total recordkeeping Burden Hours: 80,100.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1275 First Street NE., Washington, DC 20417, telephone (202) 501–4755. Please cite OMB Control No. 9000–0102, Prompt Payment, in all correspondence.

Dated: March 27, 2013.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2013–07589 Filed 4–1–13; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting

AGENCY: DoD.

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense announces the following Federal advisory committee meeting of the Defense Business Board.

DATES: The public meeting of the Defense Business Board (hereafter referred to as ''the Board'') will be held on Thursday, April 25, 2013. The meeting will begin at 12:30 p.m. and end at 3:00 p.m. (escort required; see guidance in **SUPPLEMENTARY INFORMATION**, ''Public's Accessibility to the Meeting.'')

ADDRESSES: Room 3E863 in the Pentagon, Washington, DC (escort required; see guidance in **SUPPLEMENTARY INFORMATION**, ''Public's Accessibility to the Meeting.'')

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer is Phyllis Ferguson, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Phyllis.Ferguson@osd.mil,* 703–695–7563. For meeting information please contact Ms. Debora Duffy, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *Debora.Duffy@osd.mil,* (703) 697–2168.

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting: At this meeting, the Board will deliberate the findings and draft recommendations from the ''Applying Best Business Practices for Corporate Performance Management to DoD'' Task Group Study; ''Major Business Issues for the 2014 Quadrennial Defense Review'' Task Group Study and ''Using Best Practices to Achieve More Effective Participation by Industry'' Task Group Study. The mission of the Board is to examine and advise the Secretary of Defense on overall DoD management and governance. The Board provides independent advice which reflects an outside private sector perspective on proven and effective best business practices that can be applied to DoD.

Availability of Materials for the Meeting: A copy of the agenda and the terms of reference for the Task Group study may be obtained from the Board's Web site at *http://dbb.defense.gov/meetings.shtml.* Copies will also be available at the meeting.

Meeting Agenda

12:30 p.m.–3:00 p.m. Task Group Outbrief and Board Deliberations on:

''Applying Best Business Practices for Corporate Performance Management to DoD,''

''Major Business Issues for the 2014 Quadrennial Defense Review,''

''Using Best Practices to Achieve More Effective Participation by Industry''

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Ms. Debora Duffy at the number listed in **FOR FURTHER INFORMATION CONTACT** no later than noon on Wednesday, April 17 to register and make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Metro Entrance with sufficient time to complete security screening no later than 12:10 p.m. on April 25. To complete security screening, please come prepared to present two forms of identification and one must be a picture identification card.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Ms. Duffy at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Procedures for Providing Public Comments

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public or interested organizations may submit written comments to the Board about its mission and topics pertaining to this public meeting.

Written comments should be received by the DFO at least five (5) business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via email to the address for the DFO given in this notice in either Adobe Acrobat or Microsoft Word format. Please note that since the Board operates under the provisions of the Federal Advisory Committee Act, as amended, all submitted comments and public presentations will be treated as public documents and will be made available for public inspection, including, but not limited to, being posted on the Board's Web site.

Dated: March 27, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–07537 Filed 4–1–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Advanced Placement (AP) Test Fee Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

Overview Information

Advanced Placement Test Fee Program. Notice inviting applications for new awards for fiscal year (FY) 2013.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.330B.

Dates:

Applications Available: April 2, 2013.

Deadline for Transmittal of Applications: June 3, 2013.

Deadline for Intergovernmental Review: July 31, 2013.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The AP Test Fee program awards grants to eligible State educational agencies (SEAs) to enable them to pay all or a portion of advanced placement test fees on behalf of eligible low-income students who (1) are enrolled in an advanced placement course and (2) plan to take an advanced placement exam. The program is designed to increase the number of low-income students who take advanced placement tests and receive scores for which college academic credit is awarded.

Program Authority: 20 U.S.C. 6534.

Applicable Regulations: (a) The Education Department General Administration Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 80, 81, 82, 84, 97, 98, and 99. (b) The Education Department suspension and debarment regulations in 2 CFR part 3485.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $28,727,000.

Estimated Range of Awards: $10,000–$8,000,000.

Estimated Average Size of Awards: $652,886.

Estimated Number of Awards: 44.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 12 months.

III. Eligibility Information

1. *Eligible Applicants:* SEAs in any State, including the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the freely associated states of the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau (subject to continued eligibility).

Note: For the purposes of this program, the Bureau of Indian Education in the U.S. Department of the Interior is treated as an SEA.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Supplement-Not-Supplant:* This program involves supplement-not-supplant funding requirements. Section 1706 of the ESEA requires that grant funds provided under the AP Test Fee program supplement, and not supplant, other non-Federal funds that are available to assist low-income individuals in paying for the cost of advanced placement test fees.

3. *Other:* Current grantees under this program that expect to have sufficient carryover funds to cover school year 2012–2013 advanced placement exam fees for eligible low-income students should not apply for a new award under this program.

IV. Application and Submission Information

1. *Address to Request Application Package:* To obtain an application package via the Internet use the following address: *www.ed.gov/programs/apfee/applicant.html.*

To obtain an application package from the Department use the following address: Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue SW., room 3E224, Washington, DC 20202–6200. Telephone: (202) 260–1541 or by email: *francisco.ramirez@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

3. *Submission Dates and Times:*

Applications Available: April 2, 2013.

Deadline for Transmittal of Applications: June 3, 2013.

Applications for grants under this program must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice. Deadline for Intergovernmental Review: July 31, 2013.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Data Universal Numbering System Number, Taxpayer Identification Number, Central Contractor Registry, and System for Award Management:* To do business with the Department, you must—

a. Have a Data Universal Numbering System (DUNS) number and a Taxpayer Identification Number (TIN);

b. Register both your DUNS number and TIN with the Central Contractor Registry (CCR)—and, after July 24, 2012, with the System for Award Management (SAM), the Government's primary registrant database;

c. Provide your DUNS number and TIN on your application; and

d. Maintain an active CCR or SAM registration with current information while your application is under review by the Department and, if you are awarded a grant, during the project period.

You can obtain a DUNS number from Dun and Bradstreet. A DUNS number can be created within one business day.

If you are a corporate entity, agency, institution, or organization, you can obtain a TIN from the Internal Revenue Service. If you are an individual, you can obtain a TIN from the Internal Revenue Service or the Social Security Administration. If you need a new TIN, please allow 2–5 weeks for your TIN to become active.

The CCR or SAM registration process may take five or more business days to complete. If you are currently registered with the CCR, you may not need to make any changes. However, please make certain that the TIN associated with your DUNS number is correct. Also note that you will need to update your registration annually. This may take three or more business days to complete. Information about SAM is available at SAM.gov.

In addition, if you are submitting your application via Grants.gov, you must (1) be designated by your organization as an Authorized Organization Representative (AOR); and (2) register yourself with Grants.gov as an AOR. Details on these steps are outlined at the following Grants.gov Web page: *www.grants.gov/applicants/get_registered.jsp.*

7. *Other Submission Requirements:* Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the AP Test Fee program, CFDA number 84.330B, must be submitted electronically using the Governmentwide Grants.gov Apply site at *www.Grants.gov*. Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not email an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement and submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions.

Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

You may access the electronic grant application for the AP Test Fee program at *www.Grants.gov*. You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search (e.g., search for 84.330, not 84.330B).

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted and must be date and time stamped by the Grants.gov system no later than 4:30:00 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not accept your application if it is received—that is, date and time stamped by the Grants.gov system—after 4:30:00 p.m., Washington, DC time, on the application deadline date. We do not consider an application that does not comply with the deadline requirements. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30:00 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors, including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this program to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov under News and Events on the Department's G5 system home page at *www.G5.gov.*

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications.

• You must upload any narrative sections and all other attachments to your application as files in a PDF (Portable Document) read-only, non-modifiable format. Do not upload an interactive or fillable PDF file. If you upload a file type other than a read-only, non-modifiable PDF or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by email. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (a Department-specified identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues With the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk, toll free, at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30:00 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically or by hand delivery. You also may mail your application by following the mailing instructions described elsewhere in this notice.

If you submit an application after 4:30:00 p.m., Washington, DC time, on the application deadline date, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that that problem affected your ability to submit your application by 4:30:00 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

• You do not have access to the Internet; or

• You do not have the capacity to upload large documents to the Grants.gov system; and

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue SW., room 3E224, Washington, DC 20202–6200. FAX: (202) 260–8969.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you

may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address:

U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330B), LBJ Basement Level 1, 400 Maryland Avenue SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 84.330B), 550 12th Street SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260. The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Review and Selection Process:* The Department intends to fund, at some level, all applications that meet the requirements for Approval of Application as described in the application package for this program and that demonstrate need for new or additional funds to pay advanced placement exam fees on behalf of low-income students for school year 2012–2013.

For FY 2013, the Department expects to award approximately $28,727,000 in new grants under this program. Based on the anticipated number of applications and other available information, the Department expects this amount to be sufficient to pay all but $10 of the cost of each advanced placement exam taken by low-income students. Accordingly, SEAs may use AP Test Fee program funds to cover a portion of the cost of each approved advanced placement exam taken by low-income students as follows: (a) Up to $45 for each Advanced Placement test administered by the College Board; (b) up to $94 for each Diploma Programme test administered by the International Baccalaureate Organization; and (c) up to $43.50 for each Advanced Subsidiary test and up to $71 for each Advanced test administered by Cambridge International Examinations.

Note: For FY 2013, AP Test Fee program funds may not be used to pay advanced placement test candidate registration fees on behalf of low-income students. Therefore, the candidate registration fees charged by the International Baccalaureate Organization and Cambridge International Examinations are not allowable costs under this program for FY 2013.

Also, in determining whether to approve an application for a new award (including the amount of the award) from an applicant with a current grant under this program, the Department will consider the amount of any carryover funds under the existing grant and the applicant's use of funds under previous AP Test Fee grant awards.

We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary also requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

2. *Special Conditions:* Under 34 CFR 74.14 and 80.12, the Secretary may impose special conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 34 CFR parts 74 or 80, as applicable; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 and section 1704(f) of the ESEA should you receive funding under the competition. The reporting requirements in 2 CFR part 170 do not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. The Secretary may also require more frequent performance reports under 34

CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* Under the Government Performance and Results Act of 1993 (GPRA), the Department has developed five performance measures to evaluate the overall effectiveness of the AP Test Fee program: (1) The number of advanced placement tests taken by low-income public school students nationally; (2) The number of advanced placement tests taken by minority (Hispanic, Black, Native American) public school students nationally; (3) The percentage of advanced placement tests passed (for AP exams, scores of 3–5) by low-income public school students nationally; (4) The number of advanced placement tests passed (for AP exams, scores of 3–5) by low-income public school students nationally; and (5) The cost per passage of an advanced placement test taken by a low-income public school student. The information provided by grantees in their final performance reports will be one of the sources of data for the measures. Other sources of data include the College Board, IB Americas, and University of Cambridge International Examinations.

VII. Agency Contact

FOR FURTHER INFORMATION CONTACT: Francisco Ramirez, U.S. Department of Education, 400 Maryland Avenue SW., Room 3E224, Washington, DC 20202–6200. Telephone: (202) 260–1541 or by email: *francisco.ramirez@ed.gov.*

If you use a TDD or a TTY, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: March 28, 2013.

Deborah Delisle,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2013–07635 Filed 4–1–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity (NACIQI)

AGENCY: U.S. Department of Education, Office of Postsecondary Education, National Advisory Committee on Institutional Quality and Integrity.

ACTION: Announcement of the time and location of the June 6–7, 2013 National Advisory Committee on Institutional Quality and Integrity (NACIQI) meeting.

ADDRESSES: U.S. Department of Education, Office of Postsecondary Education, 1990 K Street NW., Room 8072, Washington, DC 20006.

NACIQI'S Statutory Authority and Function: The NACIQI is established under Section 114 of the HEA of 1965, as amended, 20 U.S.C. 1011c. The NACIQI advises the Secretary of Education about:

- The establishment and enforcement of the criteria for recognition of accrediting agencies or associations under Subpart 2, Part H, Title IV, of the HEA, as amended.
- The recognition of specific accrediting agencies or associations or a specific State approval agency.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV, of the HEA, together with recommendations for improvement in such process.
- The relationship between (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions.
- Any other advisory function relating to accreditation and institutional eligibility that the Secretary may prescribe.

SUMMARY: This meeting notice is an update to the previous notice (Wednesday, February 13, 2013) and sets forth the time and location for the June 6–7, 2013, meeting of the National Advisory Committee on Institutional Quality and Integrity (NACIQI).

Meeting Date and Place: The NACIQI meeting will be held on June 6, 2013, from 8:00 a.m. to 5:30 p.m., and on June 7, 2013, from 8:00 a.m. to 5:30 p.m. at the Hyatt Arlington, 1325 Wilson Boulevard, Arlington, Virginia 22209.

Reasonable Accommodations: The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.,* interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least two weeks before the scheduled meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

FOR FURTHER INFORMATION CONTACT: Carol Griffiths, Executive Director, NACIQI, U.S. Department of Education, 1990 K Street NW., Room 8073, Washington, DC 20006–8129, telephone: (202) 219–7035, fax: (202) 219–7005, or email: *Carol.Griffiths@ed.gov.*

Electronic Access To This Document: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

David A. Bergeron,

Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Postsecondary Education.

[FR Doc. 2013–07627 Filed 4–1–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Agency Information Collection Extension

AGENCY: U.S. Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE), pursuant to the Paperwork Reduction Act of 1995, intends to extend for three years an information collection request with the Office of Management and Budget (OMB). Comments are invited on: (a) Whether the extended collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before June 3, 2013. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Written comments may be sent to Sarah Ball at 202–287–1563 or by fax at 202–287–1656 or by email at *sarah.ball@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Sarah Ball by email at *sarah.ball@hq.doe.gov.*

Information for the Excess Personal Property Furnished to Non-Federal Recipients and the Exchange/Sale Report is collected using GSA's Personal Property Reporting Tool and can be found at the following link: *https://gsa.inl.gov/property/.*

Information for the Annual Motor Vehicle Fleet Report and the Federal Fleet Report is collected using the Federal Automotive Statistical Tool and can be found at the following link: *https://fastweb.inel.gov/.*

SUPPLEMENTARY INFORMATION: This information collection request contains: (1) *OMB No.:* 1910–1000; (2) *Information Collection Request Title:* Exchange/Sale Report, Excess Personal Property Furnished to Non-Federal Recipients, Annual Motor Vehicle Fleet Report, Federal Fleet Report; (3) *Type of Review:* Renewal; (4) *Purpose:* The information being collected is data required in order to submit annual personal property reports as required by 41 CFR part 102 and the Office of Management and Budget. Respondents to this information collection request will be the Department of Energy's Management and Operating Contractor and other major site contractors; (5) *Respondents:* 44 respondents for each of the four reports equals 176 total respondents; (6) *Estimated number of burden hours:* The total estimated number of burden hours is 2,552. A breakout of burden hours for each report is listed below:

- The burden hours for responding to the Exchange/Sale Report are estimated at 5 hours for each of the 44 estimated respondents, for a total of 220 burden hours.
- The burden hours for responding to the Excess Personal Property Furnished to Non-Federal Recipients are estimated at 5 hours for each of the 44 estimated respondents, for a total of 220 burden hours.
- The burden hours for responding to the Annual Motor Vehicle Fleet Report are estimated at 24 hours for each of the 44 estimated respondents, for a total of 1056 burden hours.
- The burden hours for responding to the Federal Fleet Report are estimated at 24 hours for each of the 44 estimated respondents, for a total of 1056 burden hours.

Authority: (A) 41 CFR 102–39.85, (B) 41 CFR 102–36.295 and 102–36.300, (C) OMB Circular A–11 section 25.5, (D) 41 CFR 102–34.335.

Issued in Washington, DC, on March 26, 2013.

Paul Bosco,

Director, Office of Acquisition and Project Management.

[FR Doc. 2013–07629 Filed 4–1–13; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Orders Granting Authority To Import and Export Natural Gas, To Import Liquefied Natural Gas, To Export Liquefied Natural Gas and Vacating Prior Authority During December 2012

	FE Docket Nos.
DIAMOND CAPITAL INTERNATIONAL, LLC	12–33–NG
ACCESS GAS SERVICES (ONTARIO) INC.	12–118–NG
MONTANA-DAKOTA UTILITIES COMPANY	12–119–NG
BP ENERGY COMPANY	12–127–NG
ATLANTIC POWER ENERGY SERVICES (U.S.) LLC	12–145–NG
ACTIVE ENERGY CORP	12–147–NG
TRANSCANADA POWER MARKETING LTD.	12–149–NG
WALLER LNG SERVICES, LLC d/b/a WALLER POINT LNG	12–152–LNG
TEXAS EASTERN TRANSMISSION, L.P.	12–153–NG
SPRAGUE OPERATING RESOURCES LLC	12–154–NG
INTEGRYS ENERGY SERVICES, INC.	12–157–NG
POWEREX CORP.	12–159–NG
ALASKA PIPELINE COMPANY	12–160–NG
ENERGIA CHIHUAHUA, S.A. DE C.V.	12–162–NG
MEXICANA DE COBRE, S.A. DE C.V.	12–163–NG
ARIZONA PUBLIC SERVICE	12–165–NG
CHENIERE MARKETING, LLC	12–166–NG
TRANSALTA ENERGY MARKETING CORP.	12–167–NG
GDF SUEZ GAS NA LLC	12–171–LNG
CASTLETON COMMODITIES MERCHANT TRADING L.P.	12–177–NG

AGENCY: Office of Fossil Energy, Department of Energy (DOE).

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during December 2012, it issued orders granting authority to import and export natural gas and liquefied natural gas and vacating prior

authority. These orders are summarized in the attached appendix and may be found on the FE Web site at *http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders-2012.html.* They are also available for inspection and copying in the Office of Fossil Energy, Office of Natural Gas Regulatory Activities, Docket Room 3E–033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on March 20, 2013.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

APPENDIX—DOE/FE ORDERS GRANTING IMPORT/EXPORT AUTHORIZATIONS

Order No.	Date issued	FE Docket No.	Authorization holder	Description of action
3194	12/03/12	12–118–NG	Access Gas Services (Ontario) Inc.	Order granting blanket authority to import/export natural gas from/to Canada.
3195	12/03/12	12–119–NG	Montana-Dakota Utilities Company	Order granting blanket authority to import natural gas from Canada.
3196	12/03/12	12–127–NG	BP Energy Company	Order granting blanket authority to import/export natural gas from/to Canada/Mexico.
3197	12/03/12	12–145–NG	Atlantic Power Energy Services (US) LLC.	Order granting blanket authority to import/export natural gas from/to Canada.
3198	12/03/12	12–147–NG	Active Energy Corp	Order granting blanket authority to import/export natural gas from/to Canada.
3199	12/03/12	12–149–NG	TransCanada Power Marketing Ltd.	Order granting blanket authority to import natural gas from Canada.
3200	12/03/12	12–153–NG	Texas Eastern Transmission, LP.	Order granting blanket authority to import/export natural gas from/to Mexico.
3201	12/03/12	12–154–NG	Sprague Operating Resources LLC.	Order granting blanket authority to import natural gas from Canada.
3202	12/03/12	12–157–NG	Integrys Energy Services, Inc	Order granting blanket authority to import/export natural gas from/to Canada.
3203	12/03/12	12–159–NG	Powerex Corp	Order granting blanket authority to import/export natural gas from/to Canada/Mexico, and to import LNG from various international sources by vessel.
3204	12/03/12	12–160–NG	Alaska Pipeline Company	Order granting blanket authority to import natural gas from Canada.
3205	12/03/12	12–162–NG	Energia Chihuahua, S.A. de C.V.	Order granting blanket authority to export natural gas to Mexico.
3206	12/03/12	12–163–NG	Mexicana de Cobre, S.A. de C.V.	Order granting blanket authority to export natural gas to Mexico and vacating prior authority in DOE/FE Order No. 2929.
3207	12/03/12	12–165–NG	Arizona Public Service	Order granting blanket authority to import/export natural gas from/to Mexico.
3208	12/03/12	12–166–NG	Cheniere Marketing, LLC	Order granting blanket authority to import/export natural gas from/to Canada/Mexico, and to import LNG from various international sources by vessel, and to export LNG to Canada/Mexico by vessel/truck.
3209	12/03/12	12–167–NG	TransAlta Energy Marketing Corp.	Order granting blanket authority to import/export natural gas from/to Canada.
3210	12/03/12	12–171–NG	GDF Suez Gas NA LLC	Order granting blanket authority to import LNG from various international sources.
3087–A	12/03/12	12–33–NG	Diamond Capital International, LLC.	Order vacating blanket authority to import/export natural gas from/to Canada/Mexico, and to import LNG from various international sources by vessel, and to export LNG to Canada/Mexico by vessel/truck.
3211	12/20/12	12–152–LNG	Waller LNG Services, LLC d/b/a Waller Point LNG.	Order granting long-term multi-contract authority to export LNG by vessel from the Waller Point LNG Terminal in Cameron Parish, Louisiana, to Free Trade Agreement nations.
3212	12/28/12	12–177–NG	Castleton Commodities Merchant Trading L.P.	Order granting blanket authority to import/export natural gas from/to Canada/Mexico.

[FR Doc. 2013–07626 Filed 4–1–13; 8:45 am]
BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14498–000]

Lucid Energy, Inc., The City of Portland Water Bureau; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14498–000.

c. *Date filed:* February 13, 2013.

d. *Applicant:* Lucid Energy, Inc., The City of Portland Water Bureau.

e. *Name of Project:* Conduit 3 Hydroelectric Project.

f. *Location:* The proposed Conduit 3 Hydroelectric Project would be located near the intersection of Powell Boulevard and SE. 147th Avenue in Portland, Multnomah County, Oregon. The land on which all the project structures are located is owned by the co-applicant, the City of Portland Water Bureau.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Ms. Jan Lee, Water & Energy Resource Services P.O. Box 2517, Clackamas, OR 97105, Cell at (503) 545–9420, Fax at (503) 631–7299, and Email at *H20KW@aol.com*.

i. *FERC Contact:* Jake Tung, (202) 502–8757, *hong.tung@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. *Deadline for filing responsive documents:* Due to the small size of the proposed project, as well as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.34(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site at *http://www.ferc.gov/docs-filing/efiling.asp.* The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person 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.

l. *Description of the project:* The proposed Conduit 3 Plant Hydroelectric Project would consist of: (1) Four proposed customized pipe sections, each section containing a sealed, vertical turbine unit in the existing pipe; (2) four proposed power units with a total nameplate capacity of 170 kilowatts; (3) a proposed belowground, concrete vault to enclose the facility; and (4) appurtenant facilities. The applicant estimates the project would have an average annual generation of 1,200 megawatt-hours, which will be sold to PGE.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the web at *http://www.ferc.gov/docs-filing/elibrary.asp* using the ''eLibrary'' link. Enter the docket number, P–14498, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. *Protests or Motions to Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

p. All filings must (1) bear in all capital letters the title ''PROTEST,'' ''MOTION TO INTERVENE,'' ''COMMENTS,'' ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading, the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and seven copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

Dated: March 26, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–07543 Filed 4–1–13; 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: EC13–84–000.
Applicants: Pioneer Plains Wind Holdings, LLC, Blackwell Wind, LLC, Minco Wind III, LLC.
Description: Application of Pioneer Plains Wind Holdings, LLC, et. al. for Authorization Under Section 203 of the Federal Power Act and Request for Expedited Action.
Filed Date: 3/25/13.
Accession Number: 20130325–5158.
Comments Due: 5 p.m. ET 4/15/13.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2418–001.
Applicants: GP Big Island, LLC.
Description: Compliance filing to 8202013 to be effective 11/17/2010.
Filed Date: 3/26/13.
Accession Number: 20130326–5022.
Comments Due: 5 p.m. ET 4/16/01.

Docket Numbers: ER10–3178–001.
Applicants: Windstar Energy, LLC.
Description: Notice of Change in Status and Waiver Request of Certain Reporting Requirements of Windstar Energy, LLC.
Filed Date: 3/25/13.
Accession Number: 20130325–5212.
Comments Due: 5 p.m. ET 4/15/13.

Docket Numbers: ER11–2780–011.
Applicants: Safe Harbor Water Power Corporation.
Description: Notice of Change in Status of Safe Harbor Water Power Corporation.
Filed Date: 3/25/13.
Accession Number: 20130325–5166.
Comments Due: 5 p.m. ET 4/15/13.

Docket Numbers: ER11–3417–003; ER10–2895–006; ER11–2292–005; ER11–3942–004; ER11–2293–005; ER10–2917–006; ER11–2294–005; ER12–2447–003; ER10–2918–007; ER12–199–006; ER10–2920–006; ER10–1900–004; ER11–3941–004; ER10–2921–006; ER10–2922–006; ER10–3048–004; ER10–2966–006.
Applicants: Alta Wind VIII, LLC, Bear Swamp Power Company LLC, Brookfield Energy Marketing, Inc., Brookfield Energy Marketing LP, Brookfield Energy Marketing US LLC, Brookfield Renewable Energy Marketing US, LLC, Brookfield Smoky Mountain Hydropower LLC, Carr Street Generating Station, L.P., Coram California Development, L.P., Erie Boulevard Hydropower, L.P., FPL Energy Maine Hydro, LLC, Granite Reliable Power, LLC, Great Lakes Hydro America LLC, Hawks Nest Hydro LLC, Longview Fibre Paper and Packaging, Inc., Rumford Falls Hydro LLC, Brookfield Power Piney & Deep Creek LLC.
Description: Notice of Change in Status of the Brookfield Companies.
Filed Date: 3/25/13.
Accession Number: 20130325–5210.
Comments Due: 5 p.m. ET 4/15/13.

Docket Numbers: ER13–135–001.
Applicants: Brunswick Cellulose LLC.
Description: Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5196.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–136–001.
Applicants: Georgia-Pacific Brewton LLC.
Description: Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5174.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–137–001.
Applicants: Georgia-Pacific Cedar Springs LLC.
Description: Georgia-Pacific Cedar Springs LLC submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5203.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–138–001.
Applicants: Georgia-Pacfic Consumer Operations LLC, Palatka.
Description: Georgia-Pacfic Consumer Operations LLC, Palatka submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5220.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–140–001.
Applicants: Georgia-Pacific Consumer Operations LLC, Port Hudson.
Description: Georgia-Pacific Consumer Operations LLC, Port Hudson submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5215.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–141–001.
Applicants: Georgia-Pacific Consumer Products LP, Naheola.
Description: Georgia-Pacific Consumer Products LP, Naheola submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5211.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–142–001.
Applicants: Georgia-Pacific Consumer Products LP Savannah.
Description: Georgia-Pacific Consumer Products LP Savannah submits tariff filing per 35: Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5218.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–143–001.
Applicants: Georgia-Pacific LLC, Crossett.
Description: Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5197.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–144–001.
Applicants: Georgia-Pacific Monticello LLC.
Description: Georgia-Pacific Monticello LLC submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5208.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–145–001.
Applicants: Leaf River Cellulose, LLC.
Description: Leaf River Cellulose, LLC submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5204.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–146–001.
Applicants: Georgia-Pacific Toledo LLC.
Description: Georgia-Pacific Toledo LLC submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5212.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–147–001.
Applicants: Georgia-Pacific Consumer Products LP, Muskogee.
Description: Georgia-Pacific Consumer Products LP, Muskogee submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5206.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–148–001.
Applicants: Georgia-Pacific Consumer Products LP, Green Bay West.
Description: Georgia-Pacific Consumer Products LP, Green Bay West submits Compliance filing to be effective 10/17/2012.
Filed Date: 3/26/13.
Accession Number: 20130326–5199.
Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–797–002.
Applicants: EBRFUEL, LLC.
Description: EBRFUEL, LLC, FERC Electric Tariff to be effective 4/1/2013.

Filed Date: 3/26/13.

Accession Number: 20130326–5190.

Comments Due: 5 p.m. ET 4/16/13.

Docket Numbers: ER13–1163–000.

Applicants: Arizona Public Service Company.

Description: Palo Verde-Morgan 500kV Transmission Project Joint Participation Agreement to be effective 5/24/2013.

Filed Date: 3/25/13.

Accession Number: 20130325–5108.

Comments Due: 5 p.m. ET 4/15/13.

Docket Numbers: ER13–1164–000.

Applicants: American Electric Power Service Corporation, Ohio Power Company, PJM Interconnection, L.L.C.

Description: AEP submits new RAA Schedule 8.1 Appendix-Ohio Power Company FRR Capacity Rate to be effective 8/8/2012.

Filed Date: 3/25/13.

Accession Number: 20130325–5148.

Comments Due: 5 p.m. ET 4/15/13.

Take notice that the Commission received the following open access transmission tariff filings:

Docket Numbers: OA13–3–000.

Applicants: New York Independent System Operator, Inc.

Description: Annual Compliance Report Regarding Unreserved Use and Late Study Penalties of the New York Independent System Operator, Inc.

Filed Date: 3/26/13.

Accession Number: 20130326–5255.

Comments Due: 5 p.m. ET 4/16/13.

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: March 26, 2013.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2013–07587 Filed 4–1–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–104–000]

Columbia Gas Transmission, LLC; Notice of Request Under Blanket Authorization

Take notice that on March 15, 2013, Columbia Gas Transmission, LLC (Columbia) 5151 San Felipe, Suite 2500, Houston, Texas 77056, filed in Docket No. CP13–104–000, an application pursuant to sections 157.205, 157.208, and 157.216(b) of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to abandon and construct certain natural gas pipeline facilities in Johnson and Martin Counties, Kentucky, under Columbia's blanket certificate issued in Docket No. CP83–76–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Columbia proposes to abandon and replace approximately 6.5 miles of bare, coupled 10-inch diameter pipeline originally constructed in 1912 without cathodic protection on its Line PM–117 in Johnson and Martin Counties, Kentucky. Columbia also proposes to replace the abandoned pipeline with approximately 7.4 miles of new 6-inch diameter coated, cathodically protected, steel pipeline. Columbia states that the reduction in pipeline diameter would have no adverse effect on Columbia's ability to meet its operational and firm commitments on this pipeline. Columbia also states that it would cost approximately $15,400,000 to replace the aging pipe on Line PM–117.

Columbia states that because of the necessary relocation of a significant portion of Line PM–117, Columbia has identified 10 mainline consumer taps that would be abandoned as part of the proposed replacement. Columbia also states that continuity of service to the affected consumers would be maintained by converting them to an alternate energy source.

Any questions concerning this application may be directed to Fredric J. George, Senior Counsel, Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia 25325–1273 or via telephone at (304) 357–2359 or by facsimile (304) 357–3206.

This filing is available for review at the Commission 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 filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202) 502–8659. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Dated: March 26, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–07544 Filed 4–1–13; 8:45 am]

BILLING CODE 6717–01–P

[1] 22 FERC ¶ 62,029 (1983).

DEPARTMENT OF ENERGY

Western Area Power Administration

Pacific Northwest-Pacific Southwest Intertie Project—Rate Order No. WAPA–157

AGENCY: Western Area Power Administration, DOE.

ACTION: Notice of Final Transmission Service Rates.

SUMMARY: The Deputy Secretary of Energy confirmed and approved Rate Order No. WAPA–157 and Rate Schedules INT–FT5 and INT–NFT4, placing firm and nonfirm transmission service rates for the Pacific Northwest-Pacific Southwest Intertie Project (Intertie) of the Western Area Power Administration (Western) into effect on an interim basis. The provisional rates will be in effect until the Federal Energy Regulatory Commission (FERC) confirms, approves, and places them into effect on a final basis, or until they are replaced by other rates. The

provisional rates will provide sufficient revenue to pay all annual costs, including interest expense, and repay required investment within the allowable periods.

DATES: Rate Schedules INT–FT5 and INT–NFT4 are effective on the first day of the first full billing period beginning on or after May 1, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Murray, Rates Manager, Desert Southwest Customer Service Regional Office, Western Area Power Administration, P.O. Box 6457, Phoenix, AZ 85005–6457, (602) 605–2442, email *jmurray@wapa.gov.*

SUPPLEMENTARY INFORMATION: The previous Rate Schedules INT–FT4 and INT–NFT3 for Rate Order No. WAPA–130, were approved by FERC for a 5-year period through September 30, 2012.[1] These Rate Schedules were extended temporarily through September 30, 2013, under Rate Order No. WAPA–159.[2] Rate Schedules INT–FT4 and INT–NFT3 are being superseded by Rate Schedules INT–FT5 and INT–NFT4. Under Rate Schedule INT–FT4, the rate for firm point-to-point transmission service is $15.24 per kilowatt year (kW-year). The provisional rate for firm point-to-point transmission service under Rate Schedule INT–FT5 is $19.32/kW-year, which represents an increase of 26.8 percent when compared with the existing rate. Under Rate Schedule INT–NFT3, the rate for nonfirm point-to-point transmission service is 1.74 mills per kilowatt hour (mills/kWh). The provisional rate for nonfirm point-to-point transmission service under Rate Schedule INT–NFT4 is 2.21 mills/kWh, which represents an increase of 27 percent when compared with the existing rate.

By Delegation Order No. 00–037.00, effective December 6, 2001, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator, (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy, and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to FERC. Existing Department of Energy procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Under Delegation Order Nos. 00–037.00 and 00–001.00D, and in compliance with 10 CFR part 903 and 18 CFR part 300, I hereby confirm, approve, and place Rate Order No. WAPA–157 and the proposed rates for transmission service into effect on an interim basis. The new Rate Schedules INT–FT5 and INT–NFT4 will be submitted promptly to FERC for confirmation and approval on a final basis.

Dated: March 27, 2013.

Daniel B. Poneman,

Deputy Secretary of Energy.

In the matter of: Western Area Power Administration Rate Adjustment for the Pacific Northwest-Pacific Southwest Intertie Project.

Order Confirming, Approving, and Placing the Pacific Northwest-Pacific Southwest Intertie Project Transmission Service Rates Into Effect on an Interim Basis

These rates were established in accordance with section 302 of the Department of Energy (DOE) Organization Act (42 U.S.C. 7152). This Act transferred to and vested in the Secretary of Energy the power marketing functions of the Secretary of the Department of the Interior and the Bureau of Reclamation under the Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), as amended and supplemented by subsequent laws, particularly section 9(c) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(c)), and other Acts that specifically apply to the project involved.

By Delegation Order No. 00–037.00, effective December 6, 2001, the Secretary of Energy delegated: (1) The authority to develop power and transmission rates to Western's Administrator, (2) the authority to confirm, approve, and place such rates into effect on an interim basis to the Deputy Secretary of Energy, and (3) the authority to confirm, approve, and place into effect on a final basis, to remand, or to disapprove such rates to the Federal Energy Regulatory Commission. Existing DOE procedures for public participation in power rate adjustments (10 CFR part 903) were published on September 18, 1985.

Acronyms and Definitions

As used in this Rate Order, the following acronyms and definitions apply:

Administrator: Administrator for the Western Area Power Administration.

Balancing Authority (BA): The responsible entity that integrates resource plans ahead of time, maintains load-interchange-generation balance within a designated area, and supports interconnection frequency in real-time.

Capacity: The electric capability of a transformer, transmission circuit, or other equipment, expressed in kilowatts (kW).

Customer: An entity with a contract or service agreement that receives service from Western's Desert Southwest Region.

Deficits: Deferred or unrecovered annual expenses.

DOE: United States Department of Energy.

DOE Order RA 6120.2: A DOE order outlining power marketing administration financial reporting and ratemaking procedures.

Desert Southwest Region: The Desert Southwest Customer Service Region of Western.

FERC: Federal Energy Regulatory Commission.

Firm: A type of product and/or service that is available at the time requested by the customer.

FRN: **Federal Register** notice.

Intertie: Pacific Northwest-Pacific Southwest Intertie Project.

Kilovolt (kV): Electrical unit of measure of potential difference that equals 1,000 volts.

Kilowatt (kW): Electrical unit of capacity that equals 1,000 watts.

Kilowatt hour (kWh): Electrical unit of energy that equals 1,000 watts in 1 hour.

Kilowatt month (kW-month): Electrical unit of the monthly amount of capacity.

Kilowatt year (kW-year): Electrical unit of the yearly amount of capacity.

Mill: A monetary denomination of the United States that equals one tenth of a cent or one thousandth of a dollar.

Mills per kilowatt hour (mills/kWh): A unit of charge.

NEPA: National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*).

Nonfirm: A type of product and/or service not always available at the time requested by the customer.

Open Access Same Time Information System (OASIS): An electronic posting system that a service provider maintains for transmission access data that allows all customers to view information simultaneously.

O&M: Operation and Maintenance.

Power Repayment Study (PRS): A study used to determine how much revenue is needed to cover annual costs and future repayment obligations.

Proposed Rate: A rate that has been recommended by Western to the Deputy Secretary of Energy for approval.

Provisional Rate: A rate that has been confirmed, approved, and placed into effect on an interim basis by the Deputy Secretary of Energy.

PPW: Purchase Power and Wheeling.

Rate Brochure: A document prepared for public distribution explaining the rationale and background for the rate proposal contained in this rate order dated June 2012.

Reclamation: United States Department of Interior, Bureau of Reclamation.

[1] Rate Order No. WAPA–130 was approved by FERC on a final basis on March 18, 2008, in Docket No. EF08–5191–000 (122 FERC ¶ 62,236).

[2] Rate Order No. WAPA–159 was approved by the Deputy Secretary of Energy on August 27, 2012 (77 FR 54575; September 5, 2012), and filed with FERC for informational purposes only.

Western: Western Area Power Administration.

Effective Date

The new provisional rates will take effect on the first day of the first full billing period beginning on or after May 1, 2013, and will remain in effect through April 30, 2018, pending approval by FERC on a final basis.

Public Notice and Comment

Western followed the Procedures for Public Participation in Power and Transmission Rate Adjustments and Extensions, 10 CFR part 903, in developing these rates. The steps Western took to involve interested parties in the rate process were:

1. A FRN was published on June 11, 2012, (77 FR 34381) announcing the proposed rates for transmission service, initiating a public consultation and comment period, and setting forth the dates and locations of public information and public comment forums.
2. On June 14, 2012, Western notified all Intertie customers and interested parties of the rate adjustment and provided a copy of the published FRN.
3. On June 28, 2012, Western held a public information forum in Phoenix, Arizona. Western explained the proposed rates and potential changes to the proposed rates, answered questions, and provided rate brochures and presentation handouts.
4. On July 10, 2012, Western held a public comment forum in Phoenix, Arizona, to give the public an opportunity to comment for the record. Four individuals commented at this forum.
5. On August 14, 2012, Western received a data request for information.
6. On August 31, 2012, Western provided the information requested by sending a compact disc containing numerous electronic data files.
7. On September 10, 2012, Western received requests to extend the 90-day consultation and comment period to allow interested parties sufficient time to analyze the information Western distributed on August 31, 2012, and respond accordingly.
8. On September 19, 2012, Western's Acting Administrator extended the consultation and comment period through October 8, 2012.
9. On September 20, 2012, Western notified all Intertie customers and interested parties of the extension and provided a copy of the notice from Western's Acting Administrator.
10. Western received three comment letters during the consultation and comment period. All formally submitted comments have been considered in preparing this Rate Order.
11. Western provided a Web site for information about this rate adjustment process. The Web site is located at *www.wapa.gov/dsw/pwrmkt/Intertie/RateAdjust.htm.*

Comments

Representatives of the following organizations made oral comments: Arizona Power Authority, Phoenix, Arizona; Arizona Municipal Power Users' Association, Phoenix, Arizona; K.R. Saline & Associates, Mesa, Arizona; and Irrigation & Electrical Districts Association of Arizona, Phoenix, Arizona.

Written comments were received from the following organizations: Arizona Municipal Power Users' Association, Phoenix, Arizona; Griffith Energy LLC, Houston, Texas; and Irrigation & Electrical Districts Association of Arizona, Phoenix, Arizona.

Project Description

The Intertie was authorized by Section 8 of the Pacific Northwest Power Marketing Act of August 31, 1964 (16 U.S.C. 837g). The basic purpose of the Intertie was to provide, through transmission system interconnections among certain Federal and non-Federal power systems, maximum use of power resources to meet growing demands. This purpose was to be accomplished through the exchange of summer-winter surplus peaking capacity between the northwest and southwest to reduce capital expenditures for new generating capacity; the sale of northwest secondary energy to the southwest; the sale of southwest energy to the northwest to ''firm'' peaking hydroelectric sources during critical water years; conservation of significant amounts of fuel through the use of surplus hydroelectric energy; and increased efficiency in the operation of hydroelectric and thermal resources. As authorized, the Intertie was to be a cooperative construction venture by Federal and non-Federal entities, incorporating the capability for alternating current (AC) and direct current (DC) transmission service.

The Lower Colorado Region of Reclamation was assigned construction jurisdiction for: (i) The Celilo-Mead 750-kV DC transmission line from the Oregon-Nevada border to Mead Substation; (ii) Mead Substation; and (iii) all facilities south of Mead Substation. Several delays in construction funding for the Celilo-Mead 750-kV DC transmission line revised its estimated in-service date to the point that potential users withdrew their interest. This, and the subsequent lack of congressional funding, resulted in the May 1969 indefinite postponement of the Celilo-Mead 750-kV DC transmission line construction. The only facilities constructed were Mead Substation and all facilities south of Mead Substation, which provide AC transmission service. Pursuant to section 302 of the Department of Energy Organization Act (42 U.S.C. 7152), dated August 4, 1977, these Reclamation constructed facilities were transferred to Western.

Western's Desert Southwest Region administers these facilities as a stand-alone transmission project for operational, financial, and repayment purposes. The transmission facilities consist of a 256-mile, 500-kV transmission line from Mead Substation (Nevada) to Perkins Substation (Arizona); a 202-mile, 500-kV transmission line from Mead Substation to Adelanto Switching Substation (California); a 238-mile, 345-kV transmission line from Mead Substation to Liberty Substation (Arizona); a 19-mile, 230-kV transmission line from Liberty Substation to Westwing Substation (Arizona); and a 22-mile, 230-kV transmission line from Westwing Substation to Pinnacle Peak Substation (Arizona).

Existing and Provisional Rates

The existing rates for point-to-point transmission service consist of a firm rate and a nonfirm rate. The current rate for firm point-to-point transmission service under Rate Schedule INT–FT4 is $15.24/kW-year. The current rate for nonfirm point-to-point transmission service under Rate Schedule INT–NFT3 is 1.74 mills/kWh. The existing rates under Rate Schedules INT–FT4 and INT–NFT3 expire September 30, 2013.

The provisional rates will supersede the existing rates and become effective on an interim basis on the first day of the first full billing period beginning on or after May 1, 2013. The provisional rate for firm point-to-point transmission service under Rate Schedule INT–FT5 is $19.32/kW-year. The provisional rate for nonfirm point-to-point transmission service under Rate Schedule INT–NFT4 is 2.21 mills/kWh. The provisional rates will result in a rate increase of approximately 27 percent when compared to the existing rates. A comparison of the existing and provisional rates for transmission service follows:

COMPARISON OF EXISTING AND PROVISIONAL RATESPACIFIC NORTHWEST—PACIFIC SOUTHWEST INTERTIE PROJECT

Transmission service	Existing rates	Provisional rates (effective 5/1/13)	Change (percent)
Firm Point-to-Point	$15.24/kW-year	$19.32/kW-year	26.8
Nonfirm Point-to-Point	1.74 mills/kWh	2.21 mills/kWh	27.0

Certification of Rates

Western's Acting Administrator certified that the provisional rates for transmission service under Rate Schedules INT–FT5 and INT–NFT4 are the lowest possible rates consistent with sound business principles. The provisional rates were developed following administrative policies and applicable laws.

Transmission Rate Discussion

According to Reclamation Law, Western must establish rates sufficient to recover annual O&M, purchase power, transmission service and other costs, interest expense, and repay investments. Western prepares a PRS each fiscal year to determine if the existing rates will provide adequate revenues to repay all power system costs within the required time. Repayment criteria are based on existing law and applicable policies, including DOE Order RA 6120.2. To meet the cost recovery criteria outlined in DOE Order RA 6120.2, a PRS using the provisional rates has been developed to demonstrate that sufficient revenues will be available to meet future obligations.

The existing rates are insufficient and do not provide adequate revenues to cover costs. The revenue deficiency is a result of lower-than-projected sales of transmission service. The existing rates were based on projected sales of 500-kV transmission service increasing each year during the 5-year cost evaluation period. The actual demand for transmission capacity was significantly less than expected and the projected sales did not materialize. As a result, the revenue derived from the sales of 500-kV transmission service over the 5-year cost evaluation period has been considerably lower than planned. The provisional rates include a notable reduction in the sales forecast for 500-kV transmission service over the next 5-year cost evaluation period, which is the primary factor that led to the rate increase.

A secondary factor of the rate increase is that when the existing rates were established, purchase power was handled separately for each power system and the Intertie, being a stand-alone transmission project, had no purchase power costs to recover. Since then, Western's BA for the Desert Southwest Region has initiated power purchases for reliability purposes and the associated costs are allocated to all of the applicable transmission projects within the BA, including the Intertie. These annual purchase power costs are subject to recovery and have been included in the provisional rates.

Another factor impacting the rate increase is the requirement to pay off maturing debt associated with the original project. In 1970, a major element of the original project was placed into commercial service, which initiated the repayment cycle. This debt of $28.4 million must be paid by 2020, which is the last year this investment is allowed to remain unpaid. Principal payments for this debt have been included in the provisional rates.

Statement of Revenue and Related Expenses

The following table provides a summary of projected revenue and expense data for the provisional rates through the 5-year approval period.

INTERTIE TRANSMISSION RATES—COMPARISON OF 5-YEAR APPROVAL PERIOD—TOTAL REVENUES AND EXPENSES

	Existing rates ($000)	Provisional rates ($000)	Difference ($000)
Total Revenues	$172,149	$187,873	$15,724
Revenue Distribution			
Expenses:			
O&M	34,337	38,090	3,753
Purchase Power	0	3,700	3,700
Transmission Service & Other	9,232	8,411	(821)
Interest	91,105	92,206	1,101
Total Expenses	134,674	142,407	7,733
Principal Payments:			
Capitalized Deficits	34,188	30,092	(4,096)
Original Project and Additions	3,177	15,019	11,842
Replacements	110	355	245
Total Principal Payments	37,475	45,466	7,991
Total Revenue Distribution	172,149	187,873	15,724

Comments

The comments and responses regarding the proposed rates, paraphrased for brevity when not affecting the meaning of the statement(s), are discussed below. Direct quotes from comment letters are used for clarification where necessary.

Comment: Western should either suspend or terminate the rate adjustment until the next fiscal year since the existing rates have been extended until September 30, 2013.

Response: The existing rates do not provide sufficient revenue to cover all annual costs and repay outstanding debt within the allowable time frame. Since

the existing rates were set to expire on September 30, 2012, a temporary extension was requested so that Western could have additional time to complete the rate adjustment process. The proposed rates will supersede the existing rates when approved.

Comment: Customers wish to continue a dialogue with Western over certain costs that have been included in the proposed rates.

Response: These costs are associated with the PPW program for Western's BA in the Desert Southwest Region. Western is committed to working with its customers to ensure the allocation of purchase power costs is appropriate. An internal team is being formed to examine all aspects of the PPW program, including required reserves, and will work collaboratively with customers as additional information becomes available.

Comment: Western should consider phasing in the proposed rate increase over two or more years to lessen the negative impact on its customers. Western should develop lower rates as an alternative to its proposed rates.

Response: The proposed rates will provide adequate revenue to cover debt payments that must be made by 2020. It would not be financially prudent to delay the proposed rate increase. Such action would only shorten the period of time available to accumulate sufficient revenue and result in substantial rate increases until the outstanding debt is paid.

Comment: Western should extend the 90-day consultation and comment period to allow sufficient time to review and comment on the information provided in the data request response dated August 31, 2012.

Response: Western's Acting Administrator extended the consultation and comment period from September 10, 2012, to October 8, 2012. A copy of the notice of extension was sent to all Intertie customers and interested parties on September 20, 2012, and posted to Western's Web site at *www.wapa.gov/dsw/pwrmkt/Intertie/RateAdjust.htm* and to Western's OASIS at *www.oatioasis.com/WALC/index.html.*

Comment: Western should make available to all customers and interested parties the information provided in a data request response dated August 31, 2012.

Response: Concur. The information provided consisted of numerous electronic data files that were originally sent on a compact disc. Western posted a copy of these files to its Web site at *www.wapa.gov/dsw/pwrmkt/Intertie/RateAdjust.htm* on September 20, 2012.

Comment: Do the proposed rates include capitalized costs from the use of prepayments?

Response: The proposed rates do not include any construction projects that have been funded via prepayments. In addition, none of the customer approved construction projects for prepayment funding involve Intertie transmission facilities.

Comment: Has Western's Operations Consolidation Project or Balancing Authority Consolidation resulted in any cost increases that are included in the proposed rates?

Response: The proposed rates do not include any cost increases associated with these consolidation activities and efforts. The factors leading to the proposed rate increase are the continual shortfall in sales of 500-kV transmission service, inclusion of purchased power costs, and the required debt payments that must be made by FY 2020.

Comment: Does Western's BA in the Rocky Mountain Region have any cost impact on the proposed rates?

Response: The proposed rates only include costs associated with Western's BA in the Desert Southwest Region.

Comment: The proposed rate increase will cause prices for energy delivered by customers using the Intertie to become uncompetitive with other competing energy suppliers.

Response: Western acknowledges that the proposed rates represent a significant increase for the Intertie customers. However, Western is required to establish rates that are sufficient to recover annual costs and repay investments to satisfy the cost recovery criteria outlined in DOE Order RA 6120.2. The proposed rates are cost-based and do not include a rate of return on capital investment. Western will continue to explore methods to control costs and maintain stable transmission service rates.

Availability of Information

All brochures, studies, comments, letters, memorandums, and other documents that Western used to develop the provisional rates are available for inspection and copying at the Desert Southwest Customer Service Regional Office, Western Area Power Administration, 615 South 43rd Avenue, Phoenix, AZ 85009–5313. Many of these documents and supporting information are available on Western's Web site at *www.wapa.gov/dsw/pwrmkt/Intertie/RateAdjust.htm.*

Ratemaking Procedure Requirements

Environmental Compliance

In compliance with the NEPA of 1969 (42 U.S.C. 4321, *et seq.*); Council on Environmental Quality Regulations for implementing NEPA (40 CFR parts 1500–1508); and DOE NEPA Implementing Procedures and Guidelines (10 CFR part 1021), Western has determined that this action is categorically excluded from preparing an environmental assessment or an environmental impact statement.

Determination Under Executive Order 12866

Western has an exemption from centralized regulatory review under Executive Order 12866; accordingly, no clearance of this notice by the Office of Management and Budget is required.

Submission to the Federal Energy Regulatory Commission

The provisional interim rates herein confirmed, approved, and placed into effect, together with supporting documents, will be submitted to FERC for confirmation and final approval.

Order

In view of the foregoing and under the authority delegated to me, I confirm and approve on an interim basis, effective May 1, 2013, Rate Schedules INT–FT5 and INT–NFT4 for the Pacific Northwest-Pacific Southwest Intertie Project of the Western Area Power Administration. The rate schedules shall remain in effect on an interim basis pending FERC's confirmation and approval of them or substitute rates on a final basis through April 30, 2018.

Dated: March 27, 2013,

Daniel B. Poneman,
Deputy Secretary of Energy.

Certification of Rates

Western Area Power Administration

Desert Southwest Customer Service Region

I certify that the rates under Rate Schedules INT–FT5 and INT–NFT4 for the Pacific Northwest-Pacific Southwest Intertie Project were developed following administrative policies and applicable laws and the rates are the lowest possible, consistent with sound business principles.

Dated: February 13, 2013.

Anita J. Decker,
Acting Administrator.

Long-Term and Short-Term Firm Point-To-Point Transmission Service

Effective: The first day of the first full billing period beginning on or after May 1, 2013, and will remain in effect through April 30, 2018, or until superseded by another rate schedule.

Applicable: To firm point-to-point transmission service customers where

capacity and energy are supplied to the Pacific Northwest-Pacific Southwest Intertie Project (Intertie) transmission system at points of interconnection with other systems and transmitted and delivered, less losses, to points of delivery on the Intertie transmission system.

Long-Term Rate: For transmission service of one year or longer, the rate is $19.32 for each kilowatt (kW) per year, payable monthly at the rate of $1.61 for each kW per month.

Short-Term Rates: For transmission service up to one year, the maximum rate for each kW is as follows:

Monthly: $1.61
Weekly: $0.3715
Daily: $0.0529
Hourly: 2.21 mills

Discounts may be offered from time-to-time in accordance with Western's Open Access Transmission Tariff (OATT).

Billing: Western will bill firm point-to-point transmission service customers monthly by applying the rates listed above to the amount of capacity reserved. Payment for long-term transmission service will be required one month in advance of said service.

Character and Conditions of Service: Alternating current at 60 hertz, three-phase, delivered and metered at the voltages and points of delivery established by the service agreement or contract.

Adjustments for Reactive Power: There shall be no entitlement to transfer of reactive kilovolt-amperes at delivery points, except when such transfers may be mutually agreed upon by the customer and Western or their authorized representatives.

Adjustments for Losses: Capacity and energy losses incurred in connection with the transmission and delivery of capacity and energy under this rate schedule shall be supplied by the customer in accordance with the service agreement or contract. If losses are not fully provided by a customer, charges for financial compensation may apply.

Unreserved Use: Western will assess a charge for any unreserved use of the transmission system. Unreserved use occurs when a customer uses transmission service that it has not reserved or uses transmission service in excess of its reserved capacity. Unreserved use may also include a customer's failure to curtail transmission when requested.

The charge for unreserved use is two times the maximum allowable rate for the service at issue, assessed as follows: The penalty for a single hour of unreserved use is based on the daily short-term rate. The penalty for more than one assessment of unreserved use for any given duration (e.g., daily) increases to next longest duration (e.g., weekly). The penalty for multiple instances of unreserved use (e.g., more than one hour) within a day is based on the daily short-term rate. The penalty for multiple instances of unreserved use isolated to one calendar week is based on the weekly short-term rate. The penalty for multiple instances of unreserved use during more than one week in a calendar month is based on the monthly short-term rate.

A customer that exceeds its reserved capacity at any point of receipt or point of delivery, or a customer that uses transmission service at a point of receipt or point of delivery that it has not reserved, is required to pay for all ancillary services that were provided by the Western Area Lower Colorado (WALC) Balancing Authority and associated with the unreserved use. The customer will pay for ancillary services based on the amount of transmission service used and not reserved.

Nonfirm Transmission Service

Effective: The first day of the first full billing period beginning on or after May 1, 2013, and will remain in effect through April 30, 2018, or until superseded by another rate schedule.

Applicable: To nonfirm transmission service customers where capacity and energy are supplied to the Northwest-Pacific Southwest Intertie Project (Intertie) transmission system at points of interconnection with other systems and transmitted and delivered, less losses, to points of delivery on the Intertie transmission system.

Rate: The nonfirm transmission service rate is 2.21 mills for each kilowatt per hour. Discounts may be offered from time-to-time in accordance with Western's Open Access Transmission Tariff (OATT).

Billing: Western will bill nonfirm transmission service customers monthly by applying the rate listed above to the amount of capacity reserved.

Character and Conditions of Service: Alternating current at 60 hertz, three-phase, interruptible, delivered and metered at the voltages and points of delivery established by service agreement or in advance by Western. Curtailment conditions shall be determined by Western and in accordance with Western's OATT.

Adjustments for Reactive Power: There shall be no entitlement to transfer of reactive kilovolt amperes at delivery points, except when such transfers may be mutually agreed upon by the customer and Western or their authorized representatives.

Adjustment for Losses: Capacity and energy losses incurred in connection with the transmission and delivery of capacity and energy under this rate schedule shall be supplied by the customer in accordance with the service agreement or contract. If losses are not fully provided by a customer, charges for financial compensation may apply.

Unreserved Use: Western will assess a charge for any unreserved use of the transmission system. Unreserved use occurs when a customer uses transmission service that it has not reserved or uses transmission service in excess of its reserved capacity. Unreserved use may also include a customer's failure to curtail transmission when requested.

The charge for unreserved use is two times the maximum allowable rate for the service at issue, assessed as follows: The penalty for a single hour of unreserved use is based on the daily short-term rate. The penalty for more than one assessment of unreserved use for any given duration (e.g., daily) increases to next longest duration (e.g., weekly). The penalty for multiple instances of unreserved use (e.g., more than one hour) within a day is based on the daily short-term rate. The penalty for multiple instances of unreserved use isolated to one calendar week is based on the weekly short-term rate. The penalty for multiple instances of unreserved use during more than one week in a calendar month is based on the monthly short-term rate.

A customer that exceeds its reserved capacity at any point of receipt or point of delivery, or a customer that uses transmission service at a point of receipt or point of delivery that it has not reserved, is required to pay for all ancillary services that were provided by the Western Area Lower Colorado (WALC) Balancing Authority and associated with the unreserved use. The customer will pay for ancillary services based on the amount of transmission service used and not reserved.

[FR Doc. 2013–07618 Filed 4–1–13; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2013–0182; FRL–9382–3]

FIFRA Scientific Advisory Panel; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: There will be a 4-day meeting of the Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel (FIFRA SAP) to consider and review proposed Endocrine Disruptor Screening Program (EDSP) Tier 2 Ecotoxicity Tests.

DATES: The meeting will be held on June 25–28, 2013, from 9 a.m. to approximately 5:30 p.m.

Comments. The Agency encourages that written comments be submitted by June 11, 2013 and requests for oral comments be submitted by June 18, 2013. However, written comments and requests to make oral comments may be submitted until the date of the meeting, but anyone submitting written comments after June 11, 2013 should contact the Designated Federal Official (DFO) listed under **FOR FURTHER INFORMATION CONTACT**. For additional instructions, see Unit I.C. of the **SUPPLEMENTARY INFORMATION**.

Nominations. Nominations of candidates to serve as ad hoc members of FIFRA SAP for this meeting should be provided on or before April 16, 2013.

Webcast. This meeting may be webcast. Please refer to the FIFRA SAP's Web site, *http://www.epa.gov/scipoly/sap* for information on how to access the webcast. Please note that the webcast is a supplementary public process provided only for convenience. If difficulties arise resulting in webcasting outages, the meeting will continue as planned.

Special accommodations. For information on access or services for individuals with disabilities, and to request accommodation of a disability, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** at least 10 days prior to the meeting to give EPA as much time as possible to process your request.

ADDRESSES: The meeting will be held at the Environmental Protection Agency, Conference Center, Lobby Level, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA 22202.

Comments. Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2013–0182, 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.*

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

If your comments contain any information that you consider to be CBI or otherwise protected, please contact the DFO listed under **FOR FURTHER INFORMATION CONTACT** to obtain special instructions before submitting your comments.

Nominations, requests to present oral comments, and requests for special accommodations. Submit nominations to serve as ad hoc members of FIFRA SAP, requests for special seating accommodations, or requests to present oral comments to the DFO listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Sharlene Matten, DFO, Office of Science Coordination and Policy (7201M), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–0130; fax number: (202) 564–8382; email address: *matten.sharlene@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. This action may, however, be of interest to persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) and FIFRA. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

B. What should I consider as I prepare my Comments for EPA?

When submitting comments, remember to:

1. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

2. 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.

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.

C. How may I participate in this?

You may participate in this meeting by following the instructions in this unit. To ensure proper receipt by EPA, it is imperative that you identify docket ID number EPA–HQ–OPP–2013–0182 in the subject line on the first page of your request.

1. *Written comments.* The Agency encourages that written comments be submitted, using the instructions in **ADDRESSES**, no later than June 11, 2013, to provide FIFRA SAP the time necessary to consider and review the written comments. Written comments are accepted until the date of the meeting, but anyone submitting written comments after June 11, 2013 should contact the DFO listed under **FOR FURTHER INFORMATION CONTACT**. Anyone submitting written comments at the meeting should bring 30 copies for distribution to FIFRA SAP.

2. *Oral comments.* The Agency encourages that each individual or group wishing to make brief oral comments to FIFRA SAP submit their request to the DFO listed under **FOR FURTHER INFORMATION CONTACT** no later than June 18, 2013, in order to be included on the meeting agenda. Requests to present oral comments will be accepted until the date of the meeting and, to the extent that time permits, the Chair of FIFRA SAP may permit the presentation of oral comments at the meeting by interested persons who have not previously requested time. The request should identify the name of the individual making the presentation, the organization (if any) the individual will represent, and any requirements for audiovisual equipment (e.g., overhead projector, 35 mm projector, chalkboard). Oral comments before FIFRA SAP are limited to approximately 5 minutes unless prior arrangements have been made. In addition, each speaker should bring 25 copies of his or her comments and presentation slides for distribution to the FIFRA SAP at the meeting.

3. *Seating at the meeting.* Seating at the meeting will be open and on a first-come basis.

4. *Request for nominations to serve as ad hoc members of FIFRA SAP for this meeting.* As part of a broader process for developing a pool of candidates for each meeting, FIFRA SAP staff routinely solicits the stakeholder community for nominations of prospective candidates for service as ad hoc members of FIFRA SAP. Any interested person or organization may nominate qualified individuals to be considered as prospective candidates for a specific meeting. Individuals nominated for this meeting should have expertise in one or more of the following areas:

- Ecotoxicology (fish, avian, and/or amphibian toxicology);
- Comparative Endocrinology and Endocrine Toxicology;
- Histopathology;
- Biostatistics;
- Population Modeling;
- Regulatory toxicology/risk assessment;
- Invertebrate Toxicology and Endocrinology;
- Reproductive physiology;
- Developmental biology/toxicology;
- Thyroid physiology;
- Toxicological pathology;
- Morphometrics;
- Quantitative ecology/biostatistics; and
- Systems biology.

Nominees should be scientists who have sufficient professional qualifications, including training and experience, to be capable of providing expert comments on the scientific issues for this meeting. Nominees should be identified by name, occupation, position, address, and telephone number. Nominations should be provided to the DFO listed under **FOR FURTHER INFORMATION CONTACT** on or before April 16, 2013. The Agency will consider all nominations of prospective candidates for this meeting that are received on or before this date. However, final selection of ad hoc members for this meeting is a discretionary function of the Agency.

The selection of scientists to serve on FIFRA SAP is based on the function of the panel and the expertise needed to address the Agency's charge to the panel. No interested scientists shall be ineligible to serve by reason of their membership on any other advisory committee to a Federal department or agency or their employment by a Federal department or agency except the EPA. Other factors considered during the selection process include availability of the potential panel member to fully participate in the panel's reviews, absence of any conflicts of interest or appearance of lack of impartiality, independence with respect to the matters under review, and lack of bias. Although financial conflicts of interest, the appearance of lack of impartiality, lack of independence, and bias may result in disqualification, the absence of such concerns does not assure that a candidate will be selected to serve on FIFRA SAP. Numerous qualified candidates are identified for each panel. Therefore, selection decisions involve carefully weighing a number of factors including the candidates' areas of expertise and professional qualifications and achieving an overall balance of different scientific perspectives on the panel. In order to have the collective breadth of experience needed to address the Agency's charge for this meeting, the Agency anticipates selecting approximately 12–15 ad hoc scientists.

FIFRA SAP members are subject to the provisions of 5 CFR part 2634, Executive Branch Financial Disclosure, as supplemented by the EPA in 5 CFR part 6401. In anticipation of this requirement, prospective candidates for service on the FIFRA SAP will be asked to submit confidential financial information which shall fully disclose, among other financial interests, the candidate's employment, stocks and bonds, and where applicable, sources of research support. The EPA will evaluate the candidates financial disclosure form to assess whether there are financial conflicts of interest, appearance of a lack of impartiality or any prior involvement with the development of the documents under consideration (including previous scientific peer review) before the candidate is considered further for service on FIFRA SAP. Those who are selected from the pool of prospective candidates will be asked to attend the public meetings and to participate in the discussion of key issues and assumptions at these meetings. In addition, they will be asked to review and to help finalize the meeting minutes. The list of FIFRA SAP members participating at this meeting will be posted on the FIFRA SAP Web site at *http://www.epa.gov/scipoly/sap* or may be obtained from the OPP Docket or at *http://www.regulations.gov.*

II. Background

A. Purpose of FIFRA SAP

FIFRA SAP serves as the primary scientific peer review mechanism of EPA's Office of Chemical Safety and Pollution Prevention (OCSPP) and is structured to provide scientific advice, information and recommendations to the EPA Administrator on pesticides and pesticide-related issues as to the impact of regulatory actions on health and the environment. FIFRA SAP is a Federal advisory committee established in 1975 under FIFRA that operates in accordance with requirements of the Federal Advisory Committee Act. FIFRA SAP is composed of a permanent panel consisting of seven members who are appointed by the EPA Administrator from nominees provided by the National Institutes of Health and the National Science Foundation. FIFRA established a Science Review Board consisting of at least 60 scientists who are available to the SAP on an ad hoc basis to assist in reviews conducted by the SAP. As a peer review mechanism, FIFRA SAP provides comments, evaluations and recommendations to improve the effectiveness and quality of analyses made by Agency scientists. Members of FIFRA SAP are scientists who have sufficient professional qualifications, including training and experience, to provide expert advice and recommendation to the Agency.

B. Public Meeting

Section 408(p) of the Federal Food Drug and Cosmetic Act (FFDCA) requires the EPA to:

> Develop a screening program, using appropriate validated test systems and other scientifically relevant information, to determine whether certain substances may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or such other endocrine effect as the Administrator may designate (21 U.S.C. 346a(p)).

Subsequent to passage of the Food Quality Protection Act in 1996, which amended FFDCA and FIFRA, and amendments to the Safe Drinking Water Act the same year, the EPA formed the Endocrine Disruptor Screening and Testing Advisory Committee (EDSTAC), a Federal advisory committee of scientists and stakeholders that was charged by the EPA to provide recommendations on how to implement its EDSP. The EDSP is described in detail at the following Web site: *http://www.epa.gov/scipoly/oscpendo/.* Based on the recommendations from the EDSTAC (EDSTAC 1998), the EPA made a number of key decisions using the Administrator's discretionary authority to include not only the estrogen hormonal pathway, but the androgen and thyroid pathways of the endocrine system in humans as well as in wildlife.

The EDSTAC also recommended the Agency adopt a two-tiered screening and testing program. Tier 1 is an integrated battery of relatively short-term *in vitro* and *in vivo* assays designed to detect the potential of a chemical to

interact with the endocrine system, principally the estrogen, androgen, and thyroid hormonal pathways. Test chemicals determined to have the potential to interact with the endocrine system, based on a weight-of-evidence analysis of the results of Tier 1 screening and inclusive of other scientifically relevant information, would be considered for Tier 2 testing. Tier 2 tests consist of more comprehensive, long-term tests during various life stages and multiple generations enhanced with endocrine-specific endpoints across multiple taxonomic groups, including mammals, birds, fish, amphibians, and invertebrates. The purpose of Tier 2 testing is to identify any potential adverse outcome and provide quantitative concentration-response information that may be used for risk assessment.

The EDSP is mandated under FFDCA to use ''validated'' assays to screen and test for endocrine disrupting chemicals. The focus of this SAP review is on the validation status, based on Organization for Economic Co-Operation and Development (OECD) and Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) validation principles, for the proposed EDSP Tier 2 ecotoxicity tests including:

1. Japanese quail two-generation toxicity test.
2. Larval amphibian growth and development assay.
3. Medaka multigeneration test.
4. Mysid two-generation toxicity test.

The EDSP Tier 2 ecotoxicity tests have been developed and validated based on selected chemicals known to interact with the estrogen, androgen and/or thyroid hormonal pathways of the endocrine system. In general, the performance of respective Tier 2 ecotoxicity tests to determine the magnitude and duration of endocrine mediated effects and quantitatively assess concentration-response relationships will be the focus of this SAP. The SAP will be asked to comment on the reproducibility of results and factors that may impact interpretation of whether or not the proposed Tier 2 tests are sufficient to provide a more comprehensive assessment of the potential of a test chemical to cause endocrine mediated adverse effects in the subject taxa.

C. FIFRA SAP Documents and Meeting Minutes

EPA's background paper, related supporting materials, charge/questions to FIFRA SAP, FIFRA SAP composition (i.e., members and ad hoc members for this meeting), and the meeting agenda will be available approximately 15 days prior to the meeting. In addition, the Agency may provide additional background documents as the materials become available. You may obtain electronic copies of these documents, and certain other related documents that might be available electronically, at *http://www.regulations.gov* and the FIFRA SAP homepage at *http://www.epa.gov/scipoly/sap.*

FIFRA SAP will prepare meeting minutes summarizing its recommendations to the Agency approximately 90 days after the meeting. The meeting minutes will be posted on the FIFRA SAP Web site or may be obtained from the OPP Docket or at *http://www.regulations.gov.*

List of Subjects

Environmental protection, Pesticides and pests.

Dated: March 22, 2013.

Steven M. Knott,

Acting Director, Office of Science Coordination and Policy.

[FR Doc. 2013–07641 Filed 4–1–13; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Credit Administration Board; Sunshine Act; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act, of the regular meeting of the Farm Credit Administration Board (Board).

DATE AND TIME: The regular meeting of the Board will be held at the offices of the Farm Credit Administration in McLean, Virginia, on April 11, 2013, from 9:00 a.m. until such time as the Board concludes its business.

FOR FURTHER INFORMATION CONTACT: Dale L. Aultman, Secretary to the Farm Credit Administration Board, (703) 883–4009, TTY (703) 883–4056.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

SUPPLEMENTARY INFORMATION: Parts of this meeting of the Board will be open to the public (limited space available) and parts will be closed to the public. In order to increase the accessibility to Board meetings, persons requiring assistance should make arrangements in advance. The matters to be considered at the meeting are:

Open Session

Approval of Minutes

- March 14, 2013.

New Business

- Adjusting Civil Money Penalties for Inflation—Final Rule.
- Quarterly Report on Farm Credit System Condition.
- FCS Building Association Auditor's Report on 2012 Financial Audit.

Executive Session [1]

- Meeting with Auditors.

Closed Session [2]

- Office of Examination Supervisory and Oversight Activities Report

Dated: March 29, 2013.

Dale L. Aultman,

Secretary, Farm Credit Administration Board.

[FR Doc. 2013–07750 Filed 3–29–13; 4:15 pm]

BILLING CODE 6705–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 16, 2013.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *The Exempt Family Trust u/a Imogene P. Johnson 2012 Gift Trust and Helen P. Johnson-Leipold as trustee,* Racine, Wisconsin; as a member of the Johnson Family Control Group, to acquire voting shares of Johnson Financial Group, Inc., and thereby indirectly acquire voting shares of

[1] Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(2).

[2] Session Closed-Exempt pursuant to 5 U.S.C. 552b(c)(8) and (9).

Johnson Bank, both in Racine, Wisconsin.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Lisa J. Green,* Lawton, Oklahoma; as trustee of the 2000 Green Family Trust, to acquire voting shares of B.O.E. Bancshares, Inc., and thereby indirectly acquire voting shares of Liberty National Bank, both in Lawton, Oklahoma.

Board of Governors of the Federal Reserve System, March 27, 2013.

Michael J. Lewandowski,

Assistant Secretary of the Board.

[FR Doc. 2013–07519 Filed 4–1–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 26, 2013.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Equity Bancshares, Inc.,* Wichita, Kansas, to acquire preferred shares of Blue Valley Ban Corp., Overland Park, Kansas, and thereby cause Bank of Blue Valley, Overland Park, Kansas, to become a subsidiary of Equity Bancshares, Inc.

Board of Governors of the Federal Reserve System, March 27, 2013.

Michael J. Lewandowski,

Assistant Secretary of the Board.

[FR Doc. 2013–07518 Filed 4–1–13; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

[Document Identifier HHS–OS–18521–30D]

Agency Information Collection Activities; Proposed Collection; Public Comment Request

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: In compliance with section 3507(a)(1)(D) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, has submitted an Information Collection Request (ICR), described below, to the Office of Management and Budget (OMB). The ICR is for a new collection. Comments submitted during the first public review of this ICR will be provided to OMB. OMB will accept further comments from the public on this ICR during the review and approval period.

DATES: Comments on the ICR must be received on or before May 2, 2013.

ADDRESSES: Submit your comments to *OIRA_submission@omb.eop.gov* or via facsimile to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Information Collection Clearance staff, *Information. CollectionClearance@hhs.gov* or (202) 690–6162.

SUPPLEMENTARY INFORMATION: When submitting comments or requesting information, please include the document identifier HHS–OS–18521–30D for reference.

Information Collection Request Title: Evaluation of Implementation of the Viral Hepatitis Action Plan.

Abstract: In response to the viral hepatitis epidemic in the United States, the Department of Health and Human Services (HHS) released the Action Plan for the Prevention, Care, and Treatment of Viral Hepatitis (Action Plan) in May 2011 to provide a comprehensive strategic plan to address viral hepatitis B and C. Implementation of the Action Plan requires actions across a variety of agencies including national, state/local government, community-based organizations, and the private sector. The Evaluation of Implementation of the Viral Hepatitis Action Plan will assess state and local response to and activities that support the Action Plan, identify barriers to implementation and strategies to address these barriers, and inform future viral hepatitis efforts.

Need and Proposed Use of the Information: The purpose of this project is to evaluate the state and local response to and implementation of the Action Plan and examine viral hepatitis activities that are occurring in the four jurisdictions that have been pre-selected for the evaluation: Alabama, Massachusetts, New York, and Washington State. The information collected through the evaluation will position OASH to better understand implementation of the Action Plan at the state and local levels and barriers that might be occurring in the selected jurisdictions. The evaluation will also serve to examine the landscape of viral hepatitis activities that are taking place in the selected jurisdictions. The results of the evaluation will enable OASH to understand and identify potential strategies to strengthen local implementation of the Action Plan, address barriers, and inform future implementation efforts.

Likely Respondents: State Viral Hepatitis Prevention Coordinators (CDC-funded state health department staff); other state and local health department stakeholders such as HIV and Immunization Program staff; national organization representatives who are involved in viral hepatitis program development and advocacy; local viral hepatitis stakeholders including health care and substance abuse treatment providers, non-profit community-based organization staff and volunteers, and others identified by the State Viral Hepatitis Prevention Coordinator (see above).

Burden Statement: Burden in this context means the time expended by persons to generate, maintain, retain, disclose or provide the information requested. This includes the time needed to review instructions, to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information, to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information, and to transmit or otherwise disclose the information. The total annual burden

hours estimated for this ICR are summarized in the table below.

TOTAL ESTIMATED ANNUALIZED BURDEN—HOURS

Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Adult Viral Hepatitis Prevention Coordinators	4	1	1.5	6
State and local health departments	16	1	45/60	12
Community-based organizations	12	1	30/60	6
National organizations	12	1	30/60	6
Correctional facilities	12	1	30/60	6
Healthcare providers	12	1	30/60	6
Total				42

Keith A. Tucker,

Information Collection Clearance Officer.

[FR Doc. 2013–07541 Filed 4–1–13; 8:45 am]

BILLING CODE 4150–47–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Presidential Advisory Council on HIV/AIDS

AGENCY: Department of Health and Human Services, Office of the Secretary, Office of the Assistant Secretary for Health.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Service (DHHS) is hereby giving notice that the Presidential Advisory Council on HIV/AIDS (PACHA) will hold a meeting to discuss implementation of the Patient Protection and Affordable Care Act. The meeting will be open to the public.

DATES: The meeting will be held April 22, 2013, from 9:00 a.m. to approximately 5:30 p.m. (EDT).

ADDRESSES: U.S. Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201 in the Auditorium.

FOR FURTHER INFORMATION CONTACT: Ms. Caroline Talev, Public Health Assistant, Presidential Advisory Council on HIV/AIDS, Department of Health and Human Services, 200 Independence Avenue SW., Room 443H, Washington, DC 20201; (202) 205–1178. More detailed information about PACHA can be obtained by accessing the Council's Web site *www.aids.gov/pacha.*

SUPPLEMENTARY INFORMATION: PACHA was established by Executive Order 12963, dated June 14, 1995 as amended by Executive Order 13009, dated June 14, 1996. The Council was established to provide advice, information, and recommendations to the Secretary regarding programs and policies intended to promote effective prevention of HIV disease and AIDS. The functions of the Council are solely advisory in nature.

The Council consists of not more than 25 members. Council members are selected from prominent community leaders with particular expertise in, or knowledge of, matters concerning HIV and AIDS, public health, global health, philanthropy, marketing or business, as well as other national leaders held in high esteem from other sectors of society. Council members are appointed by the Secretary or designee, in consultation with the White House Office on National AIDS Policy. The agenda for the upcoming meeting will be posted on the Council's Web site at *www.aids.gov/pacha.*

Public attendance at the meeting is limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the designated contact person. Pre-registration for public attendance is advisable and can be accomplished by contacting Caroline Talev at *caroline.talev@hhs.gov.* Members of the public will have the opportunity to provide comments at the meeting. Any individual who wishes to participate in the public comment session must register with Caroline Talev at *caroline.talev@hhs.gov;* registration for public comment will not be accepted by telephone. Public comment will be limited to two minutes per speaker. Any members of the public who wish to have printed material distributed to PACHA members at the meeting should submit, at a minimum, 1 copy of the materials to Caroline Talev, no later than close of business Monday, April 15, 2013. Contact information for the PACHA contact person is listed above.

Dated: March 14, 2013.

B. Kaye Hayes,

Executive Director, Presidential Advisory Council on HIV/AIDS.

[FR Doc. 2013–07614 Filed 4–1–13; 8:45 am]

BILLING CODE 4150–43–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Call for Collaborating Partners for National Women's Health Week

AGENCY: Office on Women's Health, Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS), Office on Women's Health (OWH) invites public and private-sector health-related organizations to participate in National Women's Health Week (NWHW) as partners to help create awareness of women's health issues and educate women about improving their health and preventing disease.

DATES: Representatives of women's health organizations should submit expressions of interest no later than April 18, 2013.

ADDRESSES: Expressions of interest, comments, and questions may be submitted by electronic mail to *Henrietta.terry@hhs.gov* or by regular mail to Jill Wasserman, Office on Women's Health, Department of Health and Human Services, 200 Independence Avenue SW., Room 733E, Washington, DC 20201; or via fax to (202) 690–7172.

FOR FURTHER INFORMATION CONTACT: Henrietta Terry on (202) 205–1952.

SUPPLEMENTARY INFORMATION: The OWH was established in 1991 to improve the

health of American women by advancing and coordinating a comprehensive women's health agenda throughout HHS. The office fulfills its mission by advancing policy and issuing competitive contracts to an array of community, academic, and other organizations at the national and community levels. In addition, OWH's national educational campaigns provide information about the important steps women can take to improve and maintain their health, such as NWHW.

NWHW is a week-long health observance that kicks off on Mother's Day, Sunday, May 12 and ends Saturday, May 18, 2013. NWHW seeks to educate women about improving their physical and mental health and preventing disease. More than 2,200 events were held nationwide in 2012. Week-long, daily messages encourage women to make their health a top priority and take simple steps for a longer, healthier, and happier life. For more information about NWHW, please visit *http://womenshealth.gov/nwhw/.*

Dated: March 27, 2013.

Nancy C. Lee,

Deputy Assistant Secretary for Health—Women's Health.

[FR Doc. 2013–07617 Filed 4–1–13; 8:45 am]

BILLING CODE 4150–33–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 78 FR 5812, dated January 28, 2013) is amended to reflect the reorganization of the Office for State, Tribal, Local, and Territorial Support.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title and function statements for the Knowledge Management Office (CQA5), Office of the Director (CQA).

Revise the functional statement for the Public Health Law Office (CQA2), Office of the Director (CQA) as follows:

After item (8), insert the following: (9) establish collaboration and coordination between clinical medicine and public health to better coordinate and partner for healthier communities.

Dated: March 22, 2013.

Sherri A. Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2013–07582 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Statement of Organization, Functions, and Delegations of Authority

Part C (Centers for Disease Control and Prevention) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (45 FR 67772–76, dated October 14, 1980, and corrected at 45 FR 69296, October 20, 1980, as amended most recently at 78 FR 5812, dated January 28, 2013) is amended to reflect the reorganization of the Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

Section C–B, Organization and Functions, is hereby amended as follows:

Delete in its entirety the title and function statements for the Public Health Prevention Service Branch (CPLCC), Division of Leadership and Practice (CPLP).

Dated: March 22, 2013.

Sherri A. Berger,

Chief Operating Officer, Centers for Disease Control and Prevention.

[FR Doc. 2013–07545 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0338]

Center for Devices and Radiological Health: Experiential Learning Program

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration's (FDA) Center for Devices and Radiological Health (CDRH or Center) is announcing an invitation for participation in its Experiential Learning Program (ELP). The ELP provides a formal training mechanism for regulatory review staff to visit research, clinical, manufacturing, and health care facilities to observe firsthand how medical devices are designed, developed, and utilized. This training is intended to provide CDRH staff with an opportunity to observe the device development life cycle and provide a better understanding of the medical devices they review, and the challenges faced throughout development, testing, manufacturing, and clinical use. The purpose of this document is to invite medical device and health care facilities to participate in this formal training program for FDA's medical device review staff, or to contact CDRH for more information regarding the program.

DATES: Submit either an electronic or written request for participation in this program by May 2, 2013. The request should include a description of your facility relative to product areas CDRH regulates. Please include the Area of Interest/Medical Device or Technology (identified in table 1or 2) that the visit will demonstrate to CDRH staff.

ADDRESSES: Submit either electronic requests to *http://www.regulations.gov* or written requests to the Division of Dockets Management (HFA–305), 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: Latonya Powell, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4448, Silver Spring, MD 20993–0002, 301–796–6965, FAX: 301–827–3079, *Latonya.powell@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

CDRH launched the ELP Pilot in 2012 and will fully implement the program in 2013. The Center is responsible for ensuring the safety and effectiveness of medical devices marketed in the United States. Furthermore, CDRH assures that patients and providers have timely and continued access to safe, effective, high-quality medical devices and safe radiation-emitting products. In support of this mission, the Center launched various training and development initiatives to enhance performance of its regulatory review staff and other staff involved in the premarket review process. CDRH is driven to advance regulatory science; provide industry with predictable, consistent, transparent, and efficient regulatory pathways; and assure consumer

confidence in medical devices marketed in the United States and throughout the world. This program is a collaborative effort to enhance communication and facilitate the premarket review process. Furthermore, CDRH is committed to understanding current industry practices, innovative technologies, and regulatory impacts and needs.

These formal training visits are not a mechanism for FDA to inspect, assess, judge, or perform a regulatory function (i.e., compliance inspection), but rather, are an opportunity to provide the CDRH review staff a better understanding of the products they review. Through this notice, CDRH is formally requesting participation from companies, academia, and clinical facilities. This request includes those that have previously participated in the ELP or other FDA Site Visit programs, as well as new interested parties.

II. ELP

A. Experiential Learning Program

In this program, groups of CDRH staff will observe operations of medical device establishments, including, research, manufacturing, academia, and health care facilities. The areas of focus and specific areas of interest for visits may include the following:

TABLE 1—AREAS OF INTEREST—MEDICAL DEVICES/TECHNOLOGY

Focus area	Specific areas of interest
Performance validation and reliability testing of intensive care unit ventilator and anesthesia gas machines.	Ventilators, continuous positive airway pressure devices, anesthesia gas machines, and closed-loop ventilators.
Implantation techniques for spinal devices	Implantation training and assessment using cadavers and direct observation of surgical procedures for spinal implants including, but not limited to, lateral intervertebral body fusion devices, minimally invasive pedicle screw systems, and spinous process plates.
Manufacturing of ultra-high molecular weight polyethylene device components.	All joint replacement devices.
Clinical use of orthopedic bone void filler devices	Observation of surgical procedures (posterolateral spine fusion, foot, ankle) utilizing bone void fillers.
Reprocessing methods and techniques in the clinical environment.	Cleaning and sterilization methods and techniques for endoscopes (including colonoscopes, duodenoscopes, cystoscopes, etc.) and accessories; automatic endoscope reprocessors.
Bariatric surgery	Observation of bariatric surgical techniques, with and without bariatric devices.
Manufacturing and assessment of hemodialyzers and filters	Hemodialyzers, hemofilters, hemoconcentrators, ultrafilters, and plasma filters.
Sourcing and manufacturing of animal-derived collagen	Surgical meshes, wound dressings.
Traumatic wound care, management, and treatment	Observation of clinical uses of wound management/treatment devices and hemostatic products for use on traumatic injuries.
Clinical use of plastic and reconstructive devices	Observation of surgical procedures utilizing surgical meshes, dermal fillers, hemostatic agents, and bone waxes.
Treatment of acute ischemic stroke	Clot retrieval procedures, clot retrieval devices and ancillary products (medications, angiograms), stroke centers, and acute stroke care programs.
Clinical use of neurosurgical monitoring devices	Neuro-evoked response devices that are used for real-time monitoring of patients undergoing a back procedure.
Clinical use of rehabilitation devices	Clinical use of physical medicine devices (prostheses, pressure-relieving seat cushions, tilt-in-space wheelchairs, and devices for pain relief) in a rehabilitation center setting for treatment of various conditions (e.g., spinal cord injuries, traumatic brain injuries, and amputations).
Clinical use of cardiovascular devices	Endovascular stent grafts and associated delivery systems; Stents and associated delivery systems.
Manufacturing of cardiovascular devices	Drug coated devices (e.g., stents and balloons), endovascular stent grafts and associated delivery systems, stents and associated delivery systems, percutaneous heart valves.
Animal testing for chronic care cardiovascular devices	Observation of surgical procedures and chronic care maintenance in animal models using chronic care cardiovascular devices, such as heart valves and ventricular assist devices.
Manufacturing of contact lenses and care products	All contact lenses and care products.
Treatment of severe hearing loss	Surgical implantation of cochlear implants, electro-acoustic stimulation using hybrid cochlear implants, preservation of residual hearing, postoperative evaluation of residual hearing and implant performance.
Auditory brainstem implants (ABIs)	Observation of ABI surgical procedures.
Management of clinical trials for medical devices	Understanding clinical trial infrastructure, roles/responsibilities of your organization, and relationships with other organizations involved in the management and conduct of clinical trials; institutional review boards; clinical research organizations.

TABLE 2—AREAS OF INTEREST—IN VITRO DIAGNOSTIC DEVICES/TECHNOLOGY

Focus area	Specific areas of interest
Manufacturing and development of molecular/immunology devices.	Molecular diagnostics devices, and companion diagnostics devices.
Manufacturing, development, and assessment of cytology/pathology devices.	Semiautomated cytology screening devices; cytology collection devices use in human papillomavirus tests; immunohistochemistry tests development in clinical trials.
Manufacturing of microbiology devices	Antimicrobial susceptibility devices.

TABLE 2—AREAS OF INTEREST—IN VITRO DIAGNOSTIC DEVICES/TECHNOLOGY—Continued

Focus area	Specific areas of interest
Manufacturing of chemistry devices	Clinical Laboratory Improvement Amendments (CLIA) waived devices, blood collection tubes, fecal occult blood devices.
Manufacturing and development of hematology devices	Hematology analyzers (specific interest in new technology).
Manufacturing and development of coagulation devices	Coagulation assays and controls, platelet aggregatometers devices, prothrombin time/international normalized ratio meters and assays, D-Dimer analyzers and assays.
Observation of clinical testing in a CLIA high complexity laboratory.	Observation of testing in a clinical testing environment.

B. Site Selection

CDRH will be responsible for all travel expenses associated with the site visits. Therefore, selection of potential facilities will be based on the coordination of CDRH's priorities for staff training and the resources available for this program. In addition to logistical and other resource factors, all sites must have a successful compliance record with FDA or another Agency with which FDA has a memorandum of understanding. If a site visit involves a visit to a separate physical location of another firm under contract to the applicant, that firm must agree to participate in the program and must also have a satisfactory compliance history.

III. Request for Participation

Identify requests for participation with the docket number found in the brackets in the heading of this document. Received requests are available for public examination in the Division of Dockets Management (see **ADDRESSES**) between 9 a.m. and 4 p.m., Monday through Friday.

Dated: March 28, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07593 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0305]

Possible Role of Independent Third Parties in Industry-Sponsored Tobacco Product Research; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of docket; request for data, information, and comments.

SUMMARY: The Food and Drug Administration (FDA) is establishing a public docket for interested parties to submit to FDA comments on the Institute of Medicine's (IOM) recommendation regarding third-party governance of industry-sponsored tobacco product research.

DATES: Submit electronic or written comments by September 30, 2013.

ADDRESSES: You may submit comments, identified by Docket No. FDA–2013–N–0305, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

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

Written Submissions

Submit written submissions in the following ways:

• *Mail/Hand delivery/Courier (for paper or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2013–N–0305. All comments received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Laila Noory, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373 (choose Option 4), FAX: 240–276–3761, email: *CTP.3PGovernance@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 22, 2009, President Obama signed into law the Family Smoking Prevention and Tobacco Control Act (Pub. L. 111–31) (Tobacco Control Act). The Tobacco Control Act amends the Federal Food, Drug, and Cosmetic Act (the FD&C Act) by adding chapter IX (21 U.S.C. 387 *et seq.*) and grants FDA authority to regulate the manufacture, marketing, and distribution of tobacco products to protect public health generally and to reduce tobacco use by minors.

FDA expects that tobacco product manufacturers will undertake tobacco product research as part of activities regulated under the Tobacco Control Act, including submission of applications for marketing orders under sections 910 and 911 of the FD&C Act. Section 911 of the FD&C Act requires FDA to issue regulations or guidance (or any combination thereof) on the scientific evidence required for assessment and ongoing review of modified risk tobacco products (MRTPs). Section 911(*l*)(2) requires that such regulations or guidance be developed in consultation with the Institute of Medicine (IOM), among others, on the design and conduct of such studies and surveillance. Pursuant to this requirement, the IOM convened a multidisciplinary committee and published a report in December 2011. In the report, entitled ''Scientific Standards for Studies on Modified Risk Tobacco Products'' (*http://www.iom.edu/Reports/2011/Scientific-Standards-for-Studies-on-Modified-Risk-Tobacco-Products.aspx*), the IOM notes that ''governance of research is critical to the production of credible and reliable evidence.''

Specifically, the IOM report states ''[t]here is profound distrust of the tobacco industry and of research supported by the tobacco industry. This distrust is the direct result of the tobacco industry's history of improperly influencing or manipulating scientific findings and messaging about the health

effects of tobacco. This history and the lack of trust may prevent independent experts from participating in research on tobacco products and therefore may impede the production of data on MRTPs necessary to assess public health impact.'' The IOM also notes that ''the tobacco industry currently lacks the infrastructure and expertise to independently produce the necessary evidence to support an application to market an MRTP.''

As a result of these findings, the IOM recommends in its report that ''MRTP sponsors should consider use of independent third parties to undertake one or more key functions, including the design and conduct of research, the oversight of specific studies, and the distribution of sponsor funds for research. Such independent third parties should be approved by the FDA in advance of the research.''

The IOM report focuses on research to support MRTP applications, but FDA is also interested in information on third-party governance as it relates more generally to industry-sponsored tobacco research. FDA is interested in receiving information on whether some form of third-party governance should be considered for other types of industry-sponsored tobacco product research, including research to support premarket tobacco product applications and other submissions to FDA, as well as research designed to contribute to general knowledge regarding tobacco products.

II. Request for Comments and Information

As FDA considers how and whether to implement third-party governance of industry-sponsored tobacco product research, we are requesting comments on the IOM's recommendation. We encourage you to submit any available research or evidence to support your comments. FDA specifically requests comments on:

1. What are some potential models of third-party governance of industry-sponsored tobacco product research? What are the strengths and weaknesses of these models?

2. What criteria could FDA use to evaluate any potential model of third-party governance of industry-sponsored tobacco product research?

3. What role would various interested parties (e.g., individual researchers, academic institutions, for-profit and not-for-profit research organizations) play in a third-party governance model of tobacco product research?

4. Who would participate in a third-party governance model? How could a governance model be structured to reduce conflict of interest and bias in industry-sponsored tobacco product research?

5. What barriers, if any, would have to be overcome to encourage the broader scientific community to participate in a third-party governance model?

6. Are there unique research challenges faced by small manufacturers and how should they be addressed in a third-party governance model?

7. What kinds of tobacco product research could be subject to third-party governance? For example, could it be applied to:

- Product testing?
- Nonclinical studies?
- Studies in human subjects? (e.g., health effects research, behavioral research, abuse liability studies, consumer perception research)
- Computational modeling?
- Postmarket surveillance?

8. What aspects of tobacco product research could be subject to third-party governance? For example, should both the design and conduct of research studies be subject to third-party governance?

9. Are there governance models or other steps FDA can take that are more effective for overseeing research to produce generalizable knowledge, such as establishing better testing/research methods and standards, compared to specific product research?

III. Submission of Comments

Interested persons may submit either electronic comments 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. Identify comments with the docket number found in brackets in the heading of this document. Received comments 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: March 27, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07576 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0051]

User Fees and Refunds for Premarket Approval Applications and Device Biologics License Applications; Guidance for Industry and Food and Drug Administration Staff; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the guidance entitled ''User Fees and Refunds for Premarket Approval Applications (PMAs) and Device Biologics License Applications (BLAs).'' The purpose of this guidance document is to identify the types of PMAs and BLAs subject to device user fees, including supplements and other submissions, as well as those that do not have an associated user fee. The guidance also identifies industry and FDA actions on these submissions that may result in a refund of the fee. The draft of this document was issued on March 16, 2009.

DATES: Submit either electronic or written comments on this guidance at any time. General comments on agency guidance documents are welcome at any time.

ADDRESSES: Submit written requests for single copies of the guidance document entitled ''User Fees and Refunds for Premarket Approval Applications and Device Biologics License Applications'' to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4613, Silver Spring, MD 20993–0002 or Office of Communication, Outreach and Development (HFM–40), Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852–1448. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–847–8149. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit electronic comments on the guidance to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. Identify comments with the

docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Nicole Wolanski, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1650, Silver Spring, MD 20993–0002, 301–796–6570; or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, Suite 200N, Rockville, MD 20852, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Background

The Medical Device User Fee Amendments of 2012 (MDUFA III), amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act) to authorize FDA to collect user fees for the review of certain premarket submissions received on or after October 1, 2012, including PMAs and device BLAs. The additional funds obtained from user fees will enable FDA, with the cooperation of industry, to improve the medical device review process to meet certain performance goals and implement improvements for the medical device review process.

II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on user fees and refunds for PMAs and device BLAs. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by using the Internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at *http://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm.* Guidance documents are also available at *http://www.regulations.gov* or *http://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm.* To receive ''User Fees and Refunds for Premarket Approval Applications and Device Biologics License Applications,'' you may either send an email request to *dsmica@fda.hhs.gov* to receive an electronic copy of the document or send a fax request to 301–847–8149 to receive a hard copy. Please use the document number 1681 to identify the guidance you are requesting.

IV. Paperwork Reduction Act of 1995

This draft guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231.

V. Comments

Interested persons may submit either electronic comments 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. Identify comments with the docket number found in brackets in the heading of this document. Received comments 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: March 27, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07577 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–1153]

Implementation of the FDA Food Safety Modernization Act Provision Requiring FDA To Establish Pilot Projects and Submit a Report to Congress for the Improvement of Tracking and Tracing of Food; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending the comment period for the notice entitled ''Implementation of the FDA Food Safety Modernization Act Provision Requiring FDA To Establish Pilot Projects and Submit a Report to Congress for the Improvement of Tracking and Tracing of Food'' that appeared in the **Federal Register** of March 5, 2013 (78 FR 14309). In the notice, FDA requested comments on the findings and recommendations contained in the Institute of Food Technologists (IFT) report to FDA and the submission of information relevant to improving product tracing. The Agency is taking this action in response to requests for an extension to allow interested persons additional time to submit comments.

DATES: Submit either electronic or written comments by July 3, 2013.

ADDRESSES: You may submit comments and information, identified by Docket No. FDA–2012–N–1153, by any of the following methods:

Electronic Submissions

Submit electronic comments and information in the following way:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments and information.

Written Submissions

Submit written submissions in the following way:

- *Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the Agency name and Docket No. FDA–2012–N–1153 for this notice. All comments and information received may be posted without change to *http://www.regulations.gov,* including any personal information provided. For additional information on submitting comments and information, see the ''Comments'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments and information received, go to *http://www.regulations.gov* and insert the docket number(s), found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Sherri A. McGarry, Office of Foods, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 1212, Silver Spring, MD 20903, 301–796–3851.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 5, 2013 (78 FR 14309), FDA published a

notice with a 30-day comment period to request comments on the findings and recommendations contained in the IFT report and the submission of information relevant to improving product tracing. Comments on the findings and recommendations contained in the IFT report and the submission of information relevant to improving product tracing will help FDA as it forms its own recommendations, to be contained in the Agency report to Congress that is required by the FDA Food Safety Modernization Act (FSMA), and as it implements the FSMA provisions relating to the tracking and tracing of food.

The Agency has received requests for a 120-day extension of the comment period for the notice. Each request conveyed concern that the current 30-day comment period does not allow sufficient time to develop a meaningful or thoughtful response to the notice.

FDA has considered the requests and is extending the comment period for all interested persons for 90 days, until July 3, 2013. The Agency believes that a 90-day extension allows adequate time for interested persons to submit comments.

II. Request for Comments

Interested persons may submit either electronic comments 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. Identify comments with the docket number found in brackets in the heading of this document. Received comments 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: March 26, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07580 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0331]

International Consortium of Cardiovascular Registries

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA) is announcing a public meeting entitled ''International Consortium of Cardiovascular Registries.'' The purpose of this meeting is to discuss the development of an international consortium of cardiovascular registries with a broad array of interested stakeholders. The initial pilot phase of this effort will be developing relationships and analysis strategies for transcatheter cardiac valve registries, with the understanding that these efforts would be expanded to additional cardiovascular devices in the future.

Date and Time: The meeting will be held on April 22, 2013, from 8 a.m. to 5 p.m.

Location: The public meeting will be held at FDA's White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Entrance for the public meeting participants (non-FDA employees) is through Building 1 where routine security check procedures will be performed. For parking and security information, please refer to *http://www.fda.gov/AboutFDA/WorkingatFDA/BuildingsandFacilities/WhiteOakCampusInformation/ucm241740.htm.*

Contact Persons: Benjamin Eloff, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4210, Silver Spring, MD 20993, 301–796–8528, *Benjamin.eloff@fda.hhs.gov;* or Danica Marinac-Dabic, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4110, Silver Spring, MD 20993, 301–796–6689, *Danica.marinac-dabic@fda.hhs.gov.*

Registration: Registration is free and will be on a first-come, first-served basis. Persons interested in attending this public meeting must register online by 5 p.m. on April 11, 2013. Early registration is recommended because facilities are limited and, therefore, FDA may limit the number of participants from each organization. If time and space permit, onsite registration on the day of the public meeting will be provided beginning at 7 a.m.

To register for the public meeting, please visit FDA's Medical Devices News & Events—Workshops & Conferences calendar at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm.* Select this public meeting from the posted events list. Please provide complete contact information for each attendee, including name, title, affiliation, mailing address, email address, and telephone number. Those without Internet access should contact Susan Monahan to register (*Susan.Monahan@fda.hhs.gov* or 301–796–5661). Registrants will receive confirmation after they have been accepted. You will be notified if you are on a waiting list.

If you need special accommodations due to a disability, please contact Susan Monahan (*Susan.Monahan@fda.hhs.gov* or 301–796–5661) no later than April 11, 2013.

Streaming Webcast of the Public Meeting: This meeting will also be available via Webcast. Persons interested in viewing the Webcast must register online by 5 p.m. on April 11, 2013. Early registration is recommended because Webcast connections are limited. Organizations are requested to register all participants, but to view using one connection per location. Webcast participants will be sent technical system requirements after registration and connection access information after April 16, 2013. If you have never attended a Connect Pro event before, test your connection at *https://collaboration.fda.gov/common/help/en/support/meeting_test.htm.* To get a quick overview of the Connect Pro program, visit *http://www.adobe.com/go/connectpro_overview.* (FDA has verified the Web site addresses in this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

Comments: FDA is holding this public meeting to obtain information on the topics identified in section II. In order to permit the widest possible opportunity to obtain public comment, FDA is soliciting either electronic or written comments on all aspects of the public meeting topics. The deadline for submitting comments related to this public meeting is May 22, 2013. No commercial or promotional material will be permitted to be presented or distributed at the meeting.

Regardless of attendance at the public meeting, interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. It is only necessary to send one set of comments. Please identify comments with the docket number found in brackets in the heading of this document. Received comments 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.*

Transcripts: Transcripts will not be provided.

SUPPLEMENTARY INFORMATION:

I. Background

Cardiovascular procedures are performed in hundreds of thousands of patients every year to treat all manner of cardiovascular disease from coronary artery disease to peripheral vascular disease, intracardiac ablation to surgical interventions, implant of stents to implants of pacemakers, defibrillators, and their associated leads. Information obtained from clinical trials is often limited due to small size, short followup, and lack of generalizability. Observational studies and registries have become increasingly important data sources for assessing the performance of cardiovascular therapeutic medical devices in the real-world setting. However, these registries are often limited in scope and size to a specific country, region, or health care provider system.

Developing a comprehensive understanding of the performance of these devices requires not only an indepth analysis across data sources to link device use to clinical outcomes, but also to incorporate data from international experience with these devices and procedures. FDA is holding this workshop to discuss the development of an international consortium of cardiovascular registries that would allow for broad-based analysis and surveillance of medical device exposure and related clinical outcomes. This effort follows on the successful model of the International Consortium of Orthopedic Registries (ICOR), which has developed a framework for distributed analysis across their member registries around the world. The development of a similar consortium of cardiovascular registries will begin with a narrowed scope incorporating transcatheter valve therapy devices and procedures.

At the end of this workshop, FDA intends that the participants and stakeholders will develop a comprehensive plan for the development of an operational international consortium of cardiovascular registries. This plan will identify specific issues that must be addressed and provide a ''roadmap'' for full implementation.

II. Topics

Topics to be discussed at this meeting include:

- The role of registry consortia in postmarket surveillance,
- Goals of the International Consortium of Cardiovascular Registries,
- Lessons learned from the development of the ICOR,
- Development of an international consortium of transcatheter valve registries as a pilot phase,
- Analysis of near- and long-term outcomes reported through registries, and
- Discussion of capabilities, challenges, and limitations of existing transcatheter valve registries.

Dated: March 27, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07579 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Clinical Chemistry and Clinical Toxicology Devices Panel of the Medical Devices Advisory Committee: Notice of Change of Meeting Schedule

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a notice that appeared in the **Federal Register** of Wednesday, February 27, 2013 (78 FR 13347). The meeting was shortened to one day, as it was later determined that in order to be more financially prudent all three topics could fit into one day.

FOR FURTHER INFORMATION CONTACT: Sara J. Anderson, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1611, Silver Spring, MD 20993–0002, *Sara.Anderson@fda.hhs.gov,* 301–796–7047, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). Please call the Information Line for up-to-date information on this meeting.

SUPPLEMENTARY INFORMATION: In FR doc. 2013–04543, appearing on page 13347 in the **Federal Register** of Wednesday, February 27, 2013, the following correction is made:

1. On page 13347, in the first column, under the section entitled ''Date and Time'', the date is corrected to be April 25, 2013.

2. On page 13347, in the second column, the section entitled ''Agenda'' is corrected to read as follows:

Agenda: On April 25, 2013, the committee will discuss and make recommendations on the appropriate regulatory classification for diagnostic devices known as methotrexate enzyme immunoassays. Methotrexate enzyme immunoassays are considered pre-Amendment devices since they were in commercial distribution prior to May 28, 1976, when the Medical Device Amendments became effective. Methotrexate enzyme immunoassays are currently regulated under the heading of ''Enzyme Immunoassay, Methotrexate,'' Product Code LAO, as unclassified under the 510(k) premarket notification authority. Methotrexate enzyme immunoassays are for the quantitative determination of methotrexate. The measurements obtained are used in monitoring levels of methotrexate to ensure appropriate drug therapy. FDA is seeking panel input on the safety and effectiveness of methotrexate enzyme immunoassays.

The committee will also discuss and make recommendations on the appropriate regulatory classification for diagnostic devices known as phencyclidine (PCP) enzyme immunoassays and PCP radioimmunoassays. PCP enzyme immunoassays and PCP radioimmunoassays are considered pre-Amendment devices since they were in commercial distribution prior to May 28, 1976 when the Medical Device Amendments became effective. PCP enzyme immunoassays are currently regulated under the heading of ''Enzyme Immunoassay, Phencyclidine,'' Product Code LCM, and ''Radioimmunoassay, Phencyclidine,'' Product Code LCL, as unclassified under the 510(k) premarket notification authority. FDA is seeking panel input on the safety and effectiveness of PCP enzyme immunoassays and PCP radioimmunoassays.

The committee will also discuss and make recommendations on the appropriate regulatory classification for diagnostic devices known as isoniazid test strips. Isoniazid test strips are considered pre-Amendment devices since they were in commercial distribution prior to May 28, 1976 when the Medical Device Amendments became effective. Isoniazid test strips are currently regulated under the heading of ''Strip, Test Isoniazid,'' Product Code MIG, as unclassified under the 510(k) premarket notification authority. Isoniazid test strips are a qualitative assay used for detecting isonicotinic acid and its metabolites in

urine to determine compliance of isoniazid (INH) medication. FDA is seeking panel input on the safety and effectiveness of isoniazid test strips.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm*. Scroll down to the appropriate advisory committee meeting link.

3. On page 13347, in the third column, the section entitled ''Procedure'' is corrected to read as follows:

Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 16, 2013. On April 25, 2013, oral presentations from the public regarding Methotrexate Test Systems will be scheduled between approximately 9:15 a.m. and 9:45 a.m.; regarding phencyclidine (PCP) Test Systems between approximately 1:55 p.m. and 2:25 p.m.; and regarding Isoniazid Test Systems between approximately 4:15 p.m. and 4:45 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 8, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by April 9, 2013.

Dated: March 27, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–07568 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0341]

Modifications To Labeling of Nicotine Replacement Therapy Products for Over-the-Counter Human Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that we have concluded that certain statements set forth in the FDA-approved labels of over-the-counter nicotine replacement therapy products, related to concomitant use with other nicotine-containing products and duration of use, can be modified. In light of currently available evidence, these statements are no longer believed to be necessary in their current form to ensure the safe and effective use of over-the-counter nicotine replacement therapy products for their approved intended use as aids to smoking cessation. We encourage the submission of supplemental new drug applications (labeling supplements) to modify these statements as described in this notice.

ADDRESSES: Submit labeling supplements to the Center for Drug Evaluation and Research, Food and Drug Administration, Central Document Room (CDR), 5901–B Ammendale Rd., Beltsville, MD 20705–1266. Copies of the recommended revisions to product labeling may be requested from the Center for Drug Evaluation and Research's Division of Nonprescription Clinical Evaluation, 10903 New Hampshire Ave., Bldg. 22, Stop 5411, Silver Spring, MD 20993, 301–796–2080. Copies of published studies that can be used to support labeling supplements will be on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, and can be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Doris J. Bates, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 4417, Silver Spring, MD 20993, 301–796–1040, FAX: 301–796–9721, email: *doris.bates@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. Smoking and Tobacco Dependence

Tobacco use is the leading preventable cause of death and disease in the United States. According to an estimate by the Centers for Disease Control and Prevention, cigarette smoking causes 443,000 deaths each year in the United States, including nearly 50,000 deaths per year from involuntary exposure to tobacco smoke (Ref. 1). Smoking is known to cause multiple cancers, heart disease, stroke, complications of pregnancy, chronic obstructive pulmonary disease, and many other diseases that, on average, shorten smokers' lifespans by 14 years (Ref. 2).

Surveys show that approximately 70 percent of current smokers want to stop smoking, and nearly half of all smokers make a quit attempt each year (Ref. 3). Unfortunately, dependence on nicotine—the primary addictive substance in tobacco—is a chronic disease that often requires repeated intervention and multiple quit attempts to overcome. As a result, only a small percentage of smokers successfully quit each year (Ref. 3).

B. Over-the-Counter Nicotine Replacement Therapies

Nicotine replacement therapy (NRT) products are designed to help people stop smoking by supplying controlled amounts of nicotine to ease the withdrawal symptoms associated with a quit attempt. NRT products do not contain all of the carcinogens and other harmful constituents that are found in cigarette smoke. There are currently three types of NRT products approved by FDA for over-the-counter (OTC) use as smoking cessation aids: Nicotine gum, transdermal nicotine patch, and nicotine lozenge products.[1] The nicotine gum and patch products were originally approved through the new drug application (NDA) process between 1984 and 1992. Both the gum and the patch were initially available by prescription only; these products were switched from prescription to OTC status between 1996 and 2002. The nicotine lozenge and mini-lozenge were approved directly for OTC use in 2002 and 2009, respectively.

Currently, the FDA-approved labeling for OTC NRT products instructs consumers that they should stop smoking when they begin using the product and that they should not use

[1] A nicotine spray and a nicotine inhaler have also been approved as smoking cessation aids. However, these NRT products are available by prescription only and are therefore outside the scope of this notice.

the product in combination with cigarettes or other nicotine-containing products (including other NRT products). The labeling also recommends a specific duration of use of up to 12 weeks, depending on the product, and instructs consumers to stop using the NRT product at the end of that period. Consumers are advised to consult a doctor if they feel they need to continue using the NRT product for longer than the recommended course of treatment.

In recent years, a number of stakeholders in the public health and health care provider communities have suggested that these labeling statements act as barriers to the effective use of OTC NRT products for smoking cessation. These stakeholders have argued that the statement advising against concomitant use of the NRT products with cigarettes may cause some smokers to abandon quit attempts if they experience a lapse (e.g., if they have a cigarette while using an NRT product). Stakeholders have also argued that use of more than one NRT product (e.g., patch plus gum) is more effective for some smokers than use of a single NRT product in achieving cessation, and that current labeling discourages such use. With regard to duration of use, stakeholders have argued that the use of OTC NRT products beyond the labeled treatment period may increase the chances of quitting for certain smokers.[2] These stakeholders have asserted that there are no safety concerns associated with concomitant use of OTC NRT products with other nicotine-containing products, or with the use of OTC NRT products for longer than the labeled duration of use.

Over the nearly 30 years since NRT products were first approved, evidence has accumulated to suggest that the current labeling provisions on concomitant use and duration of use may no longer be necessary to ensure the safe use of OTC NRT products for smoking cessation. Based on this evidence, FDA has concluded that the current labeling statements for OTC NRT products concerning concomitant use and duration of use can be modified as described in this document. We invite the products' sponsors to submit supplemental NDAs (labeling supplements) to modify these statements in the labeling of their drug products. To facilitate the process, the Agency has identified revisions to the labeling of OTC NRT products that can be included in these labeling supplements. Those revisions are set forth in section II.

II. Proposed Revisions to the Labeling of OTC NRT Products

A. Concomitant Use of OTC NRT Products With Cigarettes or Other Nicotine-Containing Products, Including Other NRT

The ''Drug Facts'' section of the label for OTC NRT products currently contains two statements relating to the use of these products with other nicotine-containing products. The first statement is found under the ''Do not use'' subheading of the ''Warnings'' section. It instructs consumers not to use the OTC NRT product if they ''continue to smoke, chew tobacco, use snuff, or use [a different NRT product] or other nicotine containing products.'' This statement was included in the labeling because at the time during which these products were switched to OTC use, there was little reliable data on the safety of the higher levels of nicotine that would result from using NRT products in combination with other nicotine-containing products. The second statement appears under the ''Directions'' section, and tells consumers to ''stop smoking completely when you begin using the [NRT product].'' This statement was included in the label because in the clinical trials that were conducted for the original NRT product approvals, individuals who stopped smoking completely when they began using NRT were more likely to quit.

Since we first approved NRT products for OTC use, a number of studies have been conducted that provide information on the safety of using NRT products in combination with other nicotine-containing products. Many of these studies focused on the effects of using NRT products while smoking. For example, there have been studies on the use of NRT products by smokers who were not immediately interested in quitting (see Hatsukami et al., 2007), on the use of NRT products as an aid to smoking reduction (see Wennike et al., 2003; Batra et al., 2005), and on the use of NRT products before initiating a quit attempt (Lindson and Aveyard, 2011). In addition, several studies have been conducted on the use of higher-than-standard-dose NRT products (Tønnesen et al., 1999) and on the concomitant use of more than one type of NRT product (see Bohadana et al., 2000; Piper et al., 2009).

Upon reviewing the published reports of these and other studies, we have determined that the concomitant use of OTC NRT products with cigarettes or with other nicotine-containing products does not raise significant safety concerns. The published literature contains few reports of adverse events arising from the use of NRT products while smoking or using another NRT product. The Agency also notes that few adverse events have been reported in studies of concomitant use conducted under the investigational new drug (IND) process, which involves mandatory reporting of adverse events.

Accordingly, we are announcing that the statements in the current labeling of OTC NRT products relating to concomitant use of those products with other nicotine-containing products can be modified. The following specific changes to the current approved ''Drug Facts'' labeling are recommended:

- *Warnings.* The ''Do not use'' subheading and the statement underneath it instructing consumers not to use the NRT product if they ''continue to smoke, chew tobacco, use snuff, or use [a different NRT product] or other nicotine containing products'' should be deleted.
- *Directions.* The third bullet should be revised from ''stop smoking completely when you begin using the [NRT product]'' to ''begin using the [NRT product] on your quit day.''

B. Duration of Use of OTC NRT Products

Currently, the labeling of OTC NRT products recommends a specific duration of use of up to 12 weeks, depending on the product. For example, the ''Drug Facts'' section of the label for nicotine gum and lozenge products recommends that those products be used for 12 weeks; the label for certain nicotine patch products recommends a duration of use of 8 weeks, others 10 weeks. These labeled durations of use reflect the treatment periods that were studied in the clinical trials that supported the switch of these products to OTC status. Because NRT products treat the acute withdrawal symptoms associated with a quit attempt, and those symptoms typically diminish over time, most of the clinical trials conducted to support approval were short—generally between 6 and 12 weeks in length.

In addition to recommending a specific duration of use, current OTC NRT product labels direct consumers to stop using the product at the end of the recommended treatment period and to talk to a doctor if they feel they need to use the product longer. This statement was included in the labeling because at the time of the first prescription-to-OTC switch, there was insufficient data to

[2] In this notice, the Agency takes no position on the effectiveness of NRT products when used concomitantly with other nicotine-containing products, or when used for longer than the labeled duration of use.

address the Agency's concern that consumers could potentially become dependent on NRT products.

In the years since NRT products became available for OTC use, a number of studies have examined the use of NRT products over periods longer than 12 weeks. We have reviewed the published literature on this longer-term use of NRT products and have not identified any safety risks associated with such use. A well-known and highly regarded study on the effects of long-term use of NRT products is the Lung Health Study, in which almost 6,000 smokers were given access to free nicotine gum for up to 5 years (see Murray et al., 1996). In this study, over 1,000 subjects were still using the gum after 1 year. The adverse effects of long-term nicotine gum use reported by these subjects were described as minor and transient, and there was no correlation between long-term gum use and cardiovascular events. A followup study found that long-term ad lib use of nicotine gum neither increased nor decreased the Lung Health Study subjects' likelihood of developing cancer (see Murray et al., 2009). Other informative studies on the effects of long-term use of NRT products include a 52-week study of NRT product use in which nearly half of the subjects used two or more OTC NRT products in combination (see Joseph et al., 2011), and a trial involving the use of nicotine patches for 6 to 12 months by nonsmokers with mild cognitive impairment (see Newhouse et al., 2012). Both of these studies had high rates of completion and reported few adverse events from long-term use of NRT products.

We also note that although any nicotine-containing product has the potential to be addicting, based on the available evidence, currently marketed OTC NRT products do not appear to have significant potential for abuse or dependence. A 2010 review of historical reports made to the Agency's Adverse Event Reporting System and to the Substance Abuse and Mental Health Services Administration's Drug Abuse Warning Network between 1984 and 2009 suggested that NRT products have a low potential for abuse. Several published studies have also found that the abuse liability and dependence potential of NRT products is low, especially compared to cigarettes (see West et al., 2000; Houtsmuller et al., 2002).

Accordingly, we are announcing that the statement in the labeling of OTC NRT products directing consumers to stop using the NRT product at the end of the recommended treatment period can be modified. The following specific change to the current approved ''Drug Facts'' labeling is recommended:

• *Directions.* The last bullet should be revised from ''it is important to complete treatment. Stop using the [NRT product] at the end of [x] weeks. If you still feel the need to use [the NRT product], talk to your doctor'' to ''it is important to complete treatment. If you feel you need to use [the NRT product] for a longer period to keep from smoking, talk to your health care provider.''

C. Summary of Proposed Labeling Revisions

In light of currently available evidence on the concomitant use of OTC NRT products with cigarettes or other nicotine-containing products, and on the use of OTC NRT products beyond the labeled period of treatment, the following changes to the ''Drug Facts'' labeling of OTC NRT products are recommended:

Current drug facts labeling	Proposed drug facts labeling
Warnings	
Do not use: • if you continue to smoke, chew tobacco, use snuff, or use [a different NRT product] or other nicotine containing products.	None. The ''Do not use'' statement would be deleted.
Directions	
• stop smoking completely when you begin using the [NRT product] .... • it is important to complete treatment. Stop using the [NRT product] at the end of [x] weeks. If you still feel the need to use [the NRT product], talk to your doctor.	• begin using the [NRT product] on your quit day. • it is important to complete treatment. If you feel you need to use [the NRT product] for a longer period to keep from smoking, talk to your health care provider.

We have determined that these labeling revisions may be addressed through a changes being effected (CBE) supplement under 21 CFR 314.70(c)(6).

We are also recommending conforming changes to other FDA-approved labeling for OTC NRT products, such as product user guides and leaflets. Copies of the recommended changes to these other labeling items may be obtained from the Center for Drug Evaluation and Research's Division of Nonprescription Clinical Evaluation (see **ADDRESSES**).

III. Conclusions

We have determined that the current OTC NRT products can be used safely and effectively for their approved intended use as aids to smoking cessation with the labeling modifications identified in section II. We encourage the submission of labeling supplements for these drug products. These supplements should modify the labeling statements concerning concomitant use and duration of use as described in section II. The requirement for data to support these labeling changes may be met by citing the published literature we relied on in preparing this notice. A list of the published literature and reprints of the reports will be available for public inspection in the Division of Dockets Management (see **ADDRESSES**). It is unnecessary to submit copies and reprints of the reports from the listed published literature. We invite applicants to submit any other pertinent studies and literature of which they are aware.

IV. Published Literature Supporting Proposed Labeling Revisions

The published literature we have relied on in making the determinations contained in this notice is listed in this section of the document. Copies of the published literature will be on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov*.

1. Batra, A., et al., ''Smoking Reduction Treatment With 4-Mg Nicotine Gum: A Double-Blind, Randomized, Placebo-Controlled Study,'' *Clinical*

Pharmacology and Therapeutics, 78(6):689–96, 2005.
2. Benowitz, N.L., et al., ''Suppression of Nicotine Intake During Ad Libitum Cigarette Smoking by High-Dose Transdermal Nicotine,'' *Journal of Pharmacology and Experimental Therapeutics,* 287(3):958–62, 1998.
3. Blondal, T., et al., ''Nicotine Nasal Spray With Nicotine Patch for Smoking Cessation: Randomised Trial With Six Year Follow Up,'' *BMJ,* 318(7179):285–8, 1999.
4. Bohadana, A., et al., ''Nicotine Inhaler and Nicotine Patch as a Combination Therapy for Smoking Cessation,'' *Archives of Internal Medicine,* 160(20):3128–34, 2000.
5. Bolliger, C.T., et al, ''Smoking Reduction With Oral Nicotine Inhalers: Double Blind, Randomised Clinical Trial of Efficacy And Safety,'' *BMJ,* 321(7257):329–33, 2000.
6. Bullen, C., et al., ''Precessation Nicotine Replacement Therapy: Pragmatic Randomized Trial,'' *Addiction,* 105(8):1474–83, 2010.
7. Dale, L.C., et al., ''High-Dose Nicotine Patch Therapy. Percentage of Replacement and Smoking Cessation,'' *JAMA,* 274(17):1353–58, 1995.
8. Etter, J.F., et al., ''Nicotine Replacement to Reduce Cigarette Consumption in Smokers Who Are Unwilling to Quit: A Randomized Trial,'' *Journal of Clinical Psychopharmacology,* 22(5):487–95, 2002.
9. Etter, J.F., et al., ''Postintervention Effect of Nicotine Replacement Therapy on Smoking Reduction in Smokers Who Are Unwilling to Quit: A Randomized Trial,'' *Journal of Clinical Psychopharmacology,* 24(2):174–79, 2004.
10. Etter, J.F., et al., ''Nicotine Gum Treatment Before Smoking Cessation—A Randomized Trial,'' *Archives of Internal Medicine,* 169(11):1028–34, 2009.
11. Hajek, P., et al., ''Dependence Potential of Nicotine Replacement Treatments: Effects of Product Type, Patient Characteristics, and Cost to User,'' *Preventive Medicine,* 44(3):230–34, 2007.
12. Hall, S.M., et al., ''Extended Treatment of Older Cigarette Smokers,'' *Addiction,* 104(6):1043–52, 2009.
13. Hatsukami, D., et al., ''Effects of High Dose Transdermal Nicotine Replacement in Cigarette Smokers,'' *Pharmacology, Biochemistry, and Behavior,* 86(1):132–39, 2007.
14. Horst, W.D., et al., ''Extended Use of Nicotine Replacement Therapy to Maintain Smoking Cessation in Persons With Schizophrenia,'' *Neuropsychiatric Disease and Treatment,* 1(4):349–55, 2005.
15. Houtsmuller, E.J., et al., ''Flavor Improvement Does Not Increase Abuse Liability of Nicotine Chewing Gum,'' *Pharmacology, Biochemistry, and Behavior,* 72(3):559–68, 2002.
16. Hughes, J.R., et al., ''A Randomized, Controlled Trial of NRT-Aided Gradual Vs. Abrupt Cessation in Smokers Actively Trying to Quit,'' *Drug and Alcohol Dependence,* 111(1–2):105–13, 2010.
17. Joseph, A.M., et al., ''Chronic Disease Management for Tobacco Dependence,'' *Archives of Internal Medicine,* 171(21):1894–1900, 2011.
18. Lerman, C., et al., ''Genetic Variation in Nicotine Metabolism Predicts the Efficacy of Extended-Duration Transdermal Nicotine Therapy,'' *Clinical Pharmacology and Therapeutics,* 87(5):553–57, 2010.
19. Lindson, N. and Aveyard, P., ''An Updated Meta-Analysis of Nicotine Preloading for Smoking Cessation: Investigating Mediators of the Effect,'' *Psychopharmacology,* 214(3):579–92, 2011.
20. Murray, R.P., et al., ''Safety of Nicotine Polacrilex Gum Used by 3,094 Participants in the Lung Health Study. Lung Health Study Research Group,'' *CHEST,* 109(2):438–45, 1996.
21. Murray, R.P., et al., ''Does Nicotine Replacement Therapy Cause Cancer? Evidence From the Lung Health Study,'' *Nicotine & Tobacco Research,* 11(9):1076–82, 2009.
22. Newhouse, P., et al., ''Nicotine Treatment of Mild Cognitive Impairment: A 6-Month Double-Blind Pilot Clinical Trial,'' *Neurology,* 78(2):91–101, 2012.
23. Piper, M.E., et al., ''A Randomized Placebo-Controlled Clinical Trial of 5 Smoking Cessation Pharmacotherapies,'' *Archives of General Psychiatry,* 66(11):1253–62, 2009.
24. Rennard, S.I., et al., ''Efficacy of the Nicotine Inhaler in Smoking Reduction: A Double-Blind, Randomized Trial,'' *Nicotine & Tobacco Research,* 8(4):555–64, 2006.
25. Rose, J.E., et al., ''Mecamylamine Combined With Nicotine Skin Patch Facilitates Smoking Cessation Beyond Nicotine Patch Treatment Alone,'' *Clinical Pharmacology and Therapeutics,* 56(1):86–99, 1994.
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32. Wennike, P., et al., ''Smoking Reduction Promotes Smoking Cessation: Results From a Double Blind, Randomized, Placebo-Controlled Trial of Nicotine Gum With 2-Year Follow-Up,'' *Addiction,* 98(10):1395–402, 2003.
33. West, R., et al, ''A Comparison of the Abuse Liability and Dependence Potential of Nicotine Patch, Gum, Spray and Inhaler,'' *Psychopharmacology,* 149(3):198–202, 2000.
34. Zevin, S., et al, ''Dose-Related Cardiovascular and Endocrine Effects of Transdermal Nicotine,'' *Clinical Pharmacology and Therapeutics,* 64(1):87–95, 1998.

V. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov*.

1. Centers for Disease Control and Prevention, ''Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004,'' *Morbidity and Mortality Weekly Report,* 57(45):1226–1228; November 14, 2008.
2. Centers for Disease Control and Prevention, ''Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 1995–1999,'' *Morbidity and Mortality Weekly Report,* 51(14):300–303; April 12, 2002.
3. Centers for Disease Control and Prevention, ''Quitting Smoking Among Adults—United States, 2001–2010,'' [serial online], *Morbidity and Mortality Weekly Report,* 60(44):1513–1519; November 11, 2011.

Dated: March 26, 2013.

Peter Lurie,

Acting Associate Commissioner for Policy and Planning.

[FR Doc. 2013–07528 Filed 4–1–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

Request For Public Comment: 60-Day Proposed Information Collection: Indian Health Service Medical Staff Credentials And Privileges Files

AGENCY: Indian Health Service, HHS.

ACTION: Notice.

SUMMARY: In compliance with Section 3506(c)(2)(A) of the Paperwork

Reduction Act of 1995 which requires 60 days for public comment on proposed information collection projects, the Indian Health Service (IHS) is publishing for comment a summary of a proposed information collection to be submitted to the Office of Management and Budget (OMB) for review.

Proposed Collection

Title: 0917–0009, ''Indian Health Service Medical Staff Credentials and Privileges Files.'' *Type of Information Collection Request:* Extension, without revision, of currently approved information collection, 0917–0009, ''Indian Health Service Medical Staff Credentials and Privileges Files.'' *Form Numbers:* 0917–0009. *Need and Use of Information Collection:* This collection of information is used to evaluate individual health care providers applying for medical staff privileges at IHS health care facilities. The IHS operates health care facilities that provide health care services to American Indians and Alaska Natives. To provide these services, the IHS employs (directly and under contract) several categories of health care providers including: Physicians (M.D. and D.O.), dentists, psychologists, optometrists, podiatrists, audiologists, physician assistants, certified registered nurse anesthetists, nurse practitioners, and certified nurse midwives. IHS policy specifically requires physicians and dentists to be members of the health care facility medical staff where they practice. Health care providers become medical staff members, depending on the local health care facility's capabilities and medical staff bylaws. There are three types of IHS medical staff applicants: (1) Health care providers applying for direct employment with IHS; (2) contractors who will not seek to become IHS employees; and (3) employed IHS health care providers who seek to transfer between IHS health care facilities.

National health care standards developed by the Centers for Medicare and Medicaid Services, the Joint Commission, and other accrediting organizations require health care facilities to review, evaluate and verify the credentials, training and experience of medical staff applicants prior to granting medical staff privileges. In order to meet these standards, IHS health care facilities require all medical staff applicants to provide information concerning their education, training, licensure, and work experience and any adverse disciplinary actions taken against them. This information is then verified with references supplied by the applicant and may include: former employers, educational institutions, licensure and certification boards, the American Medical Association, the Federation of State Medical Boards, the National Practitioner Data Bank, and the applicants themselves.

In addition to the initial granting of medical staff membership and clinical privileges, the Joint Commission standards require that a review of the medical staff be conducted not less than every two years. This review evaluates the current competence of the medical staff and verifies whether they are maintaining the licensure or certification requirements of their specialty.

The medical staff credentials and privileges records are maintained at the health care facility where the health care provider is a medical staff member. The establishment of these records at IHS health care facilities is a Joint Commission requirement. Prior to the establishment of this Joint Commission requirement, the degree to which medical staff applications were maintained at all health care facilities in the United States that are verified for completeness and accuracy varied greatly across the Nation.

The application process has been streamlined and is using information technology to make the application electronically available on the Internet. The application may be found at the IHS.gov Web site address: *http://www.ihs.gov/IHM/index.cfm?module=dsp_ihm_pc_p3c1_ex#Manual Exhibit 3–1–A.*

Affected Public: Individuals and households. *Type of Respondents:* Individuals.

The table below provides: Types of data collection instruments, Estimated number of respondents, Number of annual number of responses, Average burden per response, and Total annual burden hours.

Data collection instrument(s)	Estimated number of respondents	Responses per Respondent	Average burden hour per response*	Total annual burden hours
Application to Medical Staff	570	1	1.00 (60 mins)	570
Reference Letter	1710	1	0.33 (20 mins)	570
Reappointment Request	190	1	1.00 (60 mins)	190
Ob-Gyn Privileges	20	1	1.00 (60 mins)	20
Internal Medicine	325	1	1.00 (60 mins)	325
Surgery Privileges	20	1	1.00 (60 mins)	20
Psychiatry Privileges	13	1	1.00 (60 mins)	13
Anesthesia Privileges	15	1	1.00 (60 mins)	15
Dental Privileges	150	1	0.33 (20 mins)	50
Optometry Privileges	21	1	0.33 (20 mins)	7
Psychology Privileges	30	1	0.17 (10 mins)	5
Audiology Privileges	7	1	0.08 (5 mins)	1
Podiatry Privileges	7	1	0.08 (5 mins)	1
Radiology Privileges	8	1	0.33 (20 mins)	3
Pathology Privileges	3	1	0.33 (20 mins)	1
Total	3,089			1,791

* For ease of understanding, burden hours are provided in actual minutes.
There are no capital costs, operating costs and/or maintenance costs to respondents.

Request for Comments: Your written comments and/or suggestions are invited on one or more of the following points: (a) Whether the information collection activity is necessary to carry out an agency function; (b) whether the agency processes the information collected in a useful and timely fashion; (c) the accuracy of public burden estimate (the estimated amount of time needed for individual respondents to provide the requested information); (d) whether the methodology and assumptions used to determine the estimate is logical; (e) ways to enhance

the quality, utility, and clarity of the information being collected; and (f) ways to minimize the public burden through the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Send Comments and Requests for Further Information: For the proposed collection or requests to obtain a copy of the data collection instrument(s) and instructions to: Paul R. Fowler D.O., J.D., Risk Management Officer, 801 Thompson Avenue, TMP, Suite 331, Rockville, MD 20852, call non-toll free (301) 443–6372, send via facsimile to (301) 594–6213, or send your email requests, comments, and return address to: *paul.fowler@ihs.gov.*

Comment Due Date: Your comments regarding this information collection is best assured of having full effect if received within 60 days of the date of this publication.

Dated: March 26, 2013.

Yvette Roubideaux,

Director, Indian Health Service.

[FR Doc. 2013–07596 Filed 4–1–13; 8:45 am]

BILLING CODE 4165–16–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Evaluation of the Brain Disorders in the Developing World Program of the John E. Fogarty International Center

SUMMARY: In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, for opportunity for public comment on proposed data collection projects, the John E. Fogarty International Center, National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

To Submit Comments and for Further Information: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Dr. Rachel Sturke, Fogarty International Center, National Institutes of Health, 16 Center Drive, Building 16, Room 202, Bethesda, MD 20892, or call non-toll-free number 301–496–1491, or Email your request, including your address to: *sturkerachel@mail.nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

Comment Due Date: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

Proposed Collection: Evaluation of the Brain Disorders in the Developing World Program of the John E. Fogarty International Center, 0925–New, Fogarty International Center (FIC), National Institutes of Health (NIH).

Need and Use of Information Collection: This study seeks to evaluate the management, effectiveness, and outcomes of the Brain Disorders in the Developing World extramural research program administered by the John E. Fogarty International Center of the NIH. The purpose of the Brain Disorders in the Developing World Program is to develop collaborative research and capacity building projects on brain disorders throughout life relevant to low- and middle-income countries. Awardees are expected to develop innovative projects that contribute to the long-term goal of building sustainable research capacity in nervous system function and impairment throughout life. Between FY 2003 and 2012, a total of 132 awards were made under the Brain Disorders program, and the total investment by Fogarty and its partners at NIH has been approximately $75 million. The findings of this evaluation study will provide valuable information concerning: (1) Whether and how the program has met its goal of supporting research and research capacity-building on brain disorders in low- and middle-income countries; (2) the extent to which the program as implemented functions efficiently and effectively; (3) the extent to which the program is consistent with the strategic priorities of Fogarty and its partners at NIH; (4) opportunities to improve upon the current implementation of the program if NIH chooses to continue supporting it; and (5) models, best practices, and lessons learned that may be applicable to other NIH programs, now and in the future.

OMB approval is requested for 1 year. There are no costs to respondents other than their time. The total estimated annualized burden hours are 151.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hour
Awardee Interviews (LMIC)	Researchers	30	1	1	30
Awardee Interviews (US)	Researchers	30	1	1	30
Trainee Interviews	Researchers	15	1	1	15
Awardee Survey (LMIC)	Researchers	115	1	20/60	38
Awardee Survey (US)	Researchers	114	1	20/60	38

Dated: March 18, 2013.

Dexter Collins,

Executive Officer, John E. Fogarty International Center, National Institutes of Health.

[FR Doc. 2013–07555 Filed 4–1–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse: Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council on Drug Abuse.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Drug Abuse.

Date: May 7–8, 2013.

Closed: May 7, 2013, 2:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Open: May 8, 2013, 8:30 a.m. to 1:00 p.m.

Agenda: This portion of the meeting will be open to the public for announcements and reports of administrative, legislative and program developments in the drug abuse field.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Conference Rooms C & D, Rockville, MD 20852.

Contact Person: Mark Swieter, Ph.D., Acting Director, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 4243, MSC 9550, 6001 Executive Boulevard, Bethesda, MD 20892–9550, (301) 435–1389, *ms80x@nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.drugabuse.gov/NACDA/NACDAHome.html,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: March 27, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–07564 Filed 4–1–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Synaptic Function across the Lifespan.

Date: April 9, 2013.

Time: 1:00 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Jonathan K Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and Related Research.

Date: April 12, 2013.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mary Clare Walker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 27, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–07566 Filed 4–1–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Member conflict: Neurobiology of Active Vision.

Date: April 30, 2013.

Time: 9:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Wei-Qin Zhao, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5181 MSC 7846, Bethesda, MD 20892–7846, 301–435–1236, *zhaow@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Program Project: Drug Addiction.

Date: May 1–2, 2013.

Time: 8:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 27, 2013 .

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–07565 Filed 4–1–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of 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 Heart, Lung, and Blood Institute Special Emphasis Panel; Training in Lung Omics.

Date: April 26, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Garden Inn Bethesda, 7301 Waverly St., Bethesda, MD 20814.

Contact Person: Charles Joyce, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892–7924, 301–435–0288, *cjoyce@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 27, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–07567 Filed 4–1–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2013–0089]

Merchant Mariner Medical Evaluation Program

AGENCY: Coast Guard, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Coast Guard is seeking public comment regarding the merchant mariner medical evaluation program. Section 718 of the Coast Guard Authorization Act of 2012 directed the Commandant of the Coast Guard to submit to Congress an assessment of the Coast Guard National Maritime Center's merchant mariner medical evaluation program and alternatives to the program. Congress specifically asked the Coast Guard to include an analysis of how a system similar to the Federal Motor Carrier Safety Administration's National Registry of Certified Medical Examiners program, and the Federal Aviation Administration's Designated Aviation Medical Examiners program, could be applied by the Coast Guard in making medical fitness determinations for issuance of merchant mariners' documents. The Coast Guard will accept comments from the public on the perceived benefits and concerns with adopting a similar program for the medical evaluation of merchant mariners.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before May 2, 2013 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2013–0089 using any one of the following methods:

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

(2) *Fax:* 202–493–2251.

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

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

To avoid duplication, please use only one of these four methods. See the ''Public Participation'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notice, call or email Lieutenant Ashley Holm, Office of Commercial Vessel Compliance(CG–CVC–4), U.S. Coast Guard, telephone (202) 372–1128, email *MMCPolicy@uscg.mil.* If you have questions on viewing material in the docket, call Ms. Barbara Hairston, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation

You may submit comments and related material regarding this notice. All comments received will be posted, without change, to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting comments: If you submit a comment, please include the docket number for this notice (USCG–2013–0089) and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and insert

''USCG–2013–0089'' in the ''Search'' box. Click ''Search,'' find this notice in the list of Results, and then click on the corresponding ''Comment Now'' box. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period.

Viewing the comments: To view comments, as well as documents mentioned in this notice as being available in the docket, go to *http://www.regulations.gov* and use ''USCG–2013–0089'' as your search term. Use the filters on the left side of the page to highlight ''Public Submissions'' or other document types. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act: Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act system of records notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Background and Purpose

Section 718 of the Coast Guard Authorization Act of 2012 (Pub. L. 112–213) directed the Commandant of the Coast Guard to, not later than 180 days after enactment, submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate an assessment of the Coast Guard National Maritime Center's merchant mariner medical evaluation program and alternatives to the program. Section 718 also directed that the assessment contain the following:

(1) An overview of the adequacy of the program for making medical certification determinations for issuance of merchant mariners' documents;

(2) An analysis of how a system similar to the Federal Motor Carrier Safety Administration's National Registry of Certified Medical Examiners program, and the Federal Aviation Administration's Designated Aviation Medical Examiners program, could be applied by the Coast Guard in making medical fitness determinations for issuance of merchant mariners' documents; and

(3) An explanation of how the amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978, that entered into force on January 1, 2012, required changes to the Coast Guard's merchant mariner medical evaluation program.

Currently, the Coast Guard maintains an ''open'' system of medical evaluation. While the ultimate determination of medical fitness rests with the Coast Guard, mariners may have any authorized medical professional fill out the appropriate evaluation forms which are then submitted to the Coast Guard. The evaluation reports are reviewed by the National Maritime Center and a fitness determination is then made. Conversely, a ''closed'' system would require mariners to have their physical evaluations done by designated medical examiners who are authorized by the Coast Guard to conduct physical examinations of mariners. Subject to detailed policy guidance, medical certificates may be issued by the designated medical examiner.

Finally, a hybrid system could be adopted whereby the designated medical examiner would issue medical certificates when mariners meet certain pre-established criteria, and the Coast Guard would only be involved in reviewing those mariners who have certain conditions.

The Coast Guard would like public input on the relative merits of a closed, open, or hybrid system of medical evaluation, noting advantages and disadvantages of the different systems. We would also be interested in knowing any other suggestions or comments that address the subject of the assessment required by section 718 of the Coast Guard Authorization Act of 2012.

Authority

This notice is issued under the authority of 46 U.S.C chapter 71, Department of Homeland Security Delegation No. 0710.1, and 46 CFR 10.215.

Dated: March 27, 2013.

D.S. Fish,

Captain, U.S. Coast Guard, Chief, Office of Investigations and Analysis.

[FR Doc. 2013–07574 Filed 4–1–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Visa Waiver Program Carrier Agreement (CBP Form I–775)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; Extension of an existing information collection: 1651–0110.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Visa Waiver Program Carrier Agreement (CBP Form I–775). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before June 3, 2013, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Regulations and Rulings, Office of International Trade, 90 K Street NE., 10th Floor, Washington, DC. 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d)

ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document the CBP is soliciting comments concerning the following information collection:

Title: Visa Waiver Program Carrier Agreement.

OMB Number: 1651–0110.

Form Number: CBP Form I–775.

Abstract: 8 U.S.C. 1223(a) of the Immigration and Nationality Act (INA) provides for the necessity of a transportation contract. This allows the Attorney General to enter into contracts with transportation lines for the inspection and administration of aliens coming into the United States from a foreign territory of from adjacent islands. No such transportation line shall be allowed to land any such alien in the United States until and unless it has entered into any such contracts which may be required by the Attorney General. This authority is delegated to the Secretary of Homeland Security under 8 CFR 2.1.

The Visa Waiver Program Carrier Agreement (CBP Form I–775) is used by carriers to request acceptance by CBP into the Visa Waiver Program (VWP). This form is an agreement whereby carriers agree to the terms of the VWP as delineated in Section 217(e) of the INA (8 U.S.C. 1187(e)). Once participation is granted, CBP Form I–775 serves to hold carriers liable for the transportation costs, to ensure the completion of required forms, and to share passenger data. Regulations are promulgated at 8 CFR Part 233. A copy of CBP Form I–775 is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_I775.pdf.*

Current Actions: This submission is being made to extend the expiration date with no change to information collected or to CBP Form I–775.

Type of Review: Extension (without change).

Affected Public: Businesses.

Estimated Number of Respondents: 400.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 400.

Estimated Time per Response: 30 minutes.

Estimated Total Annual Burden Hours: 200.

Dated: March 28, 2013.

Seth Renkema,

Acting Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2013–07639 Filed 4–1–13; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5685–N–02]

Notice of Proposed Information Collection: Comment Request Affirmative Fair Housing Marketing (AFHM) Plan

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Notice of information collection.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. HUD is soliciting public comments on the subject proposal. Developers of new projects describe their intent (marketing efforts) to assure that they meet the Fair Housing guidelines in how the project is marketed to the public.

DATES: *Comments Due Date:* June 3, 2013.

ADDRESSES: Interested persons are invited to submit comments regarding this proposed information collection requirement. Comments should refer to the proposal by name and/or OMB Control Number, and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–2000; or for the hearing and speech impaired the number for the Federal Relay Service Relay Service 1–800–877–8339.

FOR FURTHER INFORMATION CONTACT: Tracy E. Richardson, Director, Program Standards and Compliance Division, Office of Fair Housing and Equal Opportunity, Department of Housing and Urban Development, 451 Seventh Street SW., Room 5240, Washington, DC 20410–2000; email to *Tracy.E.Richardson@hud.gov;* telephone number (202) 708–1145 (this is not a toll-free number) for copies of the forms and other available information. Hearing or speech-impaired individuals may access these numbers via TTY (text telephone) by calling the Federal Information Relay Service at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is submitting this proposed information collection requirement to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Affirmative Fair Housing Marketing (AFHM) Plan.

Title of Regulation: Affirmative Fair Housing Marketing Regulations (24 CFR 200.600 and Affirmative Fair Housing Marketing Compliance Regulations (24 CFR part 108).

OMB Control Number, if applicable: 2529–0013.

Description of the need for the information and proposed use: Developers of new projects describe their intent (marketing efforts) to assure that they meet the Fair Housing guidelines in how the project is marketed to the public. HUD uses this information to assess the adequacy of the applicant's proposed actions to carry out the Affirmative Fair Housing Marketing requirements of 24 CFR 200.600 and review compliance with these requirements under 24 CFR part 108, the AFHM Compliance Regulations.

Agency form numbers, if applicable: HUD–935.2A Affirmative Fair Housing Marketing (AFHM) Plan (Multifamily), HUD–935.2B Affirmative Fair Housing Marketing (AFHM) Plan (Single-Family), and HUD–935.2C Affirmative Fair Housing Marketing (AFHM) Plan (Condominiums or Cooperatives).

Members of affected public: Applicants for mortgage insurance under the Department's insured single-family and multifamily subsidized and unsubsidized programs.

Estimation of the total number of hours needed to prepare the information collection including the number of respondents, frequency of response, and

hours of response: The number of burden hours is 25,540, which includes time for initial submission, review of existing plans, and any necessary revision. On an annual basis, there are approximately 4,360 respondents who submit initial plans or updated plans. On an annual basis, an additional 3,720 respondents simply review their existing plans. The frequency of annual response is once, and the average burden hour per response is 6 hours for the initial plan submitted, and 4 hours for review and the updating of an existing plan.

Status of the proposed Information Collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: March 27, 2013.

Tracy E. Richardson,

Director, Program Standards and Compliance Division, Fair Housing and Equal Opportunity.

[FR Doc. 2013–07646 Filed 4–1–13; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS—R7—MB—2013—N077; FF09M21200—123—FXMB1231099BPP0L2]

Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Alaska Migratory Bird Subsistence Harvest Household Survey

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (U.S. Fish and Wildlife Service) have sent an Information Collection Request (ICR) to OMB for review and approval. We summarize the ICR below and describe the nature of the collection and the estimated burden and cost. This information collection is scheduled to expire on April 30, 2013. We 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. However, under OMB regulations, we may continue to conduct or sponsor this information collection while it is pending at OMB.

DATES: You must submit comments on or before May 2, 2013.

ADDRESSES: Send your comments and suggestions on this information collection to the Desk Officer for the Department of the Interior at OMB—OIRA at 202–395–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email). Please provide a copy of your comments to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS 2042–PDM, 4401 North Fairfax Drive, Arlington, VA 22203 (mail), or *hope_grey@fws.gov* (email). Please include ''1018–0124'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Hope Grey at *hope_grey@fws.gov* (email) or 703–358–2482 (telephone). You may review the ICR online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB.

SUPPLEMENTARY INFORMATION: *OMB Control Number:* 1018–0124.

Title: Alaska Migratory Bird Subsistence Harvest Household Survey.

Service Form Number(s): 3–2380, 3–2381–1, 3–2381–2, 3–2381–3, and 3–2381–4.

Type of Request: Extension of a currently approved collection.

Description of Respondents: Households within subsistence eligible areas of Alaska (Alaska Peninsula, Kodiak Archipelago, Aleutian Islands, and areas north and west of the Alaska Range).

Respondent's Obligation: Voluntary.

Frequency of Collection: Annually for Tracking Sheet and Household Consent; three times annually for Harvest Report.

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
3–2380–Tracking Sheet and Household Consent	2,760	2,760	5	230
3–2381–1 thru 3–2381–4–Harvest Report (three seasonal sheets)	2,300	6,900	5	575
Totals	5,060	9,660		805

Abstract: The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703–712) and the Fish and Wildlife Act of 1956 (16 U.S.C. 742d) designate the Department of the Interior as the key agency responsible for managing migratory bird populations that frequent the United States and for setting harvest regulations that allow for the conservation of those populations. These responsibilities include gathering accurate geographical and temporal data on various characteristics of migratory bird harvest. We use harvest data to review regulation proposals and to issue harvest regulations.

The Migratory Bird Treaty Act Protocol Amendment (1995) (Amendment) provides for the customary and traditional use of migratory birds and their eggs for subsistence use by indigenous inhabitants of Alaska. The Amendment states that its intent is not to cause significant increases in the take of species of migratory birds relative to their continental population sizes. A submittal letter from the Department of State to the White House (May 20, 1996) accompanied the Amendment and specified the need for harvest monitoring. The submittal letter stated that the Service, the Alaska Department of Fish and Game (ADFG), and Alaska Native organizations would collect harvest information cooperatively within the subsistence eligible areas. Harvest survey data help to ensure that customary and traditional subsistence uses of migratory birds and their eggs by indigenous inhabitants of Alaska do not significantly increase the take of species of migratory birds relative to their continental population sizes.

Between 1989 and 2004, we monitored subsistence harvest of migratory birds using annual household surveys in the Yukon–Kuskokwim Delta, which is the region of highest subsistence bird harvest in the State of Alaska. In 2004, we began monitoring subsistence harvest of migratory birds in subsistence eligible areas Statewide. The Statewide harvest assessment program helps to track trends and changes in levels of harvest. The harvest assessment program relies on collaboration among the Service, the

ADFG, and a number of Alaska Native organizations.

We gather information on the annual subsistence harvest of about 60 bird species/species categories (ducks, geese, swans, cranes, upland game birds, seabirds, shorebirds, and grebes, and loons) in the subsistence eligible areas of Alaska. The survey covers 11 regions of Alaska, which are further divided into 29 subregions. We survey the regions and villages in a rotation schedule to accommodate budget constraints and to minimize respondent burden. The survey covers spring, summer, and fall harvest in most regions.

In collaboration with Alaska Native organizations, we hire local resident surveyors to collect the harvest information. The surveyors list all households in the villages to be surveyed and provide survey information and harvest report forms to randomly selected households that have agreed to participate in the survey. To ensure anonymity of harvest information, we identify households by a numeric code. The surveyor visits households three times during the survey year. At the first household visit, the surveyor explains the survey purposes and invites household participation. The surveyor returns at the end of the season of most harvest and at the end of the two other seasons combined to help the household complete the harvest report form.

We have designed the survey methods to streamline procedures and reduce respondent burden. We plan to use two forms for household participation:

• FWS Form 3–2380 (Tracking Sheet and Household Consent). The surveyor visits each household selected to participate in the survey to provide information on the objectives and to obtain household consent to participate. The surveyor uses this form to record consent and track subsequent visits for completion of harvest reports.

• FWS Forms 3–2381–1, 3–2381–2, 3–2381–3, and 3–2381–4 (Harvest Report). The Harvest Report has drawings of bird species most commonly available for harvest in the different regions of Alaska with fields for writing down the numbers of birds and eggs taken. There are four versions of this form: Interior Alaska, North Slope, Southern Coastal Alaska, and Western Alaska. This form has a sheet for each season surveyed, and each sheet has fields for the household code, community name, harvest year, date of completion, and comments.

Comments: On October 25, 2012, we published in the **Federal Register** (75 FR 65201) a notice of our intent to request that OMB renew approval for this information collection. In that notice, we solicited comments for 60 days, ending on December 24, 2012. We received one comment. The commenter stated that migratory birds should not be hunted, that people extensively lie in harvest reports, and, therefore, this survey is a waste of taxpayer dollars. Traditionally, harvest and sharing of wild fish, caribou, moose, marine mammals, and birds have been (and still are) the core of the diet, social organization, and spiritual life of Alaska Native cultures. The large majority of these villages are in remote, non-roaded areas, and subsistence harvests play an important role in food security. Subsistence harvest surveys allow Alaska Native people to actively engage as stakeholders in the management and conservation of the wildlife resources they rely upon. We believe the vast majority of the information provided in this survey is honest and truthful. Harvest survey data are used to assess and adjust hunting regulations that help protect the birds and sustainable hunting opportunities. Taxpayer dollars invested in harvest surveys help protect birds that people rely upon for food and for the enjoyment by present and future generations of both hunters and non-hunters. We did not make any changes to the information collection requirements.

We again invite comments concerning this information collection on:

• Whether or not the collection of information is necessary, including whether or not the information will have practical utility;

• The accuracy of our estimate of the burden for this collection of information;

• Ways to enhance the quality, utility, and clarity of the information to be collected; and

• Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: March 27, 2013.

Tina A. Campbell,

Chief, Division of Policy and Directives Management, U.S. Fish and Wildlife Service.

[FR Doc. 2013–07612 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2013–N079; FXIA16710900000P5–123–FF09A30000]

Wild Bird Conservation Act; Receipt of Application for Approval

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of application for approval; request for comment.

SUMMARY: The public is invited to comment on the following application for approval to conduct certain activities with birds that are protected in accordance with the Wild Bird Conservation Act of 1992.

DATES: Written data, comments, or requests for a copy of this application must be received by May 2, 2013.

ADDRESSES: Documents and other information submitted with this application are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: Chief, U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax 703/358–2298.

FOR FURTHER INFORMATION CONTACT: Craig Hoover, Chief, Branch of Operations, Division of Management Authority, at 703–358–2104.

SUPPLEMENTARY INFORMATION: The public is invited to comment on the following application for approval to conduct certain activities with bird species covered under the Wild Bird Conservation Act of 1992. This notice is provided pursuant to Section 112(4) of the Wild Bird Conservation Act of 1992, 50 CFR 15.26(c). Written data, comments, or requests for copies of this complete application should be submitted to the Chief (address above).

Applicant: Mr. Vernon Bret Padgett, Stone Mountain, GA.

The applicant wishes to establish a cooperative breeding program for Red-necked Aracari (*Pteroglossus aracari*), Green Aracari (*Pteroglossus viridis*), Toco Toucan (*Ramphastos toco*), Red-billed Toucan (*Ramphastos tucanus*),

and Channel-billed Toucan (*Ramphastos vitellinus*). The applicant wishes to be an active participant in this program along with one other individual. If approved, the program will be overseen by the Zoological Association of America.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 27, 2013.

Craig Hoover,

Chief, Branch of Operations, Division of Management Authority.

[FR Doc. 2013–07598 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2013–N075; FXES11130100000F5–134–FF01E00000]

Endangered and Threatened Wildlife and Plants; Recovery Permit Applications

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 applications for permits to conduct activities with the purpose of enhancing the survival of endangered species. The Endangered Species Act of 1973, as amended (Act), prohibits certain activities with respect to endangered species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing such permits.

DATES: To ensure consideration, please send your written comments by May 2, 2013.

ADDRESSES: Endangered Species Program Manager, Ecological Services, U.S. Fish and Wildlife Service, Pacific Regional Office, 911 NE 11th Avenue, Portland, OR 97232–4181. Please refer to the permit number for the application when submitting comments.

FOR FURTHER INFORMATION CONTACT: Grant Canterbury, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION:

Background

The Act (16 U.S.C. 1531 *et seq.*) prohibits certain activities with respect to 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 17, the Act provides for certain permits, and requires that we invite public comment before issuing these permits for endangered species.

A permit granted by us under section 10(a)(1)(A) of the Act authorizes the permittee to conduct activities (including take or interstate commerce) with respect to U.S. endangered or threatened species for scientific purposes or enhancement of propagation or survival. Our regulations implementing section 10(a)(1)(A) of the Act 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 for the application when submitting comments.

Documents and other information submitted with these applications are available for review by request from the Endangered Species Program Manager at the address listed in the **ADDRESSES** section of this notice, subject to the requirements of the Privacy Act (5 U.S.C. 552a) and Freedom of Information Act (5 U.S.C. 552).

Permit Number: TE–99474A

Applicant: Tyler Hicks, Ridgefield, Washington.

The applicant requests a new recovery permit to take (capture and release) the Fender's blue butterfly (*Icaricia icarioides fenderi*) in conjunction with research in Lane, Polk, Benton, Yamhill, and Washington Counties, Oregon, for the purpose of enhancing its survival.

Permit Number: TE–98468A

Applicant: Amnis Opes Institute, Bend, Oregon.

The applicant requests a new recovery permit to take (capture and release) the Modoc sucker (*Catostomus microps*), Lost River sucker (*Deltistes luxatus*), shortnose sucker (*Chasmistes brevirostris*), Mohave tui chub (*Gila bicolor mohavensis*), and Owens tui chub (*Gila bicolor snyderi*) in conjunction with research in Oregon and California for the purpose of enhancing their survival.

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: March 25, 2013.

Richard R. Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–07604 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2013–N081; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Marine Mammals; Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), have issued the following permits to conduct certain activities with endangered species, marine mammals, or both. We issue these permits under the Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA).

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION: On the dates below, as authorized by the

provisions of the ESA (16 U.S.C. 1531 *et seq.*), as amended, and/or the MMPA, as amended (16 U.S.C. 1361 *et seq.*), we issued requested permits subject to certain conditions set forth therein. For each permit for an endangered species, we found that (1) The application was filed in good faith, (2) The granted permit would not operate to the disadvantage of the endangered species, and (3) The granted permit would be consistent with the purposes and policy set forth in section 2 of the ESA.

ENDANGERED SPECIES

Permit no.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
89704A	Hawkins Taxidermy, LLC	78 FR 9725; February 11, 2013	March 21, 2013.

MARINE MAMMALS

Permit no.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
053639	USFWS National Forensics Laboratory	78 FR 5481; January 25, 2013	March 18, 2013.

Availability of Documents

Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280.

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2013–07597 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2013–N080; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species, marine mammals, or both. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before May 2, 2013.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES.** If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by

disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: M.J.V. Inc., Morgan, TX; PRT–99811A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the barasingha (*Rucervus duvaucelii*), Eld's deer (*Rucervus eldii*), scimitar-horned oryx (*Oryx dammah*), Arabian oryx (*Oryx leucoryx*), addax (*Addax nasomaculatus*), dama gazelle (*Nanger dama*), and red lechwe (*Kobus leche*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: M.J.V. Inc., Morgan, TX; PRT–99809A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), dama gazelle (*Nanger dama*), and red lechwe (*Kobus leche*) from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: 3–S Texas Outdoors, LLC, Bedias, TX; PRT–99836A

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah),* addax (*Addax nasomaculatus*), and red lechwe (*Kobus leche*) to enhance the species' propagation or survival. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: 3–S Texas Outdoors, LLC, Bedias, TX; PRT–99837A

The applicant requests a permit authorizing interstate and foreign commerce, export, and cull of excess barasingha (*Rucervus duvaucelii*), scimitar-horned oryx (*Oryx dammah*), addax (*Addax nasomaculatus*), and red lechwe (*Kobus leche*), from the captive herd maintained at their facility, for the purpose of enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Dallas World Aquarium, Dallas, Texas; PRT–99983A

The applicant requests a permit to export six female live, captive-born Orinoco crocodiles (*Crocodylus intermedius*) to Denmark, for the purpose of enhancement of the survival of the species.

University of Utah, Salt Lake City, Utah; PRT–166772

The applicant requests a permit to export/re-export and reimport nonliving museum specimens of endangered and threatened species previously accessioned into the applicant's collection for scientific research. This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Bill Bryant, Rock Hill, SC; PRT–97893A

Applicant: Darren Dubberley, Argyle, TX; PRT–99951A

Applicant: Donald Lepp, Yankton, SD; PRT–99464A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2013–07600 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDT000000.L11200000.DD0000.241A.00]

Notice of Public Meetings, Twin Falls District Resource Advisory Council, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meetings.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA), the Federal Advisory Committee Act of 1972 (FACA, the U.S. Department of the Interior, Bureau of Land Management (BLM) Twin Falls District Resource Advisory Council (RAC) will meet as indicated below.

DATES: On April 23 2013, the Twin Falls District RAC members will meet at the LaQuinta Inns & Suites, 539 Poleline Road, Twin Falls Idaho. The meeting will begin at 9:00 a.m. and end no later than 4:00 p.m. The public comment period for the RAC meeting will take place 9:10 a.m. to 9:40 a.m.

FOR FURTHER INFORMATION CONTACT: Heather Tiel-Nelson, Twin Falls District, Idaho, 2536 Kimberly Road, Twin Falls, Idaho, 83301, (208) 736–2352.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. During the April 23rd meeting, there will be a Craters of the Moon National Monument Resource Management Plan (RMP) Amendment update and field office updates. Additional topics may be added and will be included in local media announcements. More information is available at *www.blm.gov/id/st/en/res/resource_advisory.3.html.*

RAC meetings are open to the public. For further information about the meeting, please contact Heather Tiel-Nelson, Public Affairs Specialist for the Twin Falls District BLM at (208) 736–2352.

Dated: March 21, 2013.

Mel M. Meier,

District Manager.

[FR Doc. 2013–07603 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–VRP–WS–12612; PPWOVPADW0, PPMPRLE1Y.LB0000]

Proposed Information Collection; Backcountry Use Permit

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on February 28, 2014. We may not conduct or sponsor a survey, and a person is not required to respond to a collection of

information, unless it displays a currently valid OMB control number.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by June 3, 2013.

ADDRESSES: Send your comments on the IC to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 1201 I Street NW., MS 1237, Washington, DC 20005 (mail); or *madonna_baucum@nps.gov* (email). Please include ''1024–0022'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Garry Oye, Chief, Wilderness Stewardship Division at (702) 895–4893; or 4505 Maryland Parkway, Box 452040–RAJ284, Las Vegas, NV 89154–2040 (mail); or *garry_oye@nps.gov* (email). Please include ''1024–0022'' in the subject line.

SUPPLEMENTARY INFORMATION:

I. Abstract

In 1976, the NPS initiated a backcountry registration system in accordance with the regulations found at 36 CFR 1.5, 1.6 and 2.10. The objective of the use permit system is to provide users access to backcountry areas of national parks with continuing opportunities for solitude, while enhancing resource protection and providing a means of disseminating public safety messages regarding the backcountry travel. NPS backcountry program managers, by designating access routes and overnight camping locations, can redistribute campers in response to user impact, high fire danger, flood or wind hazard, bear activity or other situations that may temporarily close a portion of the backcountry. The NPS may also use the permit system as a means of ensuring that each backcountry user receives up-to-date information on backcountry sanitation procedures, food storage, wildlife activity, trail conditions and weather projections so that concerns for visitor safety are met.

The Backcountry Use Permit is an extension of the NPS statutory authority responsibility to protect the park areas it administers and to manage the public use thereof (16 U.S.C. 1 and 3). NPS regulations codified in 36 CFR parts 1 through 7, 12 and 13 are designated to implement statutory mandates that provide for resource protection and pubic enjoyment. The Backcountry Use Permit is the primary form used to provide access into NPS backcountry areas including those areas that require a reservation to enter where use limits are imposed in accordance with other NPS regulations. Such permitting enhances the ability to the NPS to education users on potential hazards, search and rescue efforts, and resource protection.

II. Data

OMB Control Number: 1024–0022.

Expiration Date: 02/28/2014.

Title: Backcountry Use Permit (36 CFR 1.5, 1.6, and 2.10).

Service Form Numbers: Backcountry Use Permit, 10–404A.

Type of Request: Extension of a currently approved collection of information.

Description of Respondents: Individuals wishing to use backcountry areas within national parks.

Estimated Average Number of Responses: 285,000.

Frequency of Response: 1 per respondent.

Estimated Average Time Burden per Respondent: 5 minutes.

Estimated Total Annual Reporting Burden: 23,750 hours.

Respondent's Obligation: Required to obtain or retain a benefit.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 20, 2013.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2013–07594 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–EH–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–SER–FORA–0419–10126: PPSESEROC3, PMP00UP05.YP0000]

Draft General Management Plan and Draft Environmental Impact Statement, Fort Raleigh National Historic Site, North Carolina

AGENCY: National Park Service, Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces the availability of a Draft Environmental Impact Statement for the General Management Plan (EIS/GMP) for Fort Raleigh National Historic Site, North Carolina. The draft describes and analyzes several alternatives to guide the management of the site over the next 15 to 20 years. The NPS preferred alternative incorporates various management prescriptions to ensure access to and protection and enjoyment of the monument's resources.

DATES: We will accept comments for a period of 60 days following publication of the Environmental Protection Agency's notice of availability in the **Federal Register**. We will announce the dates, times, and locations of public meetings on the draft EIS/GMP through the NPS Planning, Environment, and Public Comment (PEPC) Web site: *http://parkplanning.nps.gov/FORA* and media outlets.

ADDRESSES: You may submit comments by the following methods:

- Via the internet on the PEPC Web site *http://parkplanning.nps.gov/FORA.* An electronic public comment form is provided on this Web site.
- Via mail to Superintendent, Fort Raleigh National Historic Site, 1401 National Park Drive, Manteo, NC 27954.
- Via hand delivery to the above address.

Electronic copies of the Draft EIS/GMP will be available online at *http://parkplanning.nps.gov/FORA.* A limited number of compact disks and printed copies will be also available at the National Historic Site park headquarters at 1401 National Park Drive.

FOR FURTHER INFORMATION CONTACT: Superintendent Barclay Trimble, Fort Raleigh National Historic Site, 1401 National Park Drive, Manteo, NC 27954 or telephone at (252) 473–2111, ext. 148.

SUPPLEMENTARY INFORMATION: Public meetings, newsletters, and internet updates have kept the public informed and involved throughout the planning process. The Draft EIS/GMP provides a

framework for management, use, and development of the National Historic Site for the next 15 to 20 years. It presents and analyzes three alternatives:

- Alternative A (no action) provides a baseline for evaluating changes and impacts of the two action alternatives.
- Alternative B would greatly expand the scope of the National Historic Site's partnerships through greater partner involvement in interpretation of the Roanoke Voyages. The NPS staff would interpret other National Historic Site stories. This alternative encourages more on-site experiences through partnerships and through additional interpretive efforts, marketing, and facilities.
- Alternative C, the NPS preferred alternative, would increase our research on the site's history, archeology, inhabitants and events with emphasis on interpretive themes and preservation. As a result of our expanded research and coordination with other research organizations and agencies, visitors would benefit by gaining increased knowledge of the National Historic Site and its multiple cultural and natural themes. This alternative would respond to the mandates of Public Law 101–603, which broadened the interpretive and resource preservation purpose of the National Historic Site.

The three alternatives are described in detail in chapter 2 of the Draft EIS/GMP. Chapter 4 details the key impacts of implementing the three alternatives.

Before including your address, phone number, email address, or other personal identifying information in your comment, please be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 25, 2013.

Gordon Wissinger,

Acting Regional Director, Southeast Region.

[FR Doc. 2013–07601 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–JD–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

[OMB Control Number 1029–0117]

Notice of Proposed Information Collection

AGENCY: Office of Surface Mining Reclamation and Enforcement.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing its intention to request renewed approval from the Office of Management and Budget to continue collecting information for Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information. The information collection request describes the nature of the information collection and its expected burden and cost.

DATES: Comments on the proposed information collection must be received by June 3, 2013, to be assured of consideration.

ADDRESSES: Comments may be mailed to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave NW., Room 203—SIB, Washington, DC 20240. Comments may also be submitted electronically to *jtrelease@osmre.gov.*

FOR FURTHER INFORMATION CONTACT: To receive a copy of the information collection request contact John Trelease, at (202) 208–2783 or by email at *jtrelease@osmre.gov.*

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8 (d)]. This notice identifies an information collection that OSM will be submitting to OMB for extension. This collection is contained in 30 CFR Part 778—Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information.

OSM has revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM will request a 3-year term of approval for each information collection activity.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection of information is 1029–0117 and is displayed at 30 CFR 778.8. Responses are required to obtain a benefit.

Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) the accuracy of the agency's burden estimates; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will be included in OSM's submissions of the information collection request to OMB.

Title: 30 CFR Part 778—Permit Applications—Minimum Requirements for Legal, Financial, Compliance, and Related Information.

OMB Control Number: 1029–0117.

Summary: Section 507(b) of P.L. 95–87 provides that persons conducting coal mining activities submit to the regulatory authority all relevant information regarding ownership and control of the mining company, their compliance status and history, and authority to mine the property. This information is used to insure all legal, financial and compliance requirements are satisfied prior to issuance or denial of a permit.

Bureau Form Number: None.

Frequency of Collection: Once.

Description of Respondents: Surface coal mining permit applicants and State regulatory authorities.

Total Annual Responses: 3,223.

Total Annual Burden Hours: 9,119.

Total Non-labor Costs: $0.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: March 26, 2013.

Andrew F. DeVito,

Chief, Division of Regulatory Support.

[FR Doc. 2013–07554 Filed 4–1–13; 8:45 am]

BILLING CODE 4310–05–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1206 (Preliminary)]

Diffusion-Annealed, Nickel-Plated Steel Flat-Rolled Products From Japan; Institution of Antidumping Duty Investigation and Scheduling of Preliminary Phase Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of an investigation and commencement of preliminary phase antidumping investigation No. 731–TA–1206 (Preliminary) under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)) (the Act) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from Japan of diffusion-annealed, nickel-plated steel flat-rolled products, provided for primarily in subheadings 7210.90 and 7212.50 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value.[1] Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by May 13, 2013. The Commission's views are due at Commerce within five business days thereafter, or by May 20, 2013.

For further information concerning the conduct of this investigation and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

DATES: *Effective Date:* March 27, 2013.

FOR FURTHER INFORMATION CONTACT: Nathanael Comly (202–205–3174), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—This investigation is being instituted in response to a petition filed on March 27, 2013, by Thomas Steel Strip Corporation, Warren, OH.

Participation in the investigation and public service list.—Persons (other than petitioners) wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this investigation available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigation under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Investigations has scheduled a conference in connection with this investigation for 9:30 a.m. on April 17, 2013, at the U.S. International Trade Commission Building, 500 E Street SW., Washington, DC. Requests to appear at the conference should be filed with the Office of the Secretary (*William.bishop@usitc.gov* and *Sharon.bellamy@usitc.gov*) on or before April 15, 2013. Parties in support of the imposition of antidumping duties in this investigation and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before April 22, 2013, a written brief containing information and arguments pertinent to the subject matter of the investigation. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. Please consult the Commission's rules, as amended, 76 FR 61937 (Oct. 6, 2011) and the Commission's Handbook on Filing Procedures, 76 FR 62092 (Oct. 6, 2011), available on the Commission's Web site at *http://edis.usitc.gov.*

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

By order of the Commission.

Issued: March 28, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–07584 Filed 4–1–13; 8:45 am]

BILLING CODE 7020–02–P

[1] Imports may also be classified under subheadings 7210.70, 7212.40, 7219.90, 7220.90, 7225.99, or 7226.99.

DEPARTMENT OF LABOR

Employment and Training Administration.

Announcement Regarding a Change in Eligibility for Unemployment Insurance (UI) Claimants in Alaska, Georgia, Louisiana, Maryland, Mississippi, Missouri, Montana, Ohio, South Carolina and Texas in the Emergency Unemployment Compensation 2008 (EUC08) Program, and the Federal-State Extended Benefits (EB) Program

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Announcement regarding a change in eligibility for Unemployment Insurance (UI) claimants in Alaska, Georgia, Louisiana, Maryland, Mississippi, Missouri, Montana, Ohio, South Carolina and Texas in the Emergency Unemployment Compensation (EUC08) program, and the Federal-State Extended Benefits (EB) program.

The U.S. Department of Labor (Department) produces trigger notices indicating which states qualify for both EB and EUC08 benefits, and provides the beginning and ending dates of payable periods for each qualifying state. The trigger notices covering state eligibility for these programs can be found at: *http://ows.doleta.gov/unemploy/claims_arch.asp.*

The following changes have occurred since the publication of the last notice regarding states EUC08 and EB trigger status:

• Maryland and Texas have triggered ''off'' in Tier 3 of EUC08

Maryland and Texas began a 13-week mandatory ''on'' period in Tier 3 of EUC08 on October 7, 2012. Based on data released from the Bureau of Labor Statistics, these states are below the 7.0 percent threshold rate necessary to remain ''on'' in Tier 3 of EUC08. As a result, they have concluded a payable period in Tier 3 and the week ending January 5, 2013, was the last week in which EUC08 claimants in these states could exhaust Tier 2, and establish Tier 3 eligibility. Under the phase-out provisions, claimants could receive any remaining entitlement they had in Tier 3 after January 5, 2013.

• Georgia, Mississippi and South Carolina have triggered ''off'' in Tier 4 of EUC08.

The three month average, seasonally adjusted total unemployment rate in these states fell below the 9.0 percent threshold rate to remain ''on'' in Tier 4 of EUC08. This triggered these states ''off'' of Tier 4 and the week ending January 12, 2013, was the last week in which EUC08 claimants in these states could exhaust Tier 3, and establish Tier 4 eligibility. Under the phase-out provisions, claimants could receive any remaining entitlement they had in Tier 4 after January 12, 2013.

• Louisiana, Missouri, and Ohio have triggered ''off'' in Tier 3 of EUC08.

The three month average, seasonally adjusted total unemployment rate in Louisiana, Missouri, and Ohio fell below the 7.0 percent threshold rate to remain ''on'' in Tier 3 of EUC08. This triggered these states ''off'' of Tier 3 and the week ending January 12, 2013, was the last week in which EUC08 claimants in these states could exhaust Tier 2, and establish Tier 3 eligibility. Under the phase-out provisions, claimants could receive any remaining entitlement they had in Tier 3 after January 12, 2013.

• Montana has triggered ''off'' in Tier 2 of EUC08.

The three month average, seasonally adjusted total unemployment rate in Montana fell below the 6.0 percent threshold rate to remain ''on'' in Tier 2 of EUC08. This triggered Montana ''off'' of Tier 2 and the week ending January 12, 2013, was the last week in which EUC08 claimants in Montana could have exhausted Tier 1, and establish Tier 2 eligibility. Under the phase-out provisions, claimants could receive any remaining entitlement they had in Tier 2 after January 12, 2013.

• Alaska has triggered ''on'' Tier 4 of EUC08.

Alaska's 13-week insured unemployment rate for the week ending January 19, 2013, rose to meet the 6 percent threshold to trigger ''on'' to Tier 4 of EUC08. The payable period for Alaska in Tier Four of EUC08 began February 3, 2013. As a result, the current maximum potential entitlement for claimants in Alaska in EUC08 has increased from 37 weeks to 47 weeks.

• Alaska triggers ''on'' to EB.

Alaska's 13-week insured unemployment rate for the week ending January 19, 2013, rose to meet the 6 percent threshold to trigger ''on'' to EB. Alaska's payable period in EB began February 3, 2013.

Information for Claimants

The duration of benefits payable in the EUC08 program, and the terms and conditions under which they are payable, are governed by Public Laws 110–252, 110–449, 111–5, 111–92, 111–118, 111–144, 111–157, 111–205, 111–312, 112–96, and 112–240, and the operating instructions issued to the states by the Department. The duration of benefits payable in the EB program, and the terms and conditions on which they are payable, are governed by the Federal-State Extended Unemployment Compensation Act of 1970, as amended, and the operating instructions issued to the states by the Department.

In the case of a state beginning or concluding a payable period in EB or EUC08, the State Workforce Agency (SWA) will furnish a written notice of any change in potential entitlement to each individual who could establish, or had established, eligibility for benefits (20 CFR 615.13 (c)(1) and (c)(4)). Persons who believe they may be entitled to benefits in the EB or EUC08 programs, or who wish to inquire about their rights under these programs, should contact their SWA.

FOR FURTHER INFORMATION CONTACT: Tony Sznoluch, U.S. Department of Labor, Employment and Training Administration, Office of Unemployment Insurance, 200 Constitution Avenue NW., Frances Perkins Bldg. Room S–4524, Washington, DC 20210, telephone number (202) 693–3176 (this is not a toll-free number) or by email: *Sznoluch.anatoli@dol.gov.*

Signed in Washington, DC, this 26th day of March, 2013.

Jane Oates,

Assistant Secretary for Employment and Training.

[FR Doc. 2013–07631 Filed 4–1–13; 8:45 am]

BILLING CODE 4510–FW–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice on Reallotment of Workforce Investment Act (WIA) Title I Formula Allotted Funds for Dislocated Worker Activities for Program Year (PY) 2012

AGENCY: Employment and Training Administration, Labor.

ACTION: Notice.

SUMMARY: Public Law 105–220, the Workforce Investment Act (WIA), requires the Secretary of Labor (Secretary) to conduct reallotment of dislocated worker formula allotted funds based on State financial reports submitted as of the end of the prior program year (PY). This notice publishes the dislocated worker PY 2012 funds for recapture by State and the amount to be reallotted to eligible States.

DATES: This notice is effective April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Amanda Ahlstrand, Acting Administrator, U.S. Department of Labor, Office of Workforce Investment, Employment and Training Administration, Room C–4526, 200 Constitution Avenue NW, Washington, DC Telephone (202) 693–3052 (this is not a toll-free number) or fax (202) 693–3981.

SUPPLEMENTARY INFORMATION: WIA Section 132(c) requires the Secretary to conduct reallotment of dislocated worker funds based on financial reports submitted by States as of the end of the prior program year. The procedures the Secretary uses for recapture and reallotment of funds are described in WIA regulation at 20 CFR 667.150. Training and Employment Guidance Letter 19–11 advised States that reallotment of funds under WIA will occur during PY 2012 based on State obligations made in PY 2011. We will not recapture any *PY 2012 funds* for Adult and Youth programs because in no case do *PY 2011 unobligated funds* exceed the statutory requirement of 20 percent of State allotted funds. There

was recapture of WIA Dislocated Worker funds in PY 2011, but no reallotment of those funds.

Excess unobligated State funds in the amount of $69,038 will be captured from PY 2012 formula allotted funds for the Dislocated Worker program for one State and distributed by formula to PY 2012 dislocated worker funds for eligible States. The description of the methodology used for the *calculation of the recapture/reallotment amounts* and the distribution of the changes to PY 2012 formula allotments for dislocated worker activities are provided in Attachment C below.

WIA Section 132(c) requires the Governor to prescribe equitable procedures for making funds available from the State and local areas in the event that the State is required to make funds available for reallotment.

I. Attachment A

U.S. DEPARTMENT OF LABOR

EMPLOYMENT AND TRAINING ADMINISTRATION, WIA DISLOCATED WORKER ACTIVITIES, PY 2012 REALLOTMENT TO STATES

	Excess unobligated PY 2011 funds for recapture in PY 2012	PY 2011 * dislocated worker allotments for eligible states	PY 2012 reallotment amount for eligible states	Total PY 2012 allotments	Total adjustment to PY 2012 (recapture/ reallotment)	Revised total PY 2012 allotments
Alabama	0	16,103,978	1,050	15,469,879	1,050	15,470,929
Alaska	0	1,801,832	117	1,617,337	117	1,617,454
Arizona **	0	21,958,487	1,432	21,499,925	1,432	21,501,357
Arkansas	0	6,525,077	425	7,022,211	425	7,022,636
California	0	170,043,518	11,086	167,279,720	11,086	167,290,806
Colorado	0	13,947,918	909	16,138,114	909	16,139,023
Connecticut	0	12,099,340	789	12,425,813	789	12,426,602
Delaware	0	2,523,025	164	2,364,143	164	2,364,307
District of Columbia	69,038	0	0	2,584,544	(69,038)	2,515,506
Florida	0	81,146,334	5,290	77,488,229	5,290	77,493,519
Georgia	0	35,448,102	2,311	36,619,541	2,311	36,621,852
Hawaii	0	2,535,324	165	2,544,104	165	2,544,269
Idaho	0	4,234,037	276	4,848,656	276	4,848,932
Illinois	0	52,311,422	3,411	45,174,858	3,411	45,178,269
Indiana	0	22,936,088	1,495	19,764,183	1,495	19,765,678
Iowa	0	6,212,899	405	5,396,211	405	5,396,616
Kansas	0	5,771,477	376	6,269,130	376	6,269,506
Kentucky	0	14,962,447	976	14,426,545	976	14,427,521
Louisiana	0	8,755,097	571	10,053,020	571	10,053,591
Maine *	0	3,342,209	218	3,411,860	218	3,412,078
Maryland	0	14,280,338	931	13,446,336	931	13,447,267
Massachusetts	0	21,033,198	1,371	18,123,153	1,371	18,124,524
Michigan	0	51,206,873	3,339	37,950,243	3,339	37,953,582
Minnesota	0	12,869,603	839	12,016,430	839	12,017,269
Mississippi	0	10,134,604	661	10,347,245	661	10,347,906
Missouri	0	19,157,714	1,249	19,339,341	1,249	19,340,590
Montana	0	2,044,172	133	2,228,454	133	2,228,587
Nebraska	0	2,056,541	134	1,769,045	134	1,769,179
Nevada	0	14,310,158	933	14,404,698	933	14,405,631
New Hampshire	0	2,760,460	180	2,023,863	180	2,024,043
New Jersey	0	32,201,066	2,099	30,891,644	2,099	30,893,743
New Mexico **	0	5,171,897	337	4,691,620	337	4,691,957
New York	0	55,804,488	3,638	53,040,830	3,638	53,044,468
North Carolina	0	35,042,869	2,285	33,775,540	2,285	33,777,825
North Dakota	0	499,156	33	491,586	33	491,619
Ohio	0	44,012,508	2,869	37,410,700	2,869	37,413,569
Oklahoma	0	6,906,804	450	5,818,181	450	5,818,631
Oregon	0	15,054,272	981	14,179,357	981	14,180,338
Pennsylvania	0	37,914,512	2,472	33,628,882	2,472	33,631,354
Puerto Rico	0	13,675,088	892	13,792,527	892	13,793,419
Rhode Island	0	5,096,307	332	4,729,397	332	4,729,729
South Carolina	0	19,157,131	1,249	17,247,928	1,249	17,249,177
South Dakota	0	839,629	55	914,615	55	914,670
Tennessee	0	22,094,179	1,440	21,002,405	1,440	21,003,845
Texas	0	61,926,140	4,037	65,045,270	4,037	65,049,307
Utah**	0	6,053,827	395	6,236,314	395	6,236,709
Vermont	0	1,242,041	81	1,060,351	81	1,060,432
Virginia	0	18,453,304	1,203	16,429,934	1,203	16,431,137
Washington	0	22,238,858	1,450	22,715,887	1,450	22,717,337
West Virginia	0	4,552,003	297	4,805,556	297	4,805,853
Wisconsin	0	17,319,011	1,129	15,286,735	1,129	15,287,864
Wyoming	0	1,199,212	78	909,374	78	909,452

U.S. DEPARTMENT OF LABOR—Continued

EMPLOYMENT AND TRAINING ADMINISTRATION, WIA DISLOCATED WORKER ACTIVITIES, PY 2012 REALLOTMENT TO STATES

	Excess unobligated PY 2011 funds for recapture in PY 2012	PY 2011 * dislocated worker allotments for eligible states	PY 2012 reallotment amount for eligible states	Total PY 2012 allotments	Total adjustment to PY 2012 (recapture/ reallotment)	Revised total PY 2012 allotments
State total	$69,038	$1,058,966,574	$69,038	$1,008,151,464	$0	$1,008,151,464

* Including rescissions based on the statutory formula and prior year recapture amount for Maine. No reallotment occurred; therefore, no reallotment amounts are included.

** Includes Navajo Nation.

1/11/2013

BILLING CODE 4510–30–P

II. Attachment B

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
WIA Dislocated Worker Activities
PY 2012 Revised Allotments with Reallotment

	Total			Available 7/1/12			Available 10/1/12		
	Original	Recapture/ Reallotment	Revised	Original	Recapture/ Reallotment	Revised	Original	Recapture/ Reallotment	Revised
Alabama	15,469,879	1,050	15,470,929	2,273,354	-	2,273,354	13,196,525	1,050	13,197,575
Alaska	1,617,337	117	1,617,454	237,673	-	237,673	1,379,664	117	1,379,781
Arizona *	21,499,925	1,432	21,501,357	3,159,491	-	3,159,491	18,340,434	1,432	18,341,866
Arkansas	7,022,211	425	7,022,636	1,031,939	-	1,031,939	5,990,272	425	5,990,697
California	167,279,720	11,086	167,290,806	24,582,353	-	24,582,353	142,697,367	11,086	142,708,453
Colorado	16,138,114	909	16,139,023	2,371,554	-	2,371,554	13,766,560	909	13,767,469
Connecticut	12,425,813	789	12,426,602	1,826,018	-	1,826,018	10,599,795	789	10,600,584
Delaware	2,364,143	164	2,364,307	347,419	-	347,419	2,016,724	164	2,016,888
District of Columbia	2,584,544	(69,038)	2,515,506	379,808	-	379,808	2,204,736	(69,038)	2,135,698
Florida	77,488,229	5,290	77,493,519	11,387,173	-	11,387,173	66,101,056	5,290	66,106,346
Georgia	36,619,541	2,311	36,621,852	5,381,373	-	5,381,373	31,238,168	2,311	31,240,479
Hawaii	2,544,104	165	2,544,269	373,865	-	373,865	2,170,239	165	2,170,404
Idaho	4,848,656	276	4,848,932	712,527	-	712,527	4,136,129	276	4,136,405
Illinois	45,174,858	3,411	45,178,269	6,638,607	-	6,638,607	38,536,251	3,411	38,539,662
Indiana	19,764,183	1,495	19,765,678	2,904,417	-	2,904,417	16,859,766	1,495	16,861,261
Iowa	5,396,211	405	5,396,616	792,993	-	792,993	4,603,218	405	4,603,623

Kansas	6,269,130	376	6,269,506	921,271	-	921,271	5,347,859	376	5,348,235
Kentucky	14,426,545	976	14,427,521	2,120,032	-	2,120,032	12,306,513	976	12,307,489
Louisiana	10,053,020	571	10,053,591	1,477,327	-	1,477,327	8,575,693	571	8,576,264
Maine	3,411,860	218	3,412,078	501,385	-	501,385	2,910,475	218	2,910,693
Maryland	13,446,336	931	13,447,267	1,975,987	-	1,975,987	11,470,349	931	11,471,280
Massachusetts	18,123,153	1,371	18,124,524	2,663,262	-	2,663,262	15,459,891	1,371	15,461,262
Michigan	37,950,243	3,339	37,953,582	5,576,924	-	5,576,924	32,373,319	3,339	32,376,658
Minnesota	12,016,430	839	12,017,269	1,765,857	-	1,765,857	10,250,573	839	10,251,412
Mississippi	10,347,245	661	10,347,906	1,520,565	-	1,520,565	8,826,680	661	8,827,341
Missouri	19,339,341	1,249	19,340,590	2,841,985	-	2,841,985	16,497,356	1,249	16,498,605
Montana	2,228,454	133	2,228,587	327,479	-	327,479	1,900,975	133	1,901,108
Nebraska	1,769,045	134	1,769,179	259,967	-	259,967	1,509,078	134	1,509,212
Nevada	14,404,698	933	14,405,631	2,116,822	-	2,116,822	12,287,876	933	12,288,809
New Hampshire	2,023,863	180	2,024,043	297,414	-	297,414	1,726,449	180	1,726,629
New Jersey	30,891,644	2,099	30,893,743	4,539,638	-	4,539,638	26,352,006	2,099	26,354,105
New Mexico *	4,691,620	337	4,691,957	689,450	-	689,450	4,002,170	337	4,002,507
New York	53,040,830	3,638	53,044,468	7,794,540	-	7,794,540	45,246,290	3,638	45,249,928
North Carolina	33,775,540	2,285	33,777,825	4,963,436	-	4,963,436	28,812,104	2,285	28,814,389
North Dakota	491,586	33	491,619	72,240	-	72,240	419,346	33	419,379
Ohio	37,410,700	2,869	37,413,569	5,497,636	-	5,497,636	31,913,064	2,869	31,915,933
Oklahoma	5,818,181	450	5,818,631	855,003	-	855,003	4,963,178	450	4,963,628
Oregon	14,179,357	981	14,180,338	2,083,707	-	2,083,707	12,095,650	981	12,096,631

Pennsylvania	33,628,882	2,472	33,631,354	4,941,885	-	4,941,885	28,686,997	2,472	28,689,469
Puerto Rico	13,792,527	892	13,793,419	2,026,861	-	2,026,861	11,765,666	892	11,766,558
Rhode Island	4,729,397	332	4,729,729	695,002	-	695,002	4,034,395	332	4,034,727
South Carolina	17,247,928	1,249	17,249,177	2,534,645	-	2,534,645	14,713,283	1,249	14,714,532
South Dakota	914,615	55	914,670	134,406	-	134,406	780,209	55	780,264
Tennessee	21,002,405	1,440	21,003,845	3,086,379	-	3,086,379	17,916,026	1,440	17,917,466
Texas	65,045,270	4,037	65,049,307	9,558,635	-	9,558,635	55,486,635	4,037	55,490,672
Utah *	6,236,314	395	6,236,709	916,449	-	916,449	5,319,865	395	5,320,260
Vermont	1,060,351	81	1,060,432	155,822	-	155,822	904,529	81	904,610
Virginia	16,429,934	1,203	16,431,137	2,414,438	-	2,414,438	14,015,496	1,203	14,016,699
Washington	22,715,887	1,450	22,717,337	3,338,181	-	3,338,181	19,377,706	1,450	19,379,156
West Virginia	4,805,556	297	4,805,853	706,194	-	706,194	4,099,362	297	4,099,659
Wisconsin	15,286,735	1,129	15,287,864	2,246,440	-	2,246,440	13,040,295	1,129	13,041,424
Wyoming	909,374	78	909,452	133,636	-	133,636	775,738	78	775,816
STATE TOTAL	**1,008,151,464**	**-**	**1,008,151,464**	**148,151,464**	**-**	**148,151,464**	**860,000,000**	**-**	**860,000,000**

* Includes funds allocated to the Navajo Nation

01/11/13

BILLING CODE 4510–30–C

III. Attachment C

Dislocated Worker State Formula PY 2012 Reallotment Methodology

Reallotment Summary: This year ETA analyzed State WIA Dislocated Worker 9130 financial reports from the June 30, 2012 reporting period for program year (PY) 2011 to determine if any State had unobligated funds in excess of twenty percent of their PY 2011 allotment amount. If so, we will recapture that amount from PY 2012 funds and reallot among eligible States.

- Source Data: State WIA 9130 financial status reports
- Programs:
  State Dislocated Worker (DW)
  State Rapid Response
  Local Dislocated Worker (includes local administration)
- Period: June 30, 2012
- Years covered: PY 2011 and FY 2012

Reallotment Calculations:

(1) ETA computes the State's total amount of PY 2011 State obligations (including Fiscal Year (FY) 2012 funds) for the Dislocated Worker (DW) program. State obligations are considered to be the total of the DW statewide activities obligations, Rapid Response obligations, and 100 percent of local DW program authorized (which includes local admin authorized). The State's total unobligated balance for the DW program is the PY 2011 DW allotment amount (minus the total DW obligations) (adjusted for recapture/reallotment and statutory formula-based rescissions, if applicable. This year a rescission was applicable to all States that the recapture for Maine was applicable, but reallotment for all other States was not applicable). (For reallotment purposes, DW allotted funds transferred to the Navajo Nation are added back to Arizona, New Mexico, and Utah Local DW authorized amounts.)

(2) Section 667.150 of the regulations provides that the recapture calculations exclude the reserve for state administration. Data on State administrative authorized and obligated amounts are not normally available on WIA 9130 financial reports. In the preliminary calculation to determine States potentially liable for recapture, the DW portion of the State administrative amount authorized is estimated by calculating the five percent maximum amount for State DW administrative costs using the DW State allotment amounts (adjusted for recapture/reallotment and statutory formula-based rescissions). For the DW portion of the State administrative amount obligated, 100 percent of the estimated authorized amount is treated as obligated, although this estimate of State administration obligations is limited by reported statewide activities obligations overall.

(3) ETA requests that those States potentially liable for recapture provide additional data on state administrative amounts which are not regularly reported on the PY 2011 and FY 2012 statewide activities reports. The additional information requested is the amount of statewide activities funds that were authorized and obligated for State administration as of June 30, 2012. If a State provides actual State DW administrative costs, authorized and obligated, in the comments section of revised 9130 reports, this data replaces the estimates. Based on the requested additional actual data submitted by potentially liable States on revised reports, the DW total allotment for these States is reduced by the DW portion of the State administrative amount authorized. Likewise, the DW total obligations for these States are reduced by the DW portion of the obligated State administrative funding.

(4) States (including those adjusted by State administrative data) with unobligated balances exceeding 20 percent of the combined PY2011/FY2012 DW allotment amount (adjusted for recapture/reallotment and statutory formula-based rescissions) will have their PY 2012 DW funding (from the FY 2013 portion) reduced (recaptured) by the amount of the excess.

(5) Finally, States with unobligated balances which do not exceed 20 percent (eligible states) will receive a share of the total recaptured amount (based on their share of the total PY 2011/FY2012 DW allotments of eligible states) in their PY 2012 DW funding (FY 2013 portion).

Signed at Washington, DC, this 19th day of March, 2013.

Jane Oates,

Assistant Secretary for the Employment and Training Administration.

[FR Doc. 2013–07570 Filed 4–1–13; 8:45 am]

BILLING CODE 4510–30–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–032]

Centennial Challenges: 2014 Night Rover Challenge

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Centennial Challenges 2014 Night Rover Challenge.

SUMMARY: This notice is issued in accordance with 51 U.S.C. 20144(c).

The 2014 Night Rover Challenge is scheduled and teams that wish to compete may register. Centennial Challenges is a program of prize competitions to stimulate innovation in technologies of interest and value to NASA and the nation. The 2014 Night Rover Challenge is a prize competition designed to encourage development of new energy storage technologies or application of existing storage technologies in unique ways for application in extreme space environments. Competitors will need to demonstrate high energy density storage systems (>330w–hr/kg) that would enable a rover to operate throughout lunar darkness cycles. Cleantech Open of Palo Alto, California administers the Challenge for NASA. NASA is providing the $1,500,000 prize purse.

DATES: 2014 Night Rover Challenge will be held January 20–April 4, 2014.

ADDRESSES: 2014 Night Rover Challenge will be conducted at the NASA Glenn Research Center, Plumbrook Station located in Sandusky, OH.

FOR FURTHER INFORMATION CONTACT: To register for or get additional information regarding the 2014 Night Rover Challenge, please visit: *http://nightrover.org*

For general information on the NASA Centennial Challenges Program please visit: *www.nasa.gov/challenges.* General questions and comments regarding the program should be addressed to Dr. Larry Cooper, Centennial Challenges Program, NASA Headquarters, 300 E Street SW., Washington, DC 20546–0001. Email address: *larry.p.cooper@nasa.gov.*

SUPPLEMENTARY INFORMATION:

Summary

Solar energy is a renewable source that would be available on the Moon and at other destinations in space. To enable practical system demonstrations of diverse design solutions by independent teams, Phase I of this Challenge will be conducted in an ambient Earth environment in a NASA test chamber. The Phase I Challenge will be to demonstrate a portable energy storage system through two cycles of lunar daylight and darkness. During the daylight period, systems will receive electrical energy from a simulated solar collector. During darkness, the stored energy will be used for simulated tasks of thermal management, scientific experimentation, communications, and rover movement. The competitors may store and extract the energy by any means they desire. The winning system

will be the one that has the highest energy storage density in excess of 330 Watt-hours/kg. The available prize purse is $1.5 million.

A planned future Phase II Challenge will entail testing energy storage systems in NASA thermal and thermal-vacuum chambers to demonstrate applicability to the space and lunar environment.

I. Prize Amounts

The total Night Rover Challenge purse is $1,500,000 (one million five hundred thousand U.S. dollars). Prizes will be offered for entries that meet specific requirements detailed in the Night Rover Challenge Rules.

II. Eligibility

To be eligible to win a NASA prize, competitors must (1) Register and comply with all requirements in the rules and team agreement; (2) in the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States; and (3) shall not be a Federal entity or Federal employee acting within the scope of their employment.

III. Rules

The NASA prize purse will be awarded to the energy storage systems with the highest energy density that meet all requirements of the competition. The complete rules and team agreement for the 2014 Night Rover Challenge can be found at: *http://nightrover.org*

Dated: March 26, 2013.

Michael J. Gazarik,

Associate Administrator, Space Technology Mission Directorate, National Aeronautics and Space Administration.

[FR Doc. 2013–07552 Filed 4–1–13; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–028]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: April 2, 2013.

FOR FURTHER INFORMATION CONTACT: James J. McGroary, Patent Counsel, Marshall Space Flight Center, Mail Code LS01, Huntsville, AL 35812; telephone (256) 544–0013; fax (256) 544–0258.

NASA Case No.: MFS–32761–1–CIP: Multi-Channel Flow Plug with Eddy Current Minimization for Metering, Mixing, and Conditioning;

NASA Case No.: MFS–32761–1–CON: Multi-Channel Flow Plug with Eddy Current Minimization for Meeting, Mixing, and Conditioning.

Sumara M. Thompson-King,

Deputy General Counsel.

[FR Doc. 2013–07611 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–027]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Robin W. Edwards, Patent Counsel, Langley Research Center, Mail Stop 30, Hampton, VA 23681–2199; telephone (757) 864–3230; fax (757) 864–9190.

NASA Case No.: LAR–18202–1: Method for Ground-to-Space Laser Calibration System;

NASA Case No.: LAR–18132–1: Modeling of Laser Ablation and Plume Chemistry in a Boron Nitride Nanotube Production Rig;

NASA Case No.: LAR–17681–2: System for Repairing Cracks in Structures.

Sumara M. Thompson-King,

Deputy General Counsel.

[FR Doc. 2013–07610 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–025]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Robert H. Earp, III, Patent Attorney, Glenn Research Center at Lewis Field, Code 21–14, Cleveland, OH 44135; telephone (216) 433–5754; fax (216) 433–6790.

NASA Case No.: LEW–18889–1: High Speed Idle Engine Control Mode;

NASA Case No.: LEW–18629–1: Electrospray Collection of Lunar Dust;

NASA Case No.: LEW–18565–1: Catalytic Microtube Rocket Igniter;

NASA Case No.: LEW–18605–2: Dual-Mode Hybrid-Engine (DMH-Engine): A Next-Generation Electric Propulsion Thruster;

NASA Case No.: LEW–18919–1: Wireless controlled Chalcogenide Nanoionic Radio Frequency Switch;

NASA Case No.: LEW–18893–1: Novel Aerogel-Based Antennas (ABA) for Aerospace Applications;

NASA Case No.: LEW–18752–1: Large Strain Transparent Magneto-active Polymer Nanocomposites.

Sumara M. Thompson-King,

Deputy General Counsel.

[FR Doc. 2013–07608 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–024]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Robert M. Padilla, Patent Counsel, Ames Research Center, Code 202A–4, Moffett Field, CA 94035–1000; telephone (650) 604–5104; fax (650) 604–2767.

NASA Case No.: ARC–16644–1: Variable Camber Continuous Aerodynamic Control Surfaces and Methods for Active Wing Shaping Control;

NASA Case No.: ARC–16846–1: Dynamic Weather Routes Tool;

NASA Case No.: ARC 16902–1: Nanosensors for Medical Diagnosis;

NASA Case No.: ARC 16942–2: A New Family of Low Density Flexible Ablators;

NASA Case No.: ARC 16450–1CIP: Distributed Prognostics and Health Management with a Wireless Network Architecture;

NASA Case No.: ARC 16607–1: An Approach to Make Flexible Ablators that are Flexible Char Formers;

NASA Case No.: ARC 16340–1: Method for Formation and Manufacture of Carbon Nanotube Mesh Bucky Paper Capsules for Transplantation of Cells and Tissue and Implantation of Medical Devices;

NASA Case No.: ARC 16844–1: Adaptive Control and Disturbance Rejection of Non-Minimum Phase Plants Using Residual Mode Filters.

Sumara M. Thompson-King,

Deputy General Counsel.

[FR Doc. 2013–07607 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–026]

Government-Owned Inventions, Available for Licensing

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Availability of Inventions for Licensing.

SUMMARY: Patent applications on the inventions listed below assigned to the National Aeronautics and Space Administration, have been filed in the United States Patent and Trademark Office, and are available for licensing.

DATES: April 2, 2013.

FOR FURTHER INFORMATION CONTACT: Bryan A. Geurts, Patent Counsel, Goddard Space Flight Center, Mail Code 140.1, Greenbelt, MD 20771–0001; telephone (301) 286–7351; fax (301) 286–9502.

NASA Case No.: GSC–16193–1: Improved Approach to Exoplanet Coronagraphy.

Sumara M. Thompson-King,

Deputy General Counsel.

[FR Doc. 2013–07609 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–033]

Notice of Intent To Grant Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant Exclusive License.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive license in the United States to practice the invention described and claimed in U.S. Patent Application Serial No. 13/800,692 entitled Interconnect Device and Assemblies Made Therewith, to Topline Corporation, having its principal place of business in Irvine, CA. The patent rights in these inventions as applicable have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective partially exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

DATES: The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to Mr. James J. McGroary, Chief Patent Counsel/LS01, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–0013.

FOR FURTHER INFORMATION CONTACT: Mr. Sammy A. Nabors, Technology Transfer Office/ZP30, Marshall Space Flight Center, Huntsville, AL 35812, (256) 544–5226. Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov.*

Sumara M. Thompson-King,

Acting Deputy General Counsel.

[FR Doc. 2013–07615 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–030]

Privacy Act of 1974; Privacy Act System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of a Privacy Act system of records.

SUMMARY: Each Federal agency is required by the Privacy Act of 1974 to publish a description of a system of records containing personal information it establishes and maintains. This notice provides notification that NASA has established an internal system pertaining to its Guest Operations that maintains a listing of individuals invited to view one of NASA's satellite launches, Expendable Launch Vehicle (ELV) launches, or other significant events.

DATES: Submit comments within 60 calendar days from the date of this publication.

ADDRESSES: Patti F. Stockman, Privacy Act Officer, Office of the Chief Information Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546–0001, (202) 358–4787, *NASA-PAOfficer@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Patti F. Stockman, (202) 358–4787, *NASA-PAOfficer@nasa.gov.*

NASA 10GOS

SYSTEM NAME:

NASA Guest Operations System.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Location 1, as set forth in Appendix A.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information on individuals who have been invited to attend NASA events. These individuals can be members of the NASA community such as principal and prominent management and staff officials, program and project managers, scientists, engineers, speakers, other selected employees involved in newsworthy activities, and other participants in Agency programs, as well members of the general public who are invited to attend NASA events.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system may include personal information about the individuals invited or attending events, such as their names, home addresses, nationality and passport information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

51 U.S.C. 20113(a); 44 U.S.C. 3101.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

Any disclosures of information will be compatible with the purpose for which the Agency collected the information. Records from this system may be disclosed in accordance with NASA standard routine uses as set forth in Appendix B.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The information contained in this system of records is compiled, updated, and maintained as electronic records in a central database on a secure server at NASA Headquarters.

RETRIEVABILITY:

Records are searched and retrieved by name, business, or address.

SAFEGUARDS:

An approved security plan for this system has been established in accordance with OMB Circular A–130, Management of Federal Information Resources. Individuals will have access to the system only in accordance with approved authentication methods. Only key authorized employees with appropriately configured system roles can access the system and only from workstations within the NASA Intranet.

RETENTION AND DISPOSAL:

Records are retained in a computer database and managed, retained and dispositioned in accordance with the guidelines defined in the NASA Records Retention Schedules (NRRS), Schedule 1, Item 37A.

SYSTEM MANAGER(S) AND ADDRESS:

System Manager: Guest Operations Manager, Office of Communications, Location 1, as set forth in Appendix A.

NOTIFICATION PROCEDURE:

Individuals interested in inquiring about their records should notify the system manager.

RECORD ACCESS PROCEDURE:

Individuals who wish to gain access to their records should submit their request in writing to the system manager.

CONTESTING RECORD PROCEDURES:

The NASA regulations governing access to records, procedures for contesting the contents and for appealing initial determinations are set forth in 14 CFR part 1212.

RECORD SOURCE CATEGORIES:

The information contained in the GOS is obtained directly from the individuals, who provide the information on a voluntary basis.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Linda Cureton,

NASA Chief Information Officer.

[FR Doc. 2013–07590 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 13–029]

Privacy Act of 1974; Privacy Act System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of Privacy Act system of records.

SUMMARY: Each Federal agency is required by the Privacy Act of 1974 to publish a description of a system of records containing personal information it establishes and maintains. This notice provides notification that NASA has established an internal system of records pertaining to carpool, parking, and other aspects of employee transit and transit benefits.

DATES: Submit comments within 60 calendar days from the date of this publication.

ADDRESSES: Patti F. Stockman, Privacy Act Officer, Office of the Chief Information Officer, National Aeronautics and Space Administration Headquarters, Washington, DC 20546–0001, (202) 358–4787, *NASA–PAOfficer@nasa.gov.*

FOR FURTHER INFORMATION CONTACT: NASA Privacy Act Officer, Patti F. Stockman, (202) 358–4787, *NASA–PAOfficer@nasa.gov.*

NASA 10PATS

SYSTEM NAME:

Parking and Transit System (PATS)

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Locations 1 and 4, as set forth in Appendix A.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system maintains information on NASA civil servants and contractors who are holders of parking permits; applicants or members of carpools, vanpools and other ridesharing programs; applicants and recipients of fare subsidies issued by NASA; and applicants for other NASA transit benefit programs.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records in this system may include information about individuals, including name, home address, badge number, monthly commuting cost, email address, years of government service, grade, personal vehicle make and model, and person vehicle license number. These records may be captured as parking, rideshare, or other transit program applications, status or participation reports of individuals' participation in the programs.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

51 U.S.C. 20113(a); 44 U.S.C. 3101; 40 U.S.C. Section 471; and, 40 U.S.C. Section 486.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Any disclosures of information will be compatible with the purpose for which the Agency collected the information, which is the issuance of NASA Parking Permits and NASA Fare Subsidies.

Records in this system may be disclosed:

1. To other Federal agencies to confirm that an individual is not receiving transit benefits from multiple agencies concurrently.

2. In accordance with the NASA Standard Routine Uses as listed in Appendix B.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in hard copy and electronically in systems on secure NASA servers.

RETRIEVABILITY:

Records are retrieved by name or by zip code of residence.

SAFEGUARDS:

Hard copy records are kept in locked cabinets. Electronic records are maintained in NASA systems with approved security plans established in accordance with OMB Circular A–130, Management of Federal Information Resources. Only key authorized employees in parking and fare subsidy management offices whose official duties require access and who possess appropriately configured system roles have access to the systems in accordance with approved authentication methods can access the system.

RETENTION AND DISPOSAL:

Records are maintained and disposed of in accordance with NASA Records Retention Schedule 6, Item 11 and General Records Schedule 9, Item 7.

SYSTEM MANAGER(S) AND ADDRESS:

Transportation Officer, Headquarters Facilities and Administrative Services Division, Location 1, as set forth in Appendix A.

Subsystem Manager: Transportation Subsidy Program Lead, Logistics Management Division, Location 4, as set forth in Appendix A.

NOTIFICATION PROCEDURE:

Individuals interested in inquiring about their records should notify the System Manager or Subsystem Manager at the addresses given above.

RECORD ACCESS PROCEDURES:

Individuals who wish to gain access to their records should submit their request in writing to the System Manager or Subsystem Manager at the address given above.

CONTESTING RECORD PROCEDURES:

The NASA regulations governing access to records and procedures for contesting the contents and for appealing initial determinations are set forth in 14 CFR Part 1212.

RECORD SOURCE CATEGORIES:

Information is provided by individuals in applications submitted for parking permits, carpool and vanpool membership, ridesharing information, and fare subsidies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Linda Cureton,

NASA Chief Information Officer.

[FR Doc. 2013–07581 Filed 4–1–13; 8:45 am]

BILLING CODE 7510–13–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0060]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

Background

Pursuant to Section 189a. (2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission publish notice of any amendments issued, or proposed to be issued and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from March 7, 2013, to March 20, 2013. The last biweekly notice was published on March 19, 2013 (78 FR 16876).

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and is publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2013–0060. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0060. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0060 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, by the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0060.
- *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.* Documents may be viewed in ADAMS by performing a search on the document date and docket number.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2013–0060 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information that that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC

does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in section 50.92 of Title 10 of the *Code of Federal Regulations* (10 CFR), this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license or combined license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Agency Rules of Practice and Procedure'' in 10 CFR part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. The NRC regulations are accessible electronically from the NRC Library on the NRC's Web site at *http://www.nrc.gov/reading-rm/doc-collections/cfr/*. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address, and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, then any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC's E-Filing rule (72 FR 49139; August 28, 2007). The E-Filing process requires participants to submit and serve all adjudicatory documents over the internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E-Filing, at least 10 days prior to the filing deadline, the participant should contact the Office of

the Secretary by email at *hearing.docket@nrc.gov,* or by telephone at 301–415–1677, to request (1) a digital identification (ID) certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E-Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E-Submittal server are detailed in the NRC's ''Guidance for Electronic Submission,'' which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E-Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E-Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through the Electronic Information Exchange System, users will be required to install a Web browser plug-in from the NRC's Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with the NRC guidance available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E-Filing system. To be timely, an electronic filing must be submitted to the E-Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E-Filing system time-stamps the document and sends the submitter an email notice confirming receipt of the document. The E-Filing system also distributes an email notice that provides access to the document to the NRC's Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E-Filing system.

A person filing electronically using the agency's adjudicatory E-Filing system may seek assistance by contacting the NRC Meta System Help Desk through the ''Contact Us'' link located on the NRC's Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by email at *MSHD.Resource@nrc.gov,* or by a toll-free call at 1–866 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E-Filing, may require a participant or party to use E-Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E-Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in the NRC's electronic hearing docket which is available to the public at *http://ehd1.nrc.gov/ehd/,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. However, a request to intervene will require including information on local residence in order to demonstrate a proximity assertion of interest in the proceeding. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Requests for hearing, petitions for leave to intervene, and motions for leave to file new or amended contentions that are filed after the 60-day deadline will not be entertained absent a determination by the presiding officer that the filing demonstrates good cause by satisfying the following three factors in 10 CFR 2.309(c)(1): (i) The information upon which the filing is based was not previously available; (ii) the information upon which the filing is based is materially different from information previously available; and (iii) the filing has been submitted in a timely fashion based on the availability of the subsequent information.

For further details with respect to this license amendment application, see the application for amendment which is available for public inspection at the NRC's PDR, located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through ADAMS in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC's PDR Reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.*

Dominion Nuclear Connecticut, Inc., Docket No. 50–336, Millstone Power Station, Unit 2, New London County, Connecticut

Date of amendment request: July 21, 2010.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) ¾.9.3.1, ''Decay Time'' for Millstone Power Station Unit 2 (MPS2). The proposed change would revise TS ¾.9.3.1 by reducing the minimum decay time for irradiated fuel prior to movement in the reactor vessel from 150 hours to 100 hours. A reduction in the minimum decay time requirement is requested to provide additional flexibility in outage planning such that irradiated fuel can be moved from the reactor vessel to the spent fuel pool earlier in an outage.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

Criterion 1

Will operation of the facility in accordance with the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The accident of concern related to the proposed change is the FHA [fuel handling accident]. This accident assumes a dropped fuel assembly with resulting damage and release of the gap activity from the entire assembly. The FHA assumes that fuel movement is delayed for some time period after shutdown to accommodate for radioactive decay of the short-lived fission products. The probability of a FHA occurrence is dependent on moving fuel not when the fuel movement occurs. Reducing the decay time required by TS ¾.9.3.1 from 150 hours to 100 hours does not increase the probability of a FHA since the timing of fuel movement in the reactor pressure vessel does not alter/impact the manner in which fuel assemblies are handled.

Reducing the decay time requirement in TS ¾.9.3.1 from 150 hours to 100 hours does not change the consequences of the offsite dose and control room dose projections for the currently approved design basis FHA analysis. The current FHA analysis presented in FSAR [final safety analysis report] Section 14.7.4 and approved in License Amendment 298 assumes a minimum 100 hour decay time. Therefore, the dose results of this FHA analysis are unchanged, and remain within applicable regulatory limits.

Based on the reasons presented above, operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2

Will operation of the facility in accordance with the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated. No new accident will be created as a result of reducing the decay time requirement in TS ¾.9.3.1. Plant operation, including fuel handling, will not be affected by the proposed change, as to when fuel is moved and no new failure modes will be created.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

Criterion 3

Will operation of the facility in accordance with the proposed change involve a significant reduction in the margin of safety?

Response: No.

The proposed change does not significantly reduce the margin of safety. The current analysis of record for the FHA already accounts for irradiated fuel with at least 100 hours of decay. This approved analysis has shown that the projected doses will remain within applicable regulatory limits; therefore, the margin of safety is unchanged.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Counsel, Dominion Resources Services, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.

NRC Acting Branch Chief: Sean C. Meighan.

Entergy Nuclear Operations, Inc., Docket No. 50–247, Indian Point Nuclear Generating, Unit 2, Westchester County, New York

Date of amendment request: January 28, 2013.

Description of amendment request: Nuclear Safety Advisory Letter 11–5 identified Westinghouse methodology errors in the long-term mass and energy releases during a large break loss-of-coolant accident. These impacted the containment integrity analysis for Indian Point, Unit 2. A re-analysis of the large break loss-of-coolant accident for the limiting single failure concluded that four, rather than three containment fan cooler units would need to be credited. The proposed change will revise Technical Specification Bases Sections 3.6.4, ''Containment Pressure,'' 3.6.5, ''Containment Air Temperature,'' and 3.6.6, ''Containment Spray System and Containment Fan Cooler Unit (FCU) System.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously identified?

Response: No.

The proposed change would not change the current limiting EDG [emergency diesel generator] failure but would credit four rather than three can cooler units for containment heat removal. Four fan cooler units are available after the single failure. The fan cooler units are not accident initiators so the probability of an accident does not increase. Crediting all four fan cooler units will keep the post accident containment pressure within current limits and therefore does not increase the probability or consequences of a previously evaluated accident, but is a change from the analyses approved by the NRC [Nuclear Regulatory Commission] during stretch power uprate.

Therefore the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new of different kind of accident from any accident previously evaluated?

Response: No.

There are no changes to design, no changes to operating procedures, and the revised licensing basis change is consistent with the available equipment following the postulated worst case single failure.

Therefore the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The change reflects the credit for equipment that was always available but not previously credited (as a conservatism) in the licensing basis analyses. With credit for four fan cooler units, the post accident containment pressure remains within current limits and there is no reduction in a margin of safety.

Therefore the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440

Hamilton Avenue, White Plains, NY 10601.

NRC Acting Branch Chief: Sean Meighan.

Entergy Nuclear Operations, Inc., Docket No. 50–247, Indian Point Nuclear Generating, Unit 2, Westchester County, New York

Date of amendment request: February 6, 2013.

Description of amendment request: The proposed amendment will revise the Reactor Heatup and Cooldown curves and Low Temperature Overpressure Protection Requirements in Technical Specifications (TSs) 3.4.3, ''RCS [reactor coolant system] Pressure and Temperature (P/T) Limits,'' 3.4.6, ''RCS Loops—MODE 4,'' 3.4.7, ''RCS Loops—MODE 5, Loops Filled,'' 3.4.10, ''Pressurizer Safety Valves,'' and 3.4.12, ''Low Temperature Overpressure Protection (LTOP).''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Operation of the facility in accordance with the proposed amendment would not involve a significant increase in the probability of occurrence of consequences of an accident previously evaluated.

The proposed TS changes do not involve a significant increase in the probability or consequences of an accident previously evaluated. Except for a setpoint change for automatic PORV [power-operated relief valve] actuation, there are no physical changes to the plant being introduced by the proposed changes to the heatup and cooldown limitation curves. The proposed changes do not modify the RCS pressure boundary. That is, there are no changes in operating pressure, materials, or seismic loading. The proposed changes do not adversely affect the integrity of the RCS pressure boundary such that its function in the control of radiological consequences is affected. The proposed heatup and cooldown limitation curves were generated in accordance with the fracture toughness requirements of 10CFR50 [10 CFR 50] Appendix G, and ASME B&PV code [American Society of Mechanical Engineers Boiler and Pressure Vessel Code], Section XI, Appendix G edition with 2000 Addenda. The proposed heatup and cooldown limitation curves were established in compliance with the methodology used to calculate and predict effects of radiation on embrittlement of RPV [reactor pressure vessel] beltline materials. Use of this methodology provides compliance with the intent of 10CFR50 [10 CFR 50] Appendix G and provides margins of safety that ensure non-ductile failure of the RPV will not occur. The proposed heatup and cooldown limitation curves prohibit operation in regions where it is possible for non-ductile failure of carbon and low alloy RCS materials to occur. Hence, the primary coolant pressure boundary integrity will be maintained throughout the limit of applicability of the curves, 48 EFPY [Effective Full Power Years].

Operation within the proposed LTOP limits ensures that overpressurization of the RCS at low temperatures will not result in component stresses in excess of those allowed by the ASME B&PV Code Section XI Appendix G.

Consequently, the proposed changes do not involve a significant increase in the probability or the consequences of an accident previously evaluated.

2. Operation of the facility in accordance with the proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated. No new modes of operation are introduced by the proposed changes. The proposed changes will not create any failure mode not bounded by previously evaluated accidents. Further, the proposed changes to the heatup and cooldown limitation curves and the LTOP limits do not affect any activities or equipment other than the RCS pressure boundary and do not create the possibility of a new or different kind of accident from any accident previously evaluated.

Consequently, the proposed changes do not create the possibility of a new or different kind of accident, from any accident previously evaluated.

3. Operation of the facility in accordance with the proposed amendment would not involve a significant reduction in the margin of safety.

The Proposed TS changes do not involve a significant reduction in the margin of safety. The revised heatup and cooldown limitation curves and LTOP limits are established in accordance with current regulations and the ASME B&PV Code 1998 edition with 2000 Addenda. These proposed changes are acceptable because the ASME B&PV Code maintains the margin of safety required by 10CFR50.55(a) [10 CFR 50.55(a)]. Because operation will be within these limits, the RCS materials will continue to behave in a non-brittle manner consistent with the original design bases.

The proposed changes to the allowable operation of charging and safety injection pumps when LTOP is required to be operable is consistent with the IP2 licensing bases as established in TS Amendment 262.

Therefore, Entergy has concluded that the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, and with the changes noted above in square brackets, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Acting Branch Chief: Sean Meighan.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating, Unit 3, Westchester County, New York

Date of amendment request: January 28, 2013.

Description of amendment request: Nuclear Safety Advisory Letter (NSAL) 11–5 identified Westinghouse methodology errors in the long-term mass and energy releases during a large break loss-of-coolant accident. These impacted the containment integrity analysis for Indian Point Unit No. 3 and required revisions to limiting initial operating conditions (i.e., containment temperature, containment pressure, and refueling water storage tank temperature) and require revisions to Technical Specifications (TSs) 3.5.4, ''Refueling Water Storage Tank (RWST),'' and 3.6.4, ''Containment Pressure.'' In addition, revisions are proposed for TS 3.6.3, ''Containment Isolation Valves,'' to delete a redundant surveillance requirement and TS 5.5.15, ''Containment Leakage Rate Testing Program,'' to reflect a slightly higher calculated containment peak pressure.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change would not change the current EDG [emergency diesel generator] failure but limits the RWST temperature to ≤105 °F and containment pressure to ≤1.5 psig [pounds per square inch gauge] (when RWST temperature is >95 °F or containment/accumulator temperature is >125 °F). The proposed change also removes a redundant TS for Containment testing and corrects the peak pressure in the containment testing program. The initial conditions assumed in accident analysis are not accident initiators so the probability of an accident does not increase. The change in initial conditions compensates for the error corrections and maintains the post accident containment pressure within 0.38 psig of the current value and within Containment testing limits and therefore does not increase the probability or consequences of a previously evaluated accident. Therefore the proposed change does not involve a significant increase in the

probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The change to the initial conditions assumed in the analysis for peak containment pressure, the removal of a redundant Technical Specification and the correction to the peak pressure limit in the Containment testing program do not create the possibility of a new or different accident. There are no changes to design or operating procedures that could create a new or different kind of accident since the changes only affect the initiating conditions. The revised analysis is consistent with the available equipment following the postulate worst case single failure.

Therefore the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The change in peak containment pressure is from 42 psig to 42.38 psig as a result of the error corrections of NSAL–11–5 and change to the initial conditions for the RWST temperature and containment pressure. There is an insignificant impact on other programs due to change in peak containment pressure, which remains well below the containment design pressure of 47 psig. Therefore there is not significant reduction in margin.

Therefore the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. William C. Dennis, Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

NRC Acting Branch Chief: Sean Meighan.

Exelon Generation Company (EGC), LLC, Docket No. 50–374, LaSalle County Station (LSCS), Unit 2, LaSalle County, Illinois

Date of amendment request: October 15, 2012.

Description of amendment request: The proposed amendment would remove License Conditions which are no longer necessary to address an interim configuration of the LaSalle County Station, Unit 2, spent fuel pool prior to completed installation of NETCO–SNAP–IN® inserts.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change removes License Conditions within the LSCS Unit 2 Operating License related to interim configurations of the SFP during the installation of the NETCO–SNAP–IN® inserts and the required completion date for installation. All changes proposed by EGC in this license amendment request are administrative in nature because they remove License Conditions that have either been satisfied or that are no longer applicable. There are no physical changes to the facilities, nor any changes to the station operating procedures, limiting conditions for operation, or limiting safety system settings.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change removes License Conditions within the LSCS Unit 2 Operating License related to interim configurations of the SFP during the installation of the NETCO–SNAP–IN® inserts and the required completion date for installation. There are no changes to the SFP criticality analysis associated with the proposed change. No physical changes to the plant are proposed, and there are no changes to the manner in which the plant is operated. Rather, the proposed change is administrative because it involves removing License Conditions that have either been satisfied or that are no longer applicable.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed change removes License Conditions within the LSCS Unit 2 Operating License related to interim configurations of the SFP during the installation of the NETCO–SNAP–IN® inserts and the required completion date for installation. Plant safety margins are established through limiting conditions for operation, limiting safety system settings, and safety limits specified in Technical Specifications. The proposed change does not alter these established safety margins. The proposed change does not alter the criticality analysis for the SFP and does not affect the SFP criticality safety margin. The proposed change is administrative because it involves removing License Conditions that have either been satisfied or that are no longer applicable.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Ms. Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Acting Branch Chief: Jeremy S. Bowen.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of amendment request: July 12, 2012.

Description of amendment request: The proposed amendments would modify Technical Specification 3.7.3, ''Ultimate Heat Sink,'' by establishing controls which allow for the increase of cooling water temperature from 104 °F to 107 °F for plant safety systems.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed change makes no physical changes to the plant, nor does it alter any of the assumptions or conditions upon which the UHS is designed. These assumptions and conditions as described in the LSCS UFSAR include failure of the cooling lake dike, a loss of offsite power, and a DBA LOCA on one unit and a normal shutdown of the other unit.

The accidents analyzed in the UFSAR are assumed to be initiated by the failure of plant structures, systems, or components (SSCs). An inoperable UHS is not an initiator of any analyzed events as described in the UFSAR. The impact on the structural integrity of the UHS due to a potential increase water temperature prior to and during the UHS design basis event has been evaluated, and does not increase the probability of the failure of the cooling lake dike. The proposed temperature limit for cooling water supplied to the plant from the CSCS Pond could reduce the commercial capability of the LSCS units; however, it does not result in an increase in the probability of occurrence for any of the events described in the UFSAR.

The basis provided in Regulatory Guide 1.27, ''Ultimate Heat Sink for Nuclear Power Plants,'' Revision 1, dated March 1974, was employed for the temperature analysis of the LSCS UHS to implement General Design Criteria 2, ''Design bases for protection

against natural phenomena,'' and 44, ''Cooling water,'' of Appendix A to 10 CFR Part 50. This Regulatory Guide was employed for both the original design and licensing basis of the LSCS UHS and a subsequent evaluation which investigated the potential for changing the average water temperature of the cooling water supplied to the plant from the CSCS Pond from a fixed temperature limit to a limit based on the time of day. The meteorological conditions chosen for the LSCS UHS analysis utilized a 31-day period consisting of the most severe one day, combined with the most severe 30 days based on historical data. The heat loads selected for the UHS analysis considered failure of the cooling lake dike, a loss of offsite power, and a DBA LOCA on one unit and a normal shutdown of the other unit. The LSCS cooling lake is conservatively assumed to be unavailable at the start of the event.

The analysis shows that with an initial UHS temperature less than or equal to the proposed time-of-day-based limit, the required safety-related heat loads can be adequately cooled for 30 days while continuing to ensure safety-related cooling water temperature remains less than the design temperature for LSCS, Units 1 and 2.

Based on the above, it has been demonstrated that the change of the initial temperature limit for cooling water supplied to the plant from the CSCS Pond to less than or equal to a temperature based on the time of day will not impede the ability of the equipment and components cooled by the UHS during a UHS design basis event to perform their safety functions.

There is no impact of this change on LSCS safety analyses including the consequences of all postulated events since all required safety-related equipment continues to perform as designed. The effects of the proposed change on the ability of the UHS to assure that a 30-day supply of water is available considering losses due to evaporation, seepage, and firefighting have been considered. Sufficient inventory remains available to mitigate the design basis event for the LSCS UHS for the required 30-day period.

Therefore, the proposed activity does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed change does not physically alter the operation, testing, or maintenance of any plant SSCs beyond operating with a UHS temperature limit based on the time of day. The proposed change is bounded by existing design analyses. Moreover, the UHS temperature does not initiate accident precursors. The impact of increased UHS temperature can affect the commercial operation of the plant, but the proposed change would not create any accident not considered in the LSCS UFSAR.

This proposed change will not alter the manner in which equipment operation is initiated, nor will the functional demands on credited equipment be changed. No alteration in the procedures that ensure the LSCS units remain within analyzed limits is proposed, and no change is being made to procedures relied upon to respond to an off-normal event.

As such, no new failure modes are being introduced. The proposed change does not alter assumptions made in the LSCS safety analysis.

Changing the temperature of cooling water supplied to the plant from the CSCS Pond (i.e., the UHS) as proposed has no impact on plant accident response. The proposed temperature limits do not introduce new failure mechanisms for SSCs. An engineering analysis performed to support the change in temperature of cooling water supplied to the plant from the CSCS Pond provides the basis to conclude that the equipment is adequately designed for operation as proposed.

All systems that are important to safety will continue to be operated and maintained within their design bases, and the proposed change will continue to ensure that all associated systems and components are operated reliably within their design capabilities.

The proposed change will ensure the maximum temperature of the cooling water supplied to the plant during the UHS design basis event remains less than the current safety-related cooling water design temperature for LSCS, Units 1 and 2. Therefore, there is no impact of this change on the LSCS safety analyses including inventory and cooling requirements for safety-related systems using the UHS as their cooling water supply.

All systems will continue to be operated within their design capabilities, no new failure modes are introduced, nor is there any adverse impact on plant equipment; therefore, the proposed change does not result in the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is determined by the design and qualification of the plant equipment, the operation of the plant within analyzed limits, and the point at which protective or mitigative actions are initiated. The proposed change does not impact any of these factors. There are no required design changes or equipment performance parameter changes associated with the proposed change. No protection setpoints are affected as a result of this change. The proposed change in the limit for the temperature of cooling water supplied to the plant from the CSCS Pond will not change the operational characteristics of the design of any equipment or system. All accident analysis assumptions and conditions will continue to be met.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the requested amendments involve no significant hazards consideration.

Attorney for licensee: Ms. Tamra Domeyer, Associate General Counsel, Exelon Nuclear, 4300 Winfield Road, Warrenville, IL 60555.

NRC Acting Branch Chief: Jeremy S. Bowen.

NextEra Energy Seabrook, LLC., Docket No. 50–443, Seabrook Station, Unit 1, Rockingham County, New Hampshire

Date of amendment request: March 1, 2013.

Description of amendment request: The proposed amendment will revise the Seabrook Technical Specifications (TSs). The proposed amendment will make administrative changes and corrections to the TSs. The proposed changes delete TS Index and make corrections to TS 3.4.8, ''Reactor Coolant System Specific Activity,'' and TS 6.8.1.6.a, ''Core Operating Limits Report.''

Basis for proposed NSHC determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes (1) remove the index from the TS, (2) correct an error in the units of activity for 100/E in TS 3.4.8, Reactor Coolant System Specific Activity, and (3) remove an incorrect, non-applicable reference in TS 6.8, Core Operating Limits Report. The proposed changes are all administrative in nature. The administrative changes are not initiators of any accident previously evaluated, and, consequently, the probability and consequences of an accident previously evaluated is not significantly increased.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed changes are administrative in nature so no new or different accidents result from the proposed changes. The changes do not involve a physical alteration of the plant (i.e., no new or different type of equipment will be installed), a significant change in the method of plant operation, or new operator actions. The changes do not alter assumptions made in the safety analysis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in the margin of safety.

Margin of safety is associated with confidence in the ability of the fission product barriers (i.e., fuel cladding, reactor coolant system pressure boundary, and containment structure) to limit the level of radiation dose to the public. The proposed administrative changes do not involve a change in the method of plant operation, do not affect any accident analyses, and do not relax any safety system settings.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves NSHC.

Attorney for licensee: Mr. James Petro, Managing Attorney, Florida Power & Light Company, P.O. Box 14000, Juno Beach, FL 33408–0420.

NRC Branch Chief: Meena Khanna.

Northern States Power Company—Minnesota, Docket Nos. 50–282 and 50–306, Prairie Island Nuclear Generating Plant (PINGP), Units 1 and 2, Goodhue County, Minnesota

Date of amendment request: September 28, 2012, as supplemented on November 8, 2012 and December 18, 2012.

Description of amendment request: The proposed amendment requests U.S. Nuclear Regulatory Commission (NRC) approval to adopt a new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a), 10 CFR 50.48(c), and the guidance in Regulatory Guide (RG) 1.205, Revision 1, ''Risk-Informed, Performance Based Fire Protection for Existing Light-Water Nuclear Power Plants.'' This amendment request also follows the guidance in Nuclear Energy Institute (NEI) 04–02, Revision 2, ''Guidance for Implementing a Risk-Informed, Performance-Based Fire Protection Program Under 10 CFR 50.48(c).'' If approved, the PINGP fire protection program would transition to a new Risk-Informed, Performance-Based alternative in accordance with 10 CFR 50.48(c), which incorporates by reference National Fire Protection Association Standard 805 (NFPA 805). The NFPA 805 fire protection program would supersede the current fire protection program licensing basis in accordance with 10 CFR Part 50, Appendix R.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

Operation of the Prairie Island Nuclear Generating Plant (PINGP) in accordance with the proposed amendment does not increase the probability or consequences of accidents previously evaluated. Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling evaluations, have been performed to demonstrate that the performance-based requirements of National Fire Protection Association Standard 805 (NFPA 805) have been satisfied. The PINGP Updated Safety Analysis Report (USAR) documents the analyses of design basis accidents (DBAs) at PINGP. The proposed amendment does not adversely affect accident initiators nor alter design assumptions, conditions, or configurations of the facility that would increase the probability or consequences of accidents previously evaluated. Further, the changes to be made for fire hazard protection and mitigation do not adversely affect the ability of structures, systems, and components (SSCs) to perform their design functions, nor do they affect the postulated initiators or assumed failure modes for accidents described and evaluated in the USAR. SSCs required to safely shut down the reactor and to maintain it in a safe shutdown condition will remain capable of performing their design functions.

The purpose of this proposed amendment is to permit PINGP to adopt a new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of Regulatory Guide (RG) 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify fire protection systems and features that are an acceptable alternative to the 10 CFR Part 50, Appendix R fire protection features (69 FR 33536; June 16, 2004). Engineering analyses, in accordance with NFPA 805, have been performed to demonstrate that the risk-informed, performance-based (RI–PB) requirements per NFPA 805 have been met.

NFPA 805, taken as a whole, provides an acceptable alternative to 10 CFR 50.48(b), satisfies 10 CFR 50.48(a) and General Design Criterion (GDC) 3 of Appendix A to 10 CFR Part 50, and meets the underlying intent of the NRC's existing fire protection regulations and guidance, and provides for defense-in-depth. The goals, performance objectives, and performance criteria specified in Chapter 1 of NFPA 805 ensure that if there are any increases in the net core damage frequency (CDF) or risk associated with this license amendment request (LAR) submittal, the increase will be small and consistent with the Commission's Safety Goal Policy.

Based on this, the implementation of this amendment does not significantly increase the probability of any accident previously evaluated. Equipment required to mitigate an accident remains capable of performing the assumed function(s). The proposed amendment will not affect the source term, containment isolation, or radiological release assumptions used in evaluating the radiological consequences of any accident previously evaluated.

Therefore, the consequences of any accident previously evaluated are not significantly increased with the implementation of the proposed amendment.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Operation of PINGP in accordance with the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated. Any scenario or previously analyzed accident with offsite dose was included in the evaluation of DBAs documented in the USAR. The proposed change does not alter the requirements or function for systems required during accident conditions. Implementation of the new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205 will not result in new or different accidents.

The proposed amendment does not introduce new or different accident initiators nor alter design assumptions or conditions of the facility. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shut down the reactor and maintain it in a safe shutdown condition remain capable of performing their design functions.

The purpose of this amendment is to permit PINGP to adopt a new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify fire protection systems and features that are an acceptable alternative to the 10 CFR Part 50, Appendix R fire protection features (69 FR 33536, June 16, 2004). The requirements in NFPA 805 address only fire protection and the impacts of fire on the plant that have already been evaluated. Based on this, the implementation of this amendment does not create the possibility of a new or different kind of accident from any kind of accident previously evaluated. The proposed amendment does not introduce any new accident scenarios, transient precursors, failure mechanisms, malfunctions, or limiting single failures that could initiate a new accident. There will be no adverse effect or challenges imposed on a safety related system as a result of this proposed amendment.

Therefore, the possibility of a new or different kind of accident from any kind of accident previously evaluated is not created with the implementation of this amendment.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Operation of PINGP in accordance with the proposed amendment does not involve a significant reduction in a margin of safety.

The proposed amendment does not alter the manner in which safety limits, limiting safety system settings or limiting conditions for operation are determined. The safety analysis acceptance criteria are not affected by this change. The proposed amendment does not adversely affect existing plant safety margins or the reliability of equipment assumed to mitigate accidents in the USAR. The proposed amendment does not adversely affect the ability of SSCs to perform their design function. SSCs required to safely shut down the reactor and to maintain it in a safe shutdown condition remain capable of performing their design function.

The purpose of this amendment is to permit PINGP to adopt a new fire protection licensing basis which complies with the requirements in 10 CFR 50.48(a) and (c) and the guidance in Revision 1 of RG 1.205. The NRC considers that NFPA 805 provides an acceptable methodology and performance criteria for licensees to identify fire protection systems and features that are an acceptable alternative to the 10 CFR Part 50, Appendix R fire protection features (69 FR 33536; June 16, 2004). Engineering analyses, which may include engineering evaluations, probabilistic safety assessments, and fire modeling evaluations, have been performed to demonstrate that the performance-based methods do not result in a significant reduction in a margin of safety.

Based on this, the implementation of this amendment does not significantly reduce a margin of safety. The proposed changes are evaluated to ensure that the risk and safety margins are kept within acceptable limits.

Therefore, the transition to NFPA 805 does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Peter M. Glass, Assistant General Counsel, Xcel Energy Services, Inc., 414 Nicollet Mall, Minneapolis, MN 55401.

NRC Branch Chief: Robert D. Carlson.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, (SSES) Units 1 and 2, Luzerne County, Pennsylvania

Date of amendment requests: December 19, 2012.

Description of amendment requests: The proposed amendments would modify the SSES Unit 1 and SSES Unit 2 Technical Specifications (TS) Section 2.1.1 to reflect a revised Low Pressure Safety Limit. The change to TS Section 2.1.1 became necessary as a result of General Electric (GE) PART 21 REPORT, SC05–03, ''Potential to Exceed Low Pressure Technical Specification Safety Limit.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment changes the low pressure safety limit in Technical Specification (TS) 2.1.1 from 785 psig [pounds per square inch gauge] to 557 psig based on the capabilities of the current critical power correlation used by Susquehanna (SPCB). The SPCB correlation is approved for CPR [critical power ratio] calculations by the NRC for reactor pressures > 571.4 psia [pounds per square inch absolute] and is listed as an approved analytical method in TS 5.6.5.b.

The proposed changes will not alter existing Final Safety Analysis Report (FSAR) design basis accident analysis assumptions, add any accident initiators, or affect the function of the plant safety-related structures, systems, or components (SSCs) as to how they are operated, maintained, modified, tested, or inspected.

Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of, accident from any accident previously evaluated?

Response: No.

The change to the Low Pressure Safety Limits does not result in the need for any new or different FSAR design basis accident analysis. The inclusion does not introduce new equipment that could create a new or different kind of accident, and no new equipment failure modes are created. In addition, the proposed change does not affect the function of any safety-related SSC as to how they are operated, maintained, modified, tested or inspected. As a result, no new accident scenarios, failure mechanisms, or limiting single failures are introduced as a result of this proposed amendment.

Therefore, the proposed amendment does not create a possibility for an accident of a new or different type than those previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is associated with the confidence in the ability of the fission product barriers (i.e., fuel cladding, reactor coolant pressure boundary, and containment structure) to limit the level of radiation to the public. Evaluation of the 10 CFR Part 21, ''Reporting of Defects and Noncompliance'' issue that identified the need for the proposed change determined that there was no decrease in the safety margin and therefore no threat to fuel cladding integrity. The proposed changes to the Low Pressure Safety Limits would not alter the way safety-related SSCs function and would not alter the way PPL Susquehanna Units 1 and 2 are operated. The proposed changes to the safety limit are within the capabilities of the existing NRC approved CPR correlation and ensure valid CPR calculations for the Anticipated Operational Occurrences (AOOs) defined in the FSAR. The proposed amendment would have no impact on the structural integrity of the fuel cladding, reactor coolant pressure boundary, or containment structure. Based on the above considerations, the proposed amendment would not degrade the confidence in the ability of the fission product barriers to limit the level of radiation to the public.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Branch Chief: Meena K. Khanna.

PSEG Nuclear LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit 1 and Unit 2 (Salem), Salem County, New Jersey

Date of amendment request: July 17, 2012, as supplemented on January 28, 2013.

Description of amendment request: The proposed amendments would revise Salem Technical Specifications (TS) 3.7.6.1 (Unit 1) and 3.7.6 (Unit 2), ''Control Room Emergency Air Conditioning System,'' to eliminate the separate action statements for securing an inoperable Control Area Air Conditioning System and Control Room Emergency Air Conditioning System isolation damper in the closed position and entering the actions for an inoperable control room envelope boundary.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The Control Room Emergency Air Conditioning System (CREACS) is not an initiator of or a precursor to any accident or transient. The CREACS system is in standby during normal operation and initiates in the

event of a safety injection signal or control room radiation monitoring actuation in response to a design basis accident to pressurize the Control Room Envelope (CRE) and provide filtration of the CRE atmosphere to maintain the control room operator doses within the limits of General Design Criteria (GDC) 19. The system also operates in recirculation mode to mitigate the consequences of a fire or toxic gas release that occurs outside of the CRE.

The design of plant equipment is not being modified by the proposed amendment. The elimination of the action to secure the isolation dampers between the normal Control Area Air Conditioning System (CAACS) and the CREACS when these dampers are inoperable and entering the actions for the inoperable control room boundary will ensure operation of the plant within the limits of the radiological, smoke and chemical hazard analyses. The intent of the original action for securing the inoperable isolation damper in the closed position was to maintain the boundary of the CRE. The actions for an inoperable control room boundary ensure that mitigating actions are implemented that maintain the CRE boundary within the limits of the radiological, smoke and chemical hazard analyses.

Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes to the TS to implement the actions for an inoperable control room boundary when a normal CAACS and CREACS isolation damper is inoperable do not introduce any new accident precursors and do not involve any physical plant alterations or changes in the methods governing normal plant operation that could initiate a new or different kind of accident. The proposed amendment does not alter the function of the system to initiate and pressurize the control room envelope in the event of a DBA nor alter the ability to initiate CREACS in the recirculation mode in response to a fire or chemical release that occurs outside of the CRE.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is related to the ability of the fission product barriers (fuel cladding, reactor coolant system, and primary containment) to perform their design functions during and following postulated accidents. The proposed amendment does not alter setpoints or limits established or assumed by the accident analyses. The control room envelope is considered a barrier for the control room operators during a design basis accident radiological release and a barrier in the event of a fire or chemical hazard that occurs outside of the CRE. Implementing the actions for an inoperable control room boundary in the event of an inoperable isolation damper between the normal CAACS and CREACS ensure operation of the plant within the limits of the radiological, smoke and chemical hazard analysis. The actions for an inoperable control room boundary ensure that mitigating actions are implemented that maintain the CRE boundary within the limits of the radiological, smoke and chemical hazard analyses. Therefore the plant will continue to be operated consistent with the plant safety analyses.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment requests involve no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, PSEG Nuclear LLC—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Branch Chief: Meena K. Khanna.

South Carolina Electric and Gas Docket Nos.: 52–027 and 52–028, Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3, Fairfield County, South Carolina

Date of amendment request: March 13, 2013.

Description of amendment request: The proposed change would amend Combined License Nos.: NPF–93 and NPF–94 for Virgil C. Summer Nuclear Station (VCSNS) Units 2 and 3 in regard to the Chemical and Volume Control System (CVS) by: (1) Providing a spring-assisted check valve around the air-operated Reactor coolant System (RCS) Purification Return Line Stop Check Valve, (2) replacing the CVS zinc addition inboard containment isolation lift check valve with an air-operated globe valve and a thermal relief valve and (3) separating the zinc and hydrogen injection paths and relocate the zinc injection path.

Because this proposed change requires a departure from Tier 1 information in the Westinghouse Advanced Passive 1000 design control document (DCD), the licensee also requested an exemption from the requirements of the Generic DCD Tier 1 in accordance with 52.63(b)(1).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The changes to provide a spring-assisted check valve located in the bypass line around the makeup stop check valve would continue to meet the existing design functions because the ASME Boiler and Pressure Vessel Code (ASME Code) Section III valves will maintain the flow isolation design function and preserve the Reactor Coolant System (RCS) pressure boundary safety function. The replacement of the Chemical and Volume Control System (CVS) zinc addition inboard containment isolation lift check valve with an air operated globe valve and addition of a pressure relief valve would continue to meet the containment isolation and RCS pressure boundary design functions because the replacement valves will be designed, analyzed, tested and qualified, including seismic qualification, to ASME Code Section III requirements. Separating the zinc and hydrogen injection paths and relocating the zinc injection point would continue to meet containment boundary requirements, including containment isolation and in-service testing, and preserve the RCS pressure boundary safety functions because the revised containment isolation configuration is consistent with those described in 10 CFR Part 50, Appendix A, General Design Criterion (GDC) 55, and the additional valves and piping will be qualified to ASME Code Section III. Because the proposed CVS changes would preserve the CVS safety-related design functions, the probability of an accident previously evaluated is not affected.

The CVS safety functions have been preserved, because the proposed CVS configuration changes, including revised valve types, will perform the same safety functions as the current design. The proposed CVS configuration changes would neither impact any accident source term parameter or fission product barrier nor affect radiological dose consequence analysis.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The additional containment penetration is similar in form, fit, and function to the CVS combined zinc/hydrogen containment penetration that is currently described in the Updated Final Safety Analysis Report. Because the CVS changes use valve types, piping, and a containment penetration consistent with those already described in the Updated Final Safety Analysis Report, no new failure modes or equipment failure initiators are introduced by these changes. Accordingly, the proposed changes do not create any new malfunctions, failure mechanisms, or accident initiators.

Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The containment isolation and pressure relief functions would not be changed by this activity and are consistent with the existing design. The proposed CVS containment penetration is similar in form, fit, and function to existing CVS combined zinc/hydrogen containment penetration and, therefore, does not affect containment or its ability to perform its design function. The addition of these CVS components, including piping, a spring-assisted check valve, an air-operated containment isolation valve, a thermal relief valve and the additional CVS containment penetration do not impact a design basis or safety limit. Because the CVS design functions of controlling the RCS oxygen concentration, reducing radiation fields, containment isolation and overpressure protection within existing limits are not changed by this activity and are bounded by the existing design, there is no change to any current margin of safety.

Therefore, the proposed changes do not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ms. Kathryn M. Sutton, Morgan, Lewis & Bockius LLC, 1111 Pennsylvania Avenue NW, Washington, DC 20004–2514.

NRC Acting Branch Chief: Lawrence Burkhart.

Southern Nuclear Operating Company Docket Nos.: 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP) Units 3 and 4, Burke County, Georgia

Date of amendment request: February 15, 2013.

Description of amendment request: The proposed change would amend Combined Licenses Nos. NPF–91 and NPF–92 for Vogtle Electric Generating Plant (VEGP) Units 3 and 4 by departing from the plant-specific design control document Tier 2* material by revising reference document APP–OCS–GEH–320, ''AP1000 Human Factors Engineering Integrated System Validation Plan'' from Revision D to Revision 2. APP–OCS–GEH–320 is incorporated by reference in the updated final safety analysis report (UFSAR) as a means to implement the activities associated with the human factors engineering verification and validation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The Integrated System Validation (ISV) provides a comprehensive human performance-based assessment of the design of the AP1000 Human-System Interface (HSI) resources, based on their realistic operation within a simulator-driven Main Control Room (MCR). The ISV is part of the overall AP1000 Human Factors Engineering (HFE) program. The changes are to the ISV Plan to clarify the scope and amend the details of the methodology. The ISV Plan is needed to perform, in the simulator, the scenarios described in the document. The functions and tasks allocated to plant personnel can still be accomplished after the proposed changes. The performance of the tests governed by the ISV Plan provides additional assurances that the operators can appropriately respond to plant transients. The ISV Plan does not affect the plant itself. Changing the ISV Plan does not affect prevention and mitigation of abnormal events, e.g., accidents, anticipated operational occurrences, earthquakes, floods and turbine missiles, or their safety or design analyses. No safety-related structure, system, component (SSC) or function is adversely affected. The changes do not involve nor interface with any SSC accident initiator or initiating sequence of events, and thus, the probabilities of the accidents evaluated in the UFSAR are not affected. Because the changes do not involve any safety-related SSC or function used to mitigate an accident, the consequences of the accidents evaluated in the UFSAR are not affected.

Therefore, there is no significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The changes to the ISV Plan affect the testing and validation of the Main Control Room and Human System Interface using a plant simulator. Therefore, the changes do not affect the safety-related equipment itself, nor do they affect equipment which, if it failed, could initiate an accident or a failure of a fission product barrier. No analysis is adversely affected. No system or design function or equipment qualification will be adversely affected by the changes. This activity will not allow for a new fission product release path, nor will it result in a new fission product barrier failure mode, nor create a new sequence of events that would result in significant fuel cladding failures. In addition, the changes do not result in a new failure mode, malfunction or sequence of events that could affect safety or safety-related equipment.

Therefore, this activity does not create the possibility of a new or different kind of accident than any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety?

Response: No.

The changes to the ISV Plan affect the testing and validation of the Main Control Room and Human System Interface using a plant simulator. Therefore, the changes do not affect the assessments or the plant itself. These changes do not affect safety-related equipment or equipment whose failure could initiate an accident, nor does it adversely interface with safety-related equipment or fission product barriers. No safety analysis or design basis acceptance limit/criterion is challenged or exceeded by the requested change.

Therefore, there is no significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. M. Stanford Blanton, Balch & Bingham LLP, 1710 Sixth Avenue North, Birmingham, AL 35203–2015.

NRC Acting Branch Chief: Lawrence Burkhart.

Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed no significant hazards consideration determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment

under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) The applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1–F21, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available documents created or received at the NRC are accessible electronically through the Agencywide Documents Access and Management System (ADAMS) in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the PDR's Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Exelon Generation Company, LLC, Docket Nos. 50–352 and 50–353, Limerick Generating Station, Units 1 and 2, Montgomery County, Pennsylvania

Date of application for amendments: November 14, 2012.

Brief description of amendments: The amendments relocate the Technical Specification (TS) requirements for motor-operated valve thermal overload protection from the TSs to the Technical Requirements Manual.

Date of issuance: March 19, 2013.

Effective date: As of the date of issuance, to be implemented within 60 days.

Amendments Nos.: 209 and 170.

Facility Operating License Nos. NPF–39 and NPF–85: The amendments revised the License and TSs.

Date of initial notice in ***Federal Register***: January 8, 2013 (78 FR 1270).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated March 19, 2013.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, et al., Docket No. 50–440, Perry Nuclear Power Plant (PNPP), Unit 1, Lake County, Ohio

Date of application for amendment: July 3, 2012, supplemented by letter dated January 7, 2013.

Brief description of amendment: The proposed amendment would modify PNPP's Technical Specifications (TS) 3.8.1, ''AC [alternating current] Sources—Operating.'' Specifically, the proposed amendment will modify nine surveillance requirements (SRs) by excluding Division 3 from the current mode restrictions, thus allowing performance of the subject SRs in any mode of plant operation. The proposed amendment also deletes expired TS 3.8.1 provisions regarding use of a delayed access circuit.

Date of issuance: March 5, 2013.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 162.

Facility Operating License No. NPF–58: This amendment revised the Technical Specifications and License.

Date of initial notice in ***Federal Register***: November 13, 2012 (77 FR 67682). The January 7, 2013 supplement contained clarifying information and did not change the NRC staff's initial proposed finding of no significant hazards consideration.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 7, 2013.

No significant hazards consideration comments received: No.

Southern Nuclear Operating Company, Inc. Docket Nos. 52–025 and 52–026, Vogtle Electric Generating Plant (VEGP) Units 3 and 4, Burke County, Georgia

Date of amendment request: January 18, 2013.

Brief description of amendment: The proposed amendment would depart from VEGP Units 3 and 4 plant-specific Design Control Document (DCD) Tier 2 material incorporated into the Updated Final Safety Analysis Report (UFSAR) by revising the structural criteria code for anchoring of headed shear reinforcement bar within the nuclear island basemat.

Date of issuance: March 1, 2013.

Effective date: As of the date of issuance and shall be implemented within 30 days of issuance.

Amendment No.: Unit 3–5, and Unit 4–5.

Facility Combined Licenses No. NPF–91 and NPF–92: Amendment revised the Facility Combined Licenses.

Date of initial notice in ***Federal Register***: January 29, 2013 (78 FR 6142).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated March 1, 2013.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 25th day of March 2013.

For The Nuclear Regulatory Commission.

John D. Monninger,

Deputy Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2013–07467 Filed 4–1–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission [NRC–2013–0001]

DATE: Weeks of April 1, 8, 15, 22, 29, May 6, 2013

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland

STATUS: Public and Closed

Week of April 1, 2013

Tuesday April 2, 2013

9:25 a.m.

Affirmation Session (Public Meeting) (Tentative)

Motion to Quash Subpoena Filed by the Shaw Group, Inc. (Tentative)

This meeting will be webcast live at the Web address—*www.nrc.gov*

9:30 a.m.

Meeting with Organization of Agreement States (OAS) and Conference of Radiation Control Program Directors (CRCPD) (Public Meeting) (Contact: Cindy Flannery, 301–415–0223)

This meeting will be webcast live at the Web address—*www.nrc.gov*

Week of April 8, 2013—Tentative

There are no meetings scheduled for the week of April 8, 2013.

Week of April 15, 2013—Tentative

There are no meetings scheduled for the week of April 15, 2013.

Week of April 22, 2013—Tentative

Monday April 22, 2013

9:00 a.m.

Meeting with the Department of Energy Office of Nuclear Energy (Public Meeting) (Contact: Brett Rini, 301–251–7615)

This meeting will be webcast live at the Web address—*www.nrc.gov*

2:30 p.m.

Discussion of Management and Personnel Issues (Closed—Ex. 2 and 6)

Tuesday April 23, 2013

9:00 a.m.

Briefing on the Status of Lessons Learned from the Fukushima Dai'ichi Accident (Public Meeting) (Contact: William D. Reckley, 301–415–7490)

This meeting will be webcast live at the Web address—*www.nrc.gov*

Week of April 29, 2013—Tentative

There are no meetings scheduled for the week of April 29, 2013.

Week of May 6, 2013—Tentative

There are no meetings scheduled for the week of May 6, 2013.

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*The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

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The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g. braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *kimberly.meyer-chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: March 28, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–07700 Filed 3–29–13; 4:15 pm]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 30438; 813–310]

Stetson Capital Fund LP and Davis Polk & Wardwell LLP; Notice of Application

March 27, 2013.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an 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 sections 9, 17, 30 and 36 through 53, and the rules and regulations under the Act (the ''Rules and Regulations''). With respect to sections 17(a), (d), (f), (g), and (j) of the Act, sections 30(a), (b), (e), and (h) of the Act and the Rules and Regulations and rule 38a–1 under the Act, applicants request a limited exemption as set forth in the application.

SUMMARY OF THE APPLICATION: Applicants request an order to exempt certain limited partnerships formed for the benefit of eligible employees of Davis Polk & Wardwell LLP and its affiliates from certain provisions of the Act. Each limited partnership will be an ''employees' securities company'' within the meaning of section 2(a)(13) of the Act.

APPLICANTS: Stetson Capital Fund LP (the ''Existing Fund'') and Davis Polk & Wardwell LLP (''DPW'').

FILING DATES: The application was filed on October 10, 2000, and amended on January 22, 2004, July 25, 2008, April 10, 2012, and December 21, 2012. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

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 April 22, 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: Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC, 20549–1090. Applicants, 450 Lexington Avenue, New York, NY 10017.

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, at (202) 551–6876 or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Exemptive Applications Office).

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/seach.htm* or by calling (202) 551–8090.

Applicants' Representations

1. DPW, a New York limited liability partnership, is an international law firm. Entities controlling, controlled by, or under common control with DPW, including any related law partnership affiliated with DPW, are the ''DPW Entities.''

2. The Existing Fund is a Delaware limited partnership formed in 2000 pursuant to a limited partnership agreement. The applicants may in the future offer additional pooled investment vehicles substantially similar in all material respects (other than form of organization, investment objective and strategy, and other differences described in the application) to Eligible Investors (as defined below) (the ''Subsequent Funds'' and, together with the Existing Fund, the ''Investment Funds''). The applicants anticipate that each Subsequent Fund also will be structured as a limited partnership, although a Subsequent Fund could be structured as a domestic or offshore general partnership, limited liability company or corporation. The operating agreements of the Investment Funds are the ''Investment Fund Agreements.'' An Investment Fund may include a single vehicle designed to issue interests in series or having similar features to enable a single Investment Fund to function as if it were several successive Investment Funds for ease of administration. Each Investment Fund will be an employees' securities company within the meaning of section 2(a)(13) of the Act.

3. The Existing Fund has been established to enable certain Eligible Investors to participate in certain investment opportunities that come to

the attention of DPW, the DPW Entities or the General Partner (as defined below) of the Existing Fund. These opportunities may include investments in operating businesses, separate accounts with registered or unregistered investment advisers, investments in pooled investment vehicles such as registered investment companies, investment companies exempt from registration under the Act, commodity pools, and other securities investments (each particular investment being referred to herein as an ''Investment''). Applicants submit that a substantial community of interest exists among DPW, the DPW Entities and the members (''Members'') of the Existing Fund, given the purposes and operations of the Existing Fund and the nature of the Eligible Investors participating in such fund. DPW will ''control'' each Investment Fund within the meaning of section 2(a)(9) of the Act.

4. Interests in an Investment Fund (''Interests'') will be offered and sold in reliance upon the exemption from registration under section 4(2) of the Securities Act of 1933 (the ''Securities Act'') or pursuant to Regulation D under the Securities Act. Interests in any Investment Fund (other than short-term paper) will be offered only to DPW, DPW Entities, or Eligible Investors. ''Eligible Investors'' means persons who at the time of investment are: (a) current or former partners of, or lawyers employed by, or key administrative employees of, DPW or a DPW Entity (''Eligible Employees''), (b) the immediate family members of Eligible Employees, which are parents, children, spouses of children, spouses, and siblings, including step or adoptive relationships (''Immediate Family Members''), and (c) trusts or other entities or arrangements the sole beneficiaries of which consist of 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 (''Eligible Trusts''). To qualify as an Eligible Investor with respect to an Investment Fund, each such person must, if purchasing an Interest from an Investment Fund or from a Member, be an ''accredited investor'' as that term is defined in Regulation D under the Securities Act, or, in the case of Eligible Trusts, a trust, entity or arrangement for which an Eligible Employee is a settlor and principal investment decision-maker.[1] DPW or any DPW Entity that acquires Interests in an Investment Fund will be an accredited investor. Prior to offering Interests to an Eligible Employee or Immediate Family Member, the General Partner must reasonably believe that the Eligible Employee or Immediate Family Member is a sophisticated investor capable of understanding and evaluating the risks of participating in the Investment Fund without the benefit of regulatory safeguards. The General Partner may impose more restrictive standards for Eligible Investors in its discretion. The beneficial owners of an Eligible Trust will be persons eligible to hold interests in employees' securities companies as defined in section 2(a)(13) of the Act.

5. An Investment Fund will be managed by its general partner (''General Partner''). The managing member of the General Partner (''Managing Member'') is a limited liability company that is managed by the members of the management committee of DPW, who expect to delegate most of their authority to an investment committee (''Investment Committee''). The Investment Committee of an Investment Fund will consist of approximately five persons who include the members of the management committee of DPW and selected additional Members of such Investment Fund. If a General Partner is formed as a wholly-owned subsidiary of DPW, the members of the relevant Investment Committee will be officers and/or directors of the subsidiary. The chief function of the Investment Committee will be to review and select Investments for an Investment Fund or a series thereof from time to time. The General Partner will register as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''), if such registration is required under the Advisers Act and the rules thereunder.

6. Administration of each Investment Fund will be vested in the General Partner. The General Partner may determine to delegate administrative activities to a third-party administrator. If a third-party administrator is retained by the General Partner, the administrator will not recommend Investments or exercise investment discretion. The only functions of the administrator will be ministerial.

7. The specific investment objectives and strategies for an Investment Fund will be set forth in an informative memorandum relating to the Interests being offered, and in the relevant Investment Fund Agreement, and each Eligible Investor will receive a copy of the informative memorandum and Investment Fund Agreement before making an investment in the Investment Fund. The terms of an Investment Fund will be disclosed to each Eligible Investor at the time the investor is invited to participate in the Investment Fund.

8. The value of the Members' capital accounts will be determined at such times as the General Partner deems appropriate or necessary; however, such valuation will be done at least annually at the Investment Fund's fiscal year-end. The General Partner will value the assets held by an Investment Fund at the current market price (closing price) in the case of marketable securities. All other securities or assets will be valued by the General Partner in good faith at fair value.

9. Each Investment Fund will generally bear its own expenses. DPW may be reimbursed by an Investment Fund for reasonable and necessary out of pocket costs directly associated with the organization and operation of the Investment Fund, including administrative expenses. No Investment Fund will be charged legal fees by DPW, and there will be no allocation of any of DPW's operating expenses to the Investment Funds. Some of the investment opportunities available to an Investment Fund may involve parties for which DPW was, is or will be retained to act as legal counsel, and DPW may be paid by such parties for legal services and for related disbursements and charges. These amounts paid to DPW will not be paid by an Investment Fund itself but by the entities in which an Investment Fund invests or their sponsors. No management fee or other compensation will be paid by an Investment Fund or the Members to the Investment Committee or the General Partner. Also, no fee of any kind will be charged in connection with the sale of Interests in an Investment Fund.

10. Within 120 days after the end of its fiscal year, or as soon as practicable thereafter, each Investment Fund will send its Members an annual report regarding its operations. The annual report of the Investment Fund will contain financial statements audited by an independent accounting firm. For purposes of this requirement, ''audit'' has the meaning defined in rule 1–02(d) of Regulation S–X. The Investment Fund will maintain a file containing any financial statements and other information received from the issuers of the Investments held by the Investment

[1] If an Eligible Trust is an entity or arrangement other than a trust, (a) the reference to ''settlor'' shall be construed to mean a person who created the vehicle or arrangement, 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.

Fund, and will make such file available for inspection by its Members in accordance with its Investment Fund Agreement. Each Investment Fund, within 90 days or as soon as practicable after the end of each fiscal year of the Investment Fund, will transmit a report to each Member setting out information with respect to that Member's distributive share of income, gains, losses, credits and other items for federal income tax purposes, resulting from the operation of the Investment Fund during that year.

11. Members will not be entitled to redeem their Interests in an Investment Fund. A Member will be permitted to transfer his or her Interest only with the express consent of the General Partner, which may be withheld in the discretion of the General Partner, and then only to DPW, a DPW Entity or an Eligible Investor. A Member will not be subject to removal except for good cause as determined by the General Partner, or if the General Partner, in its discretion, deems such withdrawal to be in the best interest of the Investment Fund. The Interests of a Member who is no longer eligible to own interests in an employees' securities company as defined in section 2(a)(13) of the Act will be repurchased, subject to the minimum payment provisions described below. The General Partner does not currently intend to require any Member to withdraw.[2] Upon withdrawal or sale of a Member's Interest, the Investment Fund or purchaser will at a minimum pay to the Member the lesser of: (a) the amount of such Member's capital contributions plus interest (calculated at a rate determined by the General Partner to be reasonably comparable to interest earned by the Investment Fund on temporary investments) less prior distributions; and (b) the fair market value of the Interest as determined at the time of such withdrawal or sale in good faith by the General Partner. If a Member ceases to be a partner or employee of DPW or any DPW Entity, such Member may continue to be a Member of the Investment Fund, although with the consent of the General Partner such Member may be permitted to reduce the unfunded portion of his or her Capital Commitment (as defined below), assign his or her Interest to other Eligible Investors and/or be paid for his or her Interest as described above. The terms of any purchase will apply equally to any Immediate Family Member of, or Eligible Trust related to, an Eligible Employee.

12. Each Member will commit to contribute a fixed amount of capital to an Investment Fund (''Capital Commitment''). To provide flexibility in connection with an Investment Fund's obligation to contribute capital to fund an Investment, and the associated obligation of the Members to make capital contributions with respect to their Capital Commitments, an Investment Fund Agreement may provide that the Investment Fund may engage in borrowings in connection with such funding of Investments. All borrowings by an Investment Fund with respect to the funding of Investments will be non-recourse to the Members,[3] but may be secured by a pledge of the Members' respective capital accounts and unfunded Capital Commitments. The Investment Funds will not borrow from any person if the borrowing would cause any person not named in section 2(a)(13) of the Act to own any outstanding securities of the Investment Fund (other than short-term paper). If DPW or a DPW Entity makes a loan to an Investment Fund, it (as lender) will be entitled to receive interest, provided that the rate will be no less favorable to the borrower than the rate that could be obtained on an arm's length basis. An Investment Fund will not lend any funds to DPW or a DPW Entity. If DPW or a DPW Entity extends a loan to an Eligible Investor in respect of any Investment Fund, the loan will be made at an interest rate no less favorable than that which could be obtained on an arm's length basis. Loans will not be extended or arranged if otherwise prohibited by law, including the Sarbanes-Oxley Act of 2002.

13. An Investment Fund will not acquire any security issued by a registered investment company if immediately after the acquisition the Investment Fund would own more than 3% of the total outstanding voting stock of the registered investment company.

Applicants' Legal Analysis

1. Section 6(b) of the Act provides, in part, that the Commission will exempt employees' securities companies from the provisions of the Act to the extent that the 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, the disposition of the proceeds of any sales of the company's securities, 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 or more affiliated employers, (b) by immediate family members of such persons, 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) of the Act 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 applicants from all provisions of the Act, except sections 9, 17, 30, 36 through 53, and the Rules and Regulations. With respect to sections 17(a), (d), (f), (g) and (j) and 30(a), (b), (e) and (h) of the Act and the Rules and Regulations, and rule 38a–1 under the Act, applicants request a limited exemption 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 or purchasing any security or other property to or from the company. Applicants request an exemption from section 17(a) to permit an Investment Fund: to invest in or participate as a selling security-holder in a principal transaction with one or more affiliated persons (as defined in section 2(a)(3) of the Act) of an Investment Fund (''First-Tier Affiliates'') and affiliated persons of such First-Tier Affiliates (''Second-Tier

[2] The following circumstances, among others, could warrant the withdrawal of a Member or sale of a Member's Interests to another Eligible Investor: if a Member who is an Eligible Employee ceases to be a partner or employee of DPW, an Immediate Family Member's or Eligible Trust's related Eligible Employee ceases to be a partner or employee of DPW, a Member defaults on his or her obligations to the Investment Fund, adverse tax consequences were to inure to the Investment Fund, the General Partner or any Member were a particular Member to remain, or a situation in which the continued membership of the Member would violate applicable law or regulations.

[3] This excludes indebtedness incurred specifically on behalf of a Member where the Member has agreed to guarantee the loan or to act as co-obligor on the loan.

Affiliates,'' and together with First-Tier Affiliates, ''Affiliates'').

4. Applicants submit that the exemptions sought from section 17(a) are consistent with the purposes of the Act and the protection of investors. Applicants state that the Members will be informed in an Investment Fund's offering materials of the possible extent of the dealings by such Investment Fund and any portfolio company with DPW, any DPW Entity or any affiliated person thereof. Applicants also state that, as experienced professionals acting on behalf of financial services businesses, the Members will be able to evaluate the risks associated with such dealings. Applicants assert that the community of interest among the General Partner, the Members, DPW and the DPW Entities will serve to reduce the risk of abuse in transactions involving an Investment Fund and DPW, any DPW Entity 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 such person, acting as principal, from participating in any joint arrangement with the registered investment company unless authorized by the Commission. Applicants request an exemption from section 17(d) and rule 17d–1 to the extent necessary to permit an Investment Fund to engage in transactions in which an Affiliate participates as a joint or a joint and several participant with such Investment Fund.

6. Joint transactions in which an Investment Fund could participate might include the following: (a) a joint investment by one or more Investment Funds in a security in which DPW or a DPW Entity, or another Investment Fund, is a joint participant or plans to become a participant; (b) a joint investment by one or more Investment Funds in another Investment Fund; and (c) a joint investment by one or more Investment Funds in a security in which an Affiliate is an investor or plans to become an investor, including situations in which an Affiliate has a partnership or other interest in, or compensation arrangements with, such issuer, sponsor or offeror.

7. Applicants assert that compliance with section 17(d) and rule 17d–1 would cause an Investment Fund to forego investment opportunities simply because a Member, DPW, a DPW Entity or other affiliated persons of the Investment Fund, DPW or the DPW Entities also had or contemplated making a similar investment. In addition, because attractive investment opportunities of the types considered by an Investment Fund 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 an Investment Fund may be unable to take advantage except as a co-participant with other persons, including Affiliates. Applicants believe that the flexibility to structure co- and joint investments in the manner described above will not involve abuses of the type section 17(d) and rule 17d–1 were designed to prevent. Applicants acknowledge that any transactions subject to section 17(d) and rule 17d–1 for which exemptive relief has not been requested in the application would require specific approval by the Commission.

8. 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. Applicants request an exemption to permit the following exceptions from the requirements of rule 17f–2: (i) Compliance with paragraph (b) of the rule may be achieved through safekeeping in the locked files of DPW or a DPW partner; (ii) for the purposes of the rule, (A) employees of DPW or a DPW Entity will be deemed employees of the Investment Funds, (B) officers and members of the Managing Member and members of the Investment Committee will be deemed to be officers of such Investment Funds, and (C) officers and members of the Managing Member and members of the Investment Committee will be deemed to be the board of directors of such Investment Funds; and (iii) instead of the verification procedure under paragraph (f) of the rule, verification will be effected quarterly by two employees, each of whom shall have sufficient knowledge, sophistication and experience in business matters to perform such examination. Applicants expect that most of the Investments will be evidenced by partnership agreements or similar documents. Such instruments are most suitably kept in DPW's files, where they can be referred to as necessary. Applicants will comply with all other provisions of rule 17f–2.

9. Section 17(g) and rule 17g–1 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 of a registered investment company (''disinterested directors'') take certain actions and give certain approvals relating to fidelity bonding. Applicants request an exemption from the requirement, contained in rule 17g–1, that a majority of the ''directors'' of the Investment Funds who are not ''interested persons'' of the respective Investment Funds (as defined in the Act) take certain actions and make certain approvals concerning bonding and request instead that such actions and approvals be taken by the Managing Members, regardless of whether any of them is deemed to be an interested person of the Investment Funds. Each Managing Member will be an interested person of the Investment Funds.

10. The Investment Funds 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 relating to the provisions of notices to the board of directors. Applicants also request an exemption from the requirements of rule 17g–1(j)(3) that the Investment Funds have a majority of disinterested directors, that those disinterested directors select and nominate any other disinterested directors, and that any legal counsel for those disinterested directors be independent legal counsel. Applicants believe that the filing requirements of rule 17g–1 are burdensome and unnecessary as applied to the Investment Funds. The General Partner will maintain the materials otherwise required to be filed with the Commission by rule 17g–1(g) and the applicants agree that all such material will be subject to examination by the Commission and its staff. The General Partner will designate a person to maintain the records otherwise required to be filed with the Commission under paragraph (g) of the rule. The Investment Funds will comply with all other requirements of rule 17g–1. The fidelity bond of the Investment Funds will cover the Investment Committee, the General Partner and all employees of DPW or any DPW Entity who have access to the securities or funds of the Investment Funds.

11. Applicants request an exemption from the requirements, contained in section 17(j) of the Act and rule 17j–1 under the Act, that every registered investment company adopt a written code of ethics and every ''access person'' of such registered investment company report to the investment company with respect to transactions in any security in which such access person has, or by reason of the transaction acquires, any direct or indirect beneficial ownership in the security. Applicants request an exemption from the requirements in rule 17j–1, with the exception of rule

17j–1(b), because they are burdensome and unnecessary as applied to the Investment Funds and because the exemption is consistent with the policy of the Act. Requiring the Investment Funds to adopt a written code of ethics and requiring access persons to report each of their securities transactions would be time-consuming and expensive and would serve little purpose in light of, among other things, the community of interest among the Members of the Investment Fund and the General Partner by virtue of their common association with DPW or a DPW Entity. Accordingly, 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 Investment Funds.

12. Applicants request an exemption from the requirements in sections 30(a), 30(b), and 30(e) of the Act, and the Rules and Regulations under those sections, that registered investment companies prepare and file with the Commission and mail to their shareholders certain periodic reports and financial statements. Applicants contend that the forms prescribed by the Commission for periodic reports have little relevance to the Investment Funds and would entail administrative and legal costs that outweigh any benefit to the Members. Applicants request exemptive relief to the extent necessary to permit the Investment Funds to report annually to their Members. Applicants also request an exemption from section 30(h) of the Act to the extent necessary to exempt the General Partner, any 10 percent shareholder, and any other person who may be deemed to be an officer, director, member of an advisory board, or otherwise subject to section 30(h), from filing Forms 3, 4 and 5 under section 16 of the Securities Exchange Act of 1934 (''Exchange Act'') with respect to their ownership of Interests in the Investment Funds. Applicants assert that, because there is no trading market for Interests and the transfer of Interests is severely restricted, these filings are unnecessary for the protection of investors and burdensome to those required to make them.

13. Rule 38a–1 requires investment companies to adopt, implement and periodically review written policies reasonably designed to prevent violation of the federal securities laws and to appoint a chief compliance officer. Each Investment Fund will comply with rule 38a–1(a), (c) and (d), except that (i) the members of the Investment Committee of each Investment Fund will fulfill the responsibilities assigned to the board of directors under the rule, and (ii) because all members of the Investment Committee would be considered interested persons of the Investment Funds, approval by a majority of the disinterested board members required by rule 38a–1 will not be obtained. In addition, the Investment Funds will comply with the requirement in rule 38a–1(a)(4)(iv) that the chief compliance officer meet with the disinterested directors by having the chief compliance officer meet with the members of the Investment Committee.

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 an Investment Fund is a party, otherwise prohibited by section 17(a) or section 17(d) and rule 17d–1 (the ''Section 17 Transactions'') will be effected only if the Investment Committee determines that: (a) The terms of the Section 17 Transaction, including the consideration to be paid or received, are fair and reasonable to Members of the Investment Fund and do not involve overreaching of the Investment Fund or its Members on the part of any person concerned; and (b) the Section 17 Transaction is consistent with the interests of the Members of the Investment Fund, the Investment Fund's organizational documents and the Investment Fund's reports to its Members.

In addition, the Investment Committee will record and preserve a description of such Section 17 Transactions, the findings of the Investment Committee, the information or materials upon which their findings are based and the basis therefor. All such records will be maintained for the life of the Investment 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 an Investment Fund from or to an entity affiliated with the Investment Fund by reason of a member of the Investment Committee (a) serving as an officer, director, general partner or investment adviser of the entity, or (b) having a 5% or more investment in the entity, such individual will not participate in the Investment Fund's determination of whether or not to effect the purchase or sale.

3. The Investment Committee 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 Investment Fund, or any affiliated person of such a person, promoter, or principal underwriter.

4. The Investment Committee will not purchase for an Investment 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 Investment 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 Investment Fund holding such investment 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 Investment 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 an Investment Fund means any person who is: (a) An affiliated person of the Investment Fund; (b) DPW and any DPW Entity; (c) a current or former partner, lawyer employed by or key administrative employee of DPW or a DPW Entity; (d) a company in which a member of the Investment Committee, DPW or a DPW Entity acts as an officer, director, or general partner, or has a similar capacity to control the sale or disposition of the company's securities; or (e) an investment vehicle offered, sponsored, or managed by DPW or an affiliated person of DPW.

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 the benefit of any such family member; (c) when the investment is comprised of securities that are listed on a national securities exchange registered under section 6 of the Exchange Act; (d) when the investment is comprised of securities that are national market system (''NMS'') stocks pursuant to section 11A(a)(2) of the Exchange Act and rule 600(a) of Regulation NMS thereunder; (e) when

the investment is comprised of securities that are 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 of securities; or (f) when the investment is comprised of securities that are government securities as defined in section 2(a)(16) of the Act.

5. An Investment Fund will send, within 120 days after the end of its fiscal year, or as soon as practicable thereafter, to each Member who had an interest in the Investment Fund at any time during the fiscal year then ended, reports and information regarding the Investments, including financial statements for such Investment Fund audited by an independent accounting firm. The Investment Committee will make a valuation or have a valuation made of all of the assets of an Investment Fund as of each fiscal year end. In addition, within 90 days after the end of each fiscal year of the Investment Fund or as soon as practicable thereafter, the Investment Fund shall send a report to each person who was a Member at any time during the fiscal year then ended, setting forth such tax information as shall be necessary for the preparation by the Member of his or her federal and state income tax returns and a report of the investment activities of the Investment Fund during such year.

6. An Investment Fund will maintain and preserve, for the life of the Investment 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 the Investment Fund to be provided to its Members, and agrees 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.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69230; File No. SR–BX–2013–023]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

March 25, 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 March 19, 2013, NASDAQ OMX BX, Inc. (''BX'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, Section 2 entitled ''BX Options Market—Fees and Rebates'' to amend various fees for routing options to away markets.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on April 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxbx.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.

[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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to recoup costs that the Exchange incurs for routing and executing certain orders in equity options to away markets. Today, the Exchange calculates Routing Fees by assessing certain Exchange costs related to routing orders to away markets plus the away market's transaction fee. The Exchange assesses a $0.05 per contract[3] fixed Routing Fee when routing orders to The NASDAQ Options Market LLC (''NOM'') and NASDAQ OMX PHLX LLC (''PHLX'') and a $0.11 per contract[4] fixed Routing Fee to all other options exchanges in addition to the actual transaction fee or rebate paid by the away market. The fixed Routing Fee is based on costs that are incurred by the Exchange when routing to an away market in addition to the away market's transaction fee. For example, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC (''NOS''), a member of the Exchange and the Exchange's exclusive order router,[5] to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS incurs a clearing-related cost[6] and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange also incurs administrative and technical costs associated with operating NOS, membership fees at away markets, Options Regulatory Fees

[3] In a previous rule filing, the Exchange discussed the manner in which it analyzed costs related to routing to NOM and PHLX and determined the costs are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders. In that filing the Exchange noted that because PHLX, BX Options and NOM all utilize NOS, the cost to the Exchange is less as compared to routing to other away markets. In addition the fixed costs are reduced because NOS is owned and operated by NASDAQ OMX and the three exchanges and NOS share common technology and related operational functions. *See* Securities Exchange Act Release No. 68717 (January 24, 2013), 78 FR 6368 (January 30, 2013) (SR–BX–2013–005).

[4] The $0.11 per contract Fixed Fee would apply to all options exchanges other than NOM and PHLX, which are discussed separately in this proposal. The Exchange anticipates that if other options exchanges are approved by the Commission after the filing of this proposal, those exchanges would be assessed the $0.11 per contract fee applicable to ''all other options exchanges.''

[5] *See* BX Rules at Chapter VI, Section 11(e) (Order Routing).

[6] The Options Clearing Corporation (''OCC'') assesses a clearing fee of $0.01 per contract side. *See* Securities Exchange Act Release No. 68025 (October 10, 2012), 77 FR 63398 (October 16, 2012) (SR–OCC–2012–18).

(''ORFs'') and technical costs associated with routing options. The transaction fee assessed by the Exchange is based on the away market's actual transaction fee or rebate for a particular market participant at the time that the order was entered into the Exchange's trading system. This transaction fee is calculated on an order-by-order basis, since different away markets charge different amounts. In the event that there is no transaction fee or rebate assessed by the away market, the only fee assessed is the fixed Routing Fee. With respect to the rebate, the Exchange pays a market participant the rebate offered by an away market where there is such a rebate. Any rebate available is netted against a fee assessed by the Exchange.[7]

C2 recently filed a rule change to amend its transaction fees and rebates for simple, non-complex orders, in equity options classes which became operative on February 1, 2013.[8] As a result of that filing the Exchange amended its Pricing Schedule and today assesses non-Customer simple, non-complex orders in equity options (single stock) that are routed to C2 a Routing Fee which includes a fixed cost of $0.11 per contract plus a flat rate of $0.85 per contract, except with respect to Customers.[9] With respect to Customers, the Exchange does not pass the rebate offered by C2, rather, Customer simple, non-complex orders in equity options (single stock) that are routed to C2 are assessed $0.00 per contract.

The Exchange is proposing to further simplify its Routing Fees by assessing a flat rate of $0.95 per contract on all non-Customer orders routed to any away market. The Exchange would no longer pass any rebate paid by an away market for non-Customer orders. With respect to Customer orders, the Exchange is proposing to continue to assess Customer orders routed to NOM and PHLX a fixed fee of $0.05 per contract (''Fixed Fee'') in addition to the actual transaction fee assessed by the away market. These fees are not changing. The Exchange proposes to assess a Customer Routing Fee of $0.11 per contract (''Fixed Fee'') in addition to the actual transaction fee when routing to an options exchange other than NOM and PHLX, as is the case today. The Exchange is amending the payment of rebates and will no longer pay rebates when routing Customer orders to an away market, instead the Exchange will not assess a Routing Fee if a Customer order is routed to an away market that pays a rebate.

2. Statutory Basis

BX believes that its proposal to amend its pricing is consistent with Section 6(b) of the Act[10] in general, and furthers the objectives of Section 6(b)(4) of the Act,[11] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Participants.

The Exchange believes that its proposal to amend its non-Customer Routing Fees from a fixed fee plus actual transaction charges to a flat rate is reasonable because the flat rate makes it easier for market participants to anticipate the Routing Fees which they would be assessed at any given time. The Exchange believes that assessing all non-Customer orders the same flat rate will provide market participants with certainty with respect to Routing Fees. While, each destination market's transaction charge varies and there is a cost incurred by the Exchange when routing orders to away markets, including clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options, the Exchange believes that the proposed Routing Fees will enable it to recover the costs it incurs to route non-Customer orders away markets. Other exchanges similarly assess a fixed rate fee to route non-Customer orders.[12]

The Exchange believes that its proposal to amend the non-Customer Routing Fees from a fixed fee plus actual transaction charges to a flat rate is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same Routing Fees to all non-Customer market participants. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for non-Customer orders routed to and executed at away markets. The proposed Routing Fee for non-Customer orders is an approximation of the maximum fees the Exchange will be charged for such executions, including costs, at away markets. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services for non-Customer orders. The Exchange believes that the fixed rate non-Customer Routing Fee is equitable and not unfairly discriminatory because market participants have the ability to directly route orders to an away market and avoid the Routing Fee. Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[13] The Exchange routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) (''NBBO'') price and based on price first.[14]

The Exchange believes that its proposal to not pass a rebate that is offered by an away market for non-Customer orders is reasonable because to the extent that another market is paying a rebate, the Exchange will assess a $0.95 per contract fee as its total cost in each instance. The Routing Fee is transparent and simple. If a market participant desires the rebate, the market participant has the option to direct the order to that away market. Other options exchanges today do not pass the rebate.[15] The Exchange believes that its proposal to not pass a rebate that is offered by an away market for non-Customer orders is equitable and not unfairly discriminatory because the Exchange would not pay such a rebate on any non-Customer order.

The Exchange believes that it is reasonable to also not assess a Customer Routing Fee when routing to all other options exchanges, except NOM and PHLX,[16] if the away market pays a rebate. The Exchange will continue to assess a Fixed Fee of $0.11 per contract plus the actual transaction charge assessed by the away market when routing to all other options exchanges, except NOM and PHLX, but instead of paying the rebate, as is the case today, the Exchange will not assess a Customer

[7] For example, if a Customer order is routed to BOX, and BOX offers a customer rebate of $0.20 per contract, the Exchange would assess a $0.11 per contract fixed fee which would net against the rebate ($0.20 per contract in this example). The market participant for whom the Customer contract was routed would receive a $0.09 per contract rebate.

[8] *See* Securities Exchange Act Release No. 68792 (January 31, 2013), 78 FR 8621 (February 6, 2013) (SR–C2–2013–004).

[9] *See* Securities Exchange Act Release No. 68977 (February 25, 2013), 78 FR 14141 (March 1, 2013) (SR–BX–2013–017).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4).

[12] BATS Exchange, Inc. (''BATS'') assesses non-Customer fixed rates of $0.57 and $0.95 per contract when routing to away markets. *See* BATS BZX Exchange Fee Schedule. The Chicago Board Options Exchange Incorporated (''CBOE'') assesses non-Customer orders a $0.50 per contract routing fee in addition to the customary CBOE execution charges. *See* CBOE's Fees Schedule.

[13] *See* BX Rules at Chapter VI, Section 11(e) (Order Routing).

[14] *Id.*

[15] *See* CBOE's Fees Schedule and International Securities Exchange LLC's (''ISE'') Fee Schedule.

[16] The Exchange is not proposing to amend the Routing Fees that will be assessed when routing orders to NOM and PHLX. The Exchange will continue to assess a $0.05 per contract Fixed Fee in addition to the actual transaction charge when routing Customer orders to those markets.

Routing Fee to that away market because the Exchange will collect a rebate to offset the fee. The Exchange believes that market participants will have more certainty as to the Customer Routing Fee that will be assessed by the Exchange. The Exchange believes that the proposed pricing for the Customer Routing Fee to all other away markets, except NOM and PHLX, is equitable and not unfairly discriminatory because while the Exchange may operate at a slight gain or a slight loss when routing Customer orders to the away market, depending on the rebate paid by the away market, the proposal would apply uniformly to all market participants when routing to an away market that pays a rebate.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to assess Customer orders that are routed to NOM and PHLX a Fixed Fee of $0.05 per contract and orders that are routed to other away markets, other than NOM and PHLX, a Fixed Fee of $0.11 per contract because the cost, in terms of actual cash outlays, to the Exchange to route to NOM and PHLX is lower. For example, costs related to routing to NOM and PHLX are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.[17] NOS and the three NASDAQ OMX options markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs when routing orders. The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to NOM and PHLX.

Finally, the Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess different fees for Customers orders as compared to non-Customer orders because the Exchange has traditionally assessed lower fees to Customers as compared to non-Customers. Customers will continue to receive the lowest fees or no fees when routing orders, as is the case today. Other options exchanges also assess lower Routing Fees for customer orders as compared to non-customer orders.[18]

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 does not believe that the proposal creates intra-market competition because the Exchange is applying the same Routing Fees and credits to all market participants in the same manner dependent on the routing venue, with the exception of Customers. The Exchange has proposed separate Customer Routing Fees. Customers will continue to receive the lowest fees or no fees when routing orders, as is the case today. Other options exchanges also assess lower Routing Fees for customer orders as compared to non-customer orders.[19]

The Exchange's proposal would allow the Exchange to recoup its costs when routing orders to away markets when such orders are designated as available for routing by the market participant. The Exchange is passing along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to NOM and PHLX and is providing those saving to all market participants. Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[20] Today, other options exchanges also assess fixed routing fees to recoup costs incurred by the Exchange to route orders to away markets.[21]

The Exchange operates in a highly competitive market, comprised of eleven exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, the fees that are assessed by the Exchange must remain competitive with fees charged by other venues and therefore must continue to be reasonable and equitably allocated to those Participants that opt to direct orders to the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[22] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–BX–2013–023 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BX–2013–023. 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

[17] *See* Chapter VI, Section 11 of the NASDAQ and BX Options Rules and PHLX Rule 1080(m)(iii)(A).

[18] BATS assesses lower customer routing fees as compared to non-customer routing fees per the away market. For example BATS assesses ISE customer routing fees of $0.30 per contract and an ISE non-customer routing fee of $0.57 per contract. *See* BATS BZX Exchange Fee Schedule.

[19] *Id.*

[20] *See supra* note 13.

[21] *See* CBOE's Fees Schedule and ISE's Fee Schedule.

[22] 15 U.S.C. 78s(b)(3)(A)(ii).

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2013–023, and should be submitted on or before April 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–07591 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69244; File No. SR–NYSEArca–2013–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change Relating to the Listing and Trading of the SPDR Blackstone/GSO Senior Loan ETF Under NYSE Arca Equities Rule 8.600

March 27, 2013.

I. Introduction

On January 24, 2013, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the SPDR Blackstone/GSO Senior Loan ETF (''Fund''). The proposed rule change was published for comment in the **Federal Register** on February 13, 2013.[3] The Commission received no comments on the proposed rule change. This order grants approval of 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 proposes to list and trade Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares. The Shares will be offered by SSgA Active ETF Trust (''Trust''), which is organized as a Massachusetts business trust and is registered with the Commission as an open-end management investment company.[4] SSgA Funds Management, Inc. (''Adviser'') serves as the investment adviser to the Fund. GSO/Blackstone Debt Funds Management LLC will serve as sub-adviser (''Sub-Adviser'') [5] to the Blackstone/GSO Senior Loan Portfolio (''Portfolio'') and the Fund, subject to supervision by the Adviser and the Trust's Board of Trustees (''Board''). State Street Global Markets, LLC will be the principal underwriter and distributor of the Fund's Shares, and State Street Bank and Trust Company (''Custodian'') will serve as administrator, custodian, and transfer agent for the Fund.

SPDR Blackstone/GSO Senior Loan ETF

The investment objective of the Fund is to provide current income consistent with the preservation of capital. Under normal market conditions,[6] the Fund will invest all of its assets in the shares of the Portfolio, a separate series of the SSgA Master Trust with an identical investment objective as the Fund. As a result, the Fund will invest indirectly through the Portfolio.

According to the Exchange, in pursuing its investment objective, the Fund, under normal market conditions, will seek to outperform a primary and secondary loan index (as described below) by investing at least 80% of its net assets (plus any borrowings for investment purposes) in ''Senior Loans.'' [7] The S&P/LSTA U.S. Leveraged Loan 100 Index (''Primary Index'') comprises the 100 largest Senior Loans, as measured by the borrowed amounts outstanding.[8] The Markit iBoxx USD Leveraged Loan Index (''Secondary Index'') selects the 100 most liquid Senior Loans in the market.[9] In addition to size, liquidity is also measured, in part, based on the number of market makers who trade a specific Senior Loan and the number and size of transactions in the context of the prevailing bid/offer spread.

The Fund will not seek to track either the Primary or Secondary Index, but rather will seek to outperform those indices. In doing so, the Sub-Adviser represents that the Portfolio will primarily invest in Senior Loans.[10] The Portfolio intends to hold a large percentage of the components of the Primary and Secondary Indices. It is

[3] *See* Securities Exchange Act Release No. 68862 (February 7, 2013), 78 FR 10233 (''Notice'').

[4] The Trust is registered under the Investment Company Act of 1940 (''1940 Act''). On April 1, 2011, the Trust filed with the Commission Form N–1A under the Securities Act of 1933 and under the 1940 Act relating to the Fund (File Nos. 333–173276 and 811–22542) (''Registration Statement''). In addition, the Exchange represents that the Trust has obtained certain exemptive relief under the 1940 Act. *See* Investment Company Act Release No. 29524 (December 13, 2010) (File No. 812–13487) (''Exemptive Order'').

[5] The Exchange represents that, in the event (a) the Adviser or Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio.

[6] The terms ''under normal market conditions'' or ''under normal market circumstances'' include, but are not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; of operational issues causing dissemination of inaccurate market information; or of force-majeure-type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance. In periods of extreme market disturbance, the Fund may take temporary defensive positions by overweighting its portfolio in cash/cash-like instruments; however, to the extent possible, the Sub-Adviser would continue to seek to achieve the Fund's investment objective. Specifically, the Portfolio and Fund would continue to invest in Senior Loans. In response to prolonged periods of constrained or difficult market conditions, the Sub-Adviser will likely focus on investing in the largest and most liquid loans available in the market.

[7] A detailed discussion of Senior Loans and the Senior Loan market can be found in the Notice, *supra* note 3, 78 FR at 10238–39.

[8] The ''Primary Index Committee,'' composed of employees of Standard & Poor's, Inc. (''S&P''), maintains the Primary Index. *See id.* at 10240.

[9] The oversight committee of the Markit iBoxx USD Leveraged Loans Indices (''Oversight Committee'') conducts an annual review of the loan market and the index rules relating to the Secondary Index. *See id.* at 10241. A detailed discussion of the Primary Index and Secondary Index can be found in the Notice, *supra* note 3, 78 FR at 10239–42.

[10] The Sub-Adviser represents that, in general, the Portfolio (*i.e.,* the master fund) is where investments will be held, which investments will primarily consist of Senior Loans and may, to a lesser extent, include ''other investments'' as described below. The Fund (*i.e.,* the feeder fund) will invest in shares of the Portfolio and will not invest in other investments, but may be exposed to such investments by means of the Fund's investment in shares of the Portfolio. In extraordinary instances, the Fund reserves the right to make direct investments in Senior Loans and other investments.

anticipated that the Portfolio, in accordance with its principal investment strategy, will invest approximately 50% to 75% of its net assets in Senior Loans that are eligible for inclusion and meet the liquidity thresholds of the Primary and/or the Secondary Indices. Each of the Portfolio's Senior Loan investments is expected to have no less than $250 million USD par outstanding.

The Sub-Adviser considers Senior Loans to be first lien senior secured floating rate bank loans. A Senior Loan is an advance or commitment of funds made by one or more banks or similar financial institutions to one or more corporations, partnerships, or other business entities and typically pays interest at a floating or adjusting rate that is determined periodically at a designated premium above a base lending rate, most commonly the London-Interbank Offered Rate. A Senior Loan is considered senior to all other unsecured claims against the borrower and senior to or pari passu with all other secured claims, meaning that in the event of a bankruptcy, the Senior Loan, together with other first lien claims, is entitled to be the first to be repaid out of proceeds of the assets securing the loans before other existing unsecured claims or interests receive repayment. However, in bankruptcy proceedings, there may be other claims, such as taxes or additional advances which take precedence.[11]

According to the Exchange, the Portfolio will invest in Senior Loans that are made predominantly to businesses operating in North America, but may also invest in Senior Loans made to businesses operating outside of North America. The Portfolio may invest in Senior Loans directly, either from the borrower as part of a primary issuance or in the secondary market through assignments of portions of Senior Loans from third parties or participations in Senior Loans, which are contractual relationships with an existing lender in a loan facility whereby the Portfolio purchases the right to receive principal and interest payments on a loan, but the existing lender remains the record holder of the loan. Under normal market conditions, the Portfolio expects to maintain an average interest rate duration of less than 90 days.

In selecting securities for the Portfolio, the Sub-Adviser will seek to construct a portfolio of loans that it believes is less volatile than the general loan market. In addition, when making investments, the Sub-Adviser will seek to maintain appropriate liquidity and price transparency for the Portfolio. On an on-going basis, the Sub-Adviser will add or remove those individual loans that it believes will cause the Portfolio to outperform or underperform, respectively, either the Primary or Secondary Index.

When identifying prospective investment opportunities in Senior Loans, the Sub-Adviser currently intends to invest primarily in Senior Loans that are below investment grade quality and will rely on fundamental credit analysis in an effort to attempt to minimize the loss of the Portfolio's capital.[12] The Sub-Adviser expects to invest in Senior Loans or other debt of companies possessing the attributes described below, which it believes will help generate higher risk adjusted total returns. The Sub-Adviser does not intend to purchase Senior Loans that are in default; however, the Portfolio may hold a Senior Loan that has defaulted subsequent to its purchase by the Portfolio.

The Sub-Adviser intends to invest in Senior Loans or other debt of companies that it believes have developed strong positions within their respective markets and exhibit the potential to maintain sufficient cash flows and profitability to service their obligations in a range of economic environments. The Sub-Adviser will seek Senior Loans or other debt of companies that it believes possess advantages in scale, scope, customer loyalty, product pricing, or product quality versus their competitors, thereby minimizing business risk and protecting profitability.

The Sub-Adviser intends to invest primarily in Senior Loans or other debt of established companies which have demonstrated a record of profitability and cash flows over several economic cycles. The Sub-Adviser believes such companies are well-positioned to maintain consistent cash flow to service and repay their obligations and maintain growth in their businesses or market share. The Sub-Adviser does not intend to invest in Senior Loans or other debt of primarily start-up companies, companies in turnaround situations, or companies with speculative business plans.

The Sub-Adviser intends to focus on investments in which the Senior Loans or other debt of a target company has an experienced management team with an established track record of success. The Sub-Adviser will typically require companies to have in place proper incentives to align management's goals with the Portfolio's goals.

The Sub-Adviser will seek to invest in Senior Loans or other debt broadly among companies and industries, thereby potentially reducing the risk of a downturn in any one company or industry having a disproportionate impact on the value of the Portfolio's holdings. However, as a result of its investment in participations in loans and the fact that originating banks may be deemed issuers of loans, the Portfolio may be deemed to concentrate its investments in the financial services industries. Loans, and the collateral securing them, are typically monitored by agents for the lenders, which may be the originating bank or banks.[13]

The Portfolio and the Fund are expected to be managed in a ''master-feeder'' structure, under which the Fund, under normal market conditions, will invest all of its assets in the Portfolio, the corresponding ''master fund,'' which is a separate 1940 Act-registered mutual fund that has an identical investment objective. As a result, the Fund (*i.e.,* a ''feeder fund'') has an indirect interest in all of the securities owned by the Portfolio. Because of this indirect interest, the Fund's investment returns should be the same as those of the Portfolio, adjusted for the expenses of the Fund. In extraordinary instances, the Fund reserves the right to make direct investments.

[11] Senior Loans consist generally of obligations of companies and other entities (collectively, ''borrowers'') incurred for the purpose of reorganizing the assets and liabilities of a borrower; acquiring another company; taking over control of a company (leveraged buyout); temporary refinancing; or financing internal growth or other general business purposes. Senior Loans are often obligations of borrowers who have incurred a significant percentage of debt compared to equity issued and thus are highly leveraged.

[12] The Portfolio will primarily invest in securities (including Senior Loans) which typically will be rated below investment grade. Securities rated below investment grade, commonly referred to as ''junk'' or ''high yield'' securities, include securities that are rated Ba1/BB+/BB+ or below by Moody's Investors Service, Inc. (''Moody's''), Fitch Inc., or S&P, respectively, and may involve greater risks than securities in higher rating categories.

[13] According to the Exchange, the Portfolio may be reliant on the creditworthiness of the agent bank and other intermediate participants in a Senior Loan, in addition to the borrower, since rights that may exist under the loan against the borrower if the borrower defaults are typically asserted by or through the agent bank or intermediate participant. Agents are typically large commercial banks, although for Senior Loans that are not broadly syndicated, they can also include thrift institutions, insurance companies, or finance companies (or their affiliates). Such companies may be especially susceptible to the effects of changes in interest rates resulting from changes in U.S. or foreign fiscal or monetary policies, governmental regulations affecting capital raising activities, or other economic or market fluctuations. It is the expectation that the Portfolio will only invest in broadly syndicated loans.

The Sub-Adviser will manage the investments of the Portfolio. Under the master-feeder arrangement, investment advisory fees charged at the master fund level are deducted from the advisory fees charged at the feeder fund level. According to the Exchange, this arrangement avoids a ''layering'' of fees, *e.g.,* the Fund's total annual operating expenses would be no higher as a result of investing in a master-feeder arrangement than they would be if the Fund pursued its investment objectives directly. In addition, the Fund may discontinue investing through the master-feeder arrangement and pursue its investment objectives directly if the Trust's Board determines that doing so would be in the best interests of shareholders.

According to the Exchange, historically, the amount of public information available about a specific Senior Loan has been less extensive than if the loan were registered or exchange-traded. As noted above, the loans in which the Portfolio will invest will, in most instances, be Senior Loans, which are secured and senior to other indebtedness of the borrower. Each Senior Loan will generally be secured by collateral such as accounts receivable; inventory; equipment; real estate; intangible assets such as trademarks, copyrights, and patents; and securities of subsidiaries or affiliates. The value of the collateral generally will be determined by reference to financial statements of the borrower, by an independent appraisal, by obtaining the market value of such collateral (in the case of cash or securities if readily ascertainable), or by other customary valuation techniques considered appropriate by the Sub-Adviser. The value of collateral may decline after the Portfolio's investment, and collateral may be difficult to sell in the event of default. Consequently, the Portfolio may not receive all the payments to which it is entitled. By virtue of their senior position and collateral, Senior Loans typically provide lenders with the first right to cash flows or proceeds from the sale of a borrower's collateral if the borrower becomes insolvent (subject to the limitations of bankruptcy law, which may provide higher priority to certain claims such as employee salaries, employee pensions, and taxes). This means Senior Loans are generally repaid before unsecured bank loans, corporate bonds, subordinated debt, trade creditors, and preferred or common stockholders. To the extent that the Portfolio invests in unsecured loans, if the borrower defaults on such loans, there is no specific collateral on which the lender can foreclose. If the borrower defaults on a subordinated loan, the collateral may not be sufficient to cover both the senior and subordinated loans.

There is no organized exchange on which loans are traded, and reliable market quotations may not be readily available. A majority of the Portfolio's assets are likely to be invested in loans that are less liquid than securities traded on national exchanges. Loans with reduced liquidity involve greater risk than securities with more liquid markets. Available market quotations for such loans may vary over time, and if the credit quality of a loan unexpectedly declines, secondary trading of that loan may decline for a period of time. During periods of infrequent trading, valuing a loan can be more difficult, and buying and selling a loan at an acceptable price can be more difficult and delayed. In the event that the Portfolio voluntarily or involuntarily liquidates Portfolio assets during periods of infrequent trading, it may not receive full value for those assets. Therefore, elements of judgment may play a greater role in the valuation of loans. To the extent that a secondary market exists for certain loans, the market may be subject to irregular trading activity, wide bid/ask spreads, and extended trade settlement periods.

Senior Loans will usually require, in addition to scheduled payments of interest and principal, the prepayment of the Senior Loan from free cash flow. The degree to which borrowers prepay Senior Loans, whether as a contractual requirement or at their election, may be affected by general business conditions, the financial condition of the borrower, and competitive conditions among loan investors, among other factors. As such, prepayments cannot be predicted with accuracy. Recent market conditions, including falling default rates among others, have led to increased prepayment frequency and loan renegotiations. These renegotiations are often on terms more favorable to borrowers. Upon a prepayment, either in part or in full, the actual outstanding debt on which the Portfolio derives interest income will be reduced. However, the Portfolio may receive a prepayment penalty fee assessed against the prepaying borrower.

Other Investments

The Fund may (indirectly through its investments in the Portfolio or, in extraordinary circumstances, directly) invest in certain other types of investments. According to the Exchange, in addition to the principal investments described above, the Portfolio may invest in bonds, including corporate bonds, high-yield debt securities, and U.S. Government obligations.[14] The Portfolio also may invest in preferred securities.

The Portfolio may invest in repurchase agreements with commercial banks, brokers, or dealers to generate income from its excess cash balances and its securities lending cash collateral.[15] In addition, the Portfolio may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date, and interest payment and have the characteristics of borrowing. The Portfolio also may invest in commercial paper.[16]

Subject to limitations, the Portfolio may invest in secured loans that are not first lien loans or loans that are unsecured. These loans have the same characteristics as Senior Loans except that such loans are not first in priority of repayment and/or may not be secured by collateral. Accordingly, the risks associated with these loans are higher than the risks for loans with first priority over the collateral. Because these loans are lower in priority and/or unsecured, they are subject to the additional risk that the cash flow of the borrower may be insufficient to meet scheduled payments after giving effect to the secured obligations of the borrower or in the case of a default, recoveries may be lower for unsecured loans than for secured loans.[17]

The Portfolio may invest in short-term instruments, including money market instruments (including money market funds advised by the Adviser), cash, and

[14] U.S. Government obligations are a type of bond and include securities issued or guaranteed as to principal and interest by the U.S. Government or its agencies or instrumentalities. The Portfolio also may purchase U.S.-registered, dollar-denominated bonds of foreign corporations, governments, agencies, and supra-national entities.

[15] A repurchase agreement is an agreement under which the Portfolio acquires a financial instrument (*e.g.,* a security issued by the U.S. government or an agency thereof, a banker's acceptance or a certificate of deposit) from a seller, subject to resale to the seller at an agreed-upon price and date (normally, the next business day). A repurchase agreement may be considered a loan collateralized by securities.

[16] Commercial paper consists of short-term promissory notes issued by banks, corporations, and other entities to finance short-term credit needs. These securities generally are discounted, but sometimes may be interest bearing.

[17] According to the Exchange, secured loans that are not first lien and loans that are unsecured generally have greater price volatility than Senior Loans and may be less liquid. There is also a possibility that originators will not be able to sell participations in these loans, which would create greater credit risk exposure for the holders of such loans. Secured loans that are not first lien and loans that are unsecured share the same risks as other below investment grade instruments.

cash equivalents, on an ongoing basis to provide liquidity or for other reasons.

The Portfolio may invest in the securities of other investment companies, including closed-end funds (including loan-focused closed end funds), subject to applicable limitations under Section 12(d)(1) of the 1940 Act.[18] To the extent allowed by law, the Portfolio's investment restrictions, and the Trust's Exemptive Order, the Portfolio may invest its assets in securities of investment companies that are money market funds, including those advised by the Adviser or otherwise affiliated with the Adviser, in excess of the limits discussed above.

In addition, the Portfolio may invest in exchange-traded notes, such as securities listed on the Exchange under NYSE Arca Equities Rule 5.2(j)(6), which are debt obligations of investment banks that are traded on exchanges and the returns of which are linked to the performance of certain reference assets, which may include market indexes.

The Portfolio will not invest 25% or more of the value of its total assets in securities of issuers in any one industry; however it may be deemed to concentrate its investment in any of the industries or group of industries in the financial services sector (consisting of financial institutions, including commercial banks, insurance companies, and other financial companies and their respective holding companies) to the extent that the banks originating or acting as agents for the lenders, or granting or acting as intermediaries in participation interests, in loans held by the Portfolio are deemed to be issuers of such loans.

The Portfolio may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities, junior subordinated loans, and unsecured loans deemed illiquid by the Adviser and Sub-Adviser. The Portfolio will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Portfolio's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

Except for investments in ETFs that may hold non-U.S. issues, the Portfolio will not otherwise invest in non-U.S.-registered equity issues. In addition, the Portfolio will not invest in options contracts, futures contracts, or swap agreements.

In certain situations or market conditions, the Portfolio may temporarily depart from its normal investment policies and strategies provided that the alternative is consistent with the Portfolio's investment objective and is in the best interest of the Portfolio. For example, the Portfolio may hold a higher than normal proportion of its assets in cash in times of extreme market stress.[19] The Portfolio may borrow money from a bank as permitted by the 1940 Act or other governing statute, by applicable rules thereunder, or by Commission or other regulatory agency with authority over the Portfolio, but only for temporary or emergency purposes.

The Portfolio will be classified as a ''diversified'' investment company under the 1940 Act and intends to qualify for and to elect treatment as a separate regulated investment company under Subchapter M of the Internal Revenue Code.

The Portfolio's investments will be consistent with the Portfolio's investment objective and will not be used to enhance leverage.

Criteria To Be Applied to the Fund

While the Fund, which would be listed pursuant to the criteria applicable to actively managed funds under NYSE Arca Equities Rule 8.600, is not eligible for listing under NYSE Arca Equities Rule 5.2(j)(3) applicable to listing and trading of Investment Company Units based on a securities index, the Adviser and Sub-Adviser represent that, under normal market conditions, the Fund would generally satisfy the generic fixed income initial listing requirements in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 on a continuous basis measured at the time of purchase, as described below.[20]

With respect to the requirement of Commentary .02(a)(1), the Fund (through its investment in the Portfolio) will invest at least 80% of its net assets (plus any borrowings for investment purposes) in Senior Loans. The Adviser and Sub-Adviser expect that substantially all of the Fund's assets will be invested in Fixed Income Securities or cash/cash-like instruments.

With respect to the requirement of Commentary .02(a)(2), the Portfolio's Adviser and Sub-Adviser expect that substantially all, but at least 75%, of the Portfolio will be invested in loans that have an aggregate outstanding exposure of greater than $100 million.

With respect to the requirement of Commentary .02(a)(3), the Sub-Adviser represents that the Portfolio will not typically invest in convertible securities; however, should the Portfolio make such investments, the Sub-Adviser would direct the Portfolio to divest any converted equity security as soon as practicable.

[18] The Portfolio may invest in other debt or fixed income exchange-traded funds (''ETFs''), such as securities listed on the Exchange under NYSE Arca Equities Rules 5.2(j)(3), 8.100, and 8.600 (including other ETFs managed by the Adviser). ETFs may be structured as investment companies that are registered under the 1940 Act, typically as open-end funds or unit investment trusts. These ETFs are generally based on specific domestic and foreign market securities indices.

[19] *See* note 6, *supra.*

[20] NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 sets forth generic listing criteria applicable to listing under Rule 19b–4(e) under the Exchange Act of Investment Company Units (''Units'') based on an index or portfolio of ''Fixed Income Securities,'' which are debt securities that are notes, bonds, debentures, or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities (''Treasury Securities''), government-sponsored entity securities (''GSE Securities''), municipal securities, trust preferred securities, supra-national debt, and debt of a foreign country or a subdivision thereof. NYSE Arca Equities Rule 5.2(j)(3), Commentary .02(a) is as follows:

(a) Eligibility Criteria for Index Components. Upon the initial listing of a series of Units pursuant to Rule 19b–4(e) under the Exchange Act, the components of an index or portfolio underlying a series of Units shall meet the following criteria:

(1) The index or portfolio must consist of Fixed Income Securities;

(2) Components that in aggregate account for at least 75% of the weight of the index or portfolio each shall have a minimum original principal amount outstanding of $100 million or more;

(3) A component may be a convertible security, however, once the convertible security component converts to the underlying equity security, the component is removed from the index or portfolio;

(4) No component fixed-income security (excluding Treasury Securities and GSE Securities) shall represent more than 30% of the weight of the index or portfolio, and the five most heavily weighted component fixed-income securities in the index or portfolio shall not in the aggregate account for more than 65% of the weight of the index or portfolio;

(5) An underlying index or portfolio (excluding one consisting entirely of exempted securities) must include a minimum of 13 non-affiliated issuers; and

(6) Component securities that in aggregate account for at least 90% of the weight of the index or portfolio must be either (a) from issuers that are required to file reports pursuant to Sections 13 and 15(d) of the Exchange Act; (b) from issuers that have a worldwide market value of its outstanding common equity held by non-affiliates of $700 million or more; (c) from issuers that have outstanding securities that are notes, bonds debentures, or evidence of indebtedness having a total remaining principal amount of at least $1 billion; (d) exempted securities as defined in Section 3(a)(12) of the Exchange Act; or (e) from issuers that are a government of a foreign country or a political subdivision of a foreign country.

With respect to the requirement of Commentary .02(a)(4), the Sub-Adviser represents that the Portfolio will not concentrate its investments in excess of 30% in any one security (excluding Treasury Securities and GSE Securities) and will not invest more than 65% of its assets in five or fewer securities (excluding Treasury Securities and GSE Securities).

With respect to the requirement of Commentary .02(a)(5), the Sub-Adviser represents that the Portfolio will invest in Senior Loans issued to at least 13 non-affiliated borrowers.

With respect to the requirements of Commentary .02(a)(6), the Sub-Adviser represents that the Portfolio may make investments on a continuous basis in compliance with such requirement at the time of purchase; however, the market for Senior Loans differs in several material respects from the market of other fixed income securities (*e.g.,* bonds). A significant percentage of the Senior Loan market would not meet the criteria set forth in Commentary .02(a)(6), but would be readily tradable in the secondary market. For the 12-month period ending August 12, 2012, 53.4% of the borrowers of primary Senior Loans (also known as leveraged loans) had total indebtedness of $1 billion or less and Senior Loans outstanding of $250 million or more (Source: S&P). In order to add to the Portfolio's diversification and to expand the Portfolio's investment universe, the Portfolio may invest in Senior Loans borrowed by entities that would not meet the criteria set forth in Commentary .02(a)(6) above, provided the borrower has at least $250 million outstanding in Senior Loans. The Senior Loans borrowed by such entities would be well known to participants in the Senior Loan markets, would typically attract multiple market makers, and would share the liquidity and transparency characteristics of senior secured debt borrowed by entities meeting the criteria in the generic listing criteria of NYSE Arca Equities Rule 5.2(j)(3), Commentary .02.

Additional information regarding the Fund, the Portfolio, and the Shares, including investment strategies, risks, Senior Loan market, Primary and Secondary Indices, creation and redemption procedures, fees, Portfolio holdings disclosure policies, distributions and taxes is included in the Notice and Registration Statement.[21]

[21] *See* Notice and Registration Statement, *supra* notes 3 and 4, respectively.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act[22] and the rules and regulations thereunder applicable to a national securities exchange.[23] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[24] which requires, among other things, that the Exchange's rules be 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. The Commission notes that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600.

The Commission finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Act,[25] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for, and transactions in, securities. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information will be available via the Consolidated Tape Association (''CTA'') high-speed line. The intra-day, closing and settlement prices of the Portfolio securities, including Senior Loans and other assets, will also readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services. The Portfolio Indicative Value (''PIV''), as defined in NYSE Arca Equities Rule 8.600(c)(3), will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Exchange's Core Trading Session.[26]

[22] 15 U.S.C. 78f.

[23] 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).

[24] 17 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[26] According to the Exchange, several major market data vendors display and/or make widely available PIVs taken from the CTA or other data feeds. *See* Notice, *supra* note 3, 78 FR at 10243, n.43.

On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio, as defined in NYSE Arca Equities Rule 8.600(c)(2), that will form the basis for the Fund's calculation of net asset value (''NAV'') at the end of the business day.[27] The NAV of the Fund will be calculated by the Custodian and determined at the close of the regular trading session on the New York Stock Exchange (ordinarily 4:00 p.m. Eastern time) on each day that such exchange is open. The Web site for the Fund will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. In addition, a basket composition file, which includes the security names, amount, and share quantities, as applicable, required to be delivered in exchange for the Fund's Shares, together with estimates and actual cash components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange via the National Securities Clearing Corporation. The Primary Index and Secondary Index descriptions are publicly available, and information, including values, components, and weightings, is updated and provided daily on a subscription basis by S&P and Markit, respectively. Complete methodologies for the Primary and Secondary Index are made available on the Web sites of S&P and Markit, respectively. Moreover, prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. The Exchange will obtain a representation from the issuer of the Shares that the NAV per Share will be calculated daily and that the NAV and the Disclosed Portfolio will be made available to all market participants at the same time.

[27] On a daily basis, the Disclosed Portfolio will include each portfolio security, including Senior Loans, and other financial instruments of the Portfolio with the following information on the Fund's Web site: ticker symbol (if applicable), name of security and financial instrument, number of shares (if applicable) and dollar value of securities (including Senior Loans) and financial instruments held in the Portfolio, and percentage weighting of the security and financial instrument in the Portfolio.

Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable,[28] and trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth additional circumstances under which Shares of the Fund may be halted.[29] The Exchange states that it has a general policy prohibiting the distribution of material, non-public information by its employees. Further, the Commission notes that the Reporting Authority that provides the Disclosed Portfolio must implement and maintain, or be subject to, procedures designed to prevent the use and dissemination of material, non-public information regarding the actual components of the portfolio.[30] The Adviser and the Sub-Adviser are each affiliated with a broker-dealer and have implemented a ''fire wall'' with respect to such broker-dealers regarding access to information concerning the composition and/or changes to the Fund's Portfolio.[31] The Primary Index Committee has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Primary Index, and the Oversight Committee has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Secondary Index. The Exchange further represents that S&P and Markit are not broker-dealers or affiliated with a broker-dealer, and each has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Primary Index and Secondary Index, respectively. The Commission also notes that the Financial Industry Regulatory Authority (''FINRA''), on behalf of the Exchange,[32] will communicate as needed regarding trading in the Shares with other markets that are members of the Intermarket Surveillance Group (''ISG'') or with which the Exchange has in place a comprehensive surveillance sharing agreement.

The Exchange represents that the Shares are deemed to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. In support of this proposal, the Exchange has made representations, including:

(1) The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600.

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.

(3) The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws and that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

(4) Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Information Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its Equity Trading Permit Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated PIV will not be calculated or publicly disseminated; (d) how information regarding the PIV is disseminated; (e) the requirement that Equity Trading Permit Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(5) For initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Act,[33] as provided by NYSE Arca Equities Rule 5.3.

(6) It is anticipated that the Portfolio, in accordance with its principal investment strategy, will invest approximately 50% to 75% of its net assets in Senior Loans that are eligible for inclusion and meet the liquidity thresholds of the Primary and/or the Secondary Indices. Each of the Portfolio's Senior Loan investments will have no less than $250 million USD par outstanding. The Sub-Adviser does not intend to purchase Senior Loans that are in default, and it is the expectation that the Portfolio will only invest in broadly syndicated loans.

(7) Under normal market conditions, the Fund would generally satisfy the generic fixed income initial listing requirements in NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 on a continuous basis measured at the time of purchase.

(8) The Fund will not invest in non-U.S.-registered equity issues (except for Underlying ETFs that may hold non-U.S. issues). The Portfolio may hold in the aggregate up to 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities, junior subordinated loans, and unsecured loans deemed illiquid by the Adviser and Sub-Adviser. The Portfolio will not invest in options contracts, futures contracts, or swap agreements.

(9) The Portfolio's and Fund's investments will be consistent with the Portfolio's and Fund's investment objective and will not be used to enhance leverage.

(10) A minimum of 100,000 Shares of the Fund will be outstanding at the commencement of trading on the Exchange.

This approval order is based on all of the Exchange's representations, including those set forth above and in

[28] These reasons may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments composing the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

[29] *See* NYSE Arca Equities Rule 8.600(d)(2)(C) (providing additional considerations for the suspension of trading in or removal from listing of Managed Fund Shares on the Exchange).

[30] *See* NYSE Arca Equities Rule 8.600(d)(2)(B)(ii).

[31] *See* note 5, *supra* and accompanying text. The Commission notes that an investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[32] The Exchange states that, while FINRA surveils trading on the Exchange pursuant to a regulatory services agreement, the Exchange is responsible for FINRA's performance under this regulatory services agreement.

[33] *See* 17 CFR 240.10A–3.

the Notice, and the Exchange's description of the Fund.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act [34] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[35] that the proposed rule change (SR–NYSEArca-2013–08) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–07585 Filed 4–1–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69245; File No. SR–NASDAQ–2013–053]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale

March 27, 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 March 20, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is proposing to extend for three months the fee pilot pursuant to which NASDAQ distributes the NASDAQ Last Sale (''NLS'') market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the ''NASDAQ Last Sale for NASDAQ'' and ''NASDAQ Last Sale for NYSE/Amex'' [3] data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the FINRA/NASDAQ Trade Reporting Facility (''FINRA/NASDAQ TRF''), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (''FINRA''). The purpose of this proposal is to extend the existing pilot program for three months, from April 1, 2013 to June 30, 2013.

This pilot program supports the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by over 50,000,000 investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.

The text of the proposed rule change is below. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

7039. NASDAQ Last Sale Data Feeds

(a) For a three month pilot period commencing on [January] *April* 1, 2013, NASDAQ shall offer two proprietary data feeds containing real-time last sale information for trades executed on NASDAQ or reported to the NASDAQ/FINRA Trade Reporting Facility.

(1)—(2) No change.

(b)—(c) No change.

* * * * *

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

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) Pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data at no cost to millions of internet users and television viewers. NASDAQ now proposes a three-month extension of that pilot program, subject to the same fee structure as is applicable today.

NLS consists of two separate ''Level 1'' products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/NASDAQ TRF. First, the ''NASDAQ Last Sale for NASDAQ'' data product is a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the ''NASDAQ Last Sale for NYSE/NYSE MKT'' data product provides real-time last sale information including execution price, volume, and time for NYSE- and NYSE MKT-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. By contrast, the securities information processors (''SIPs'') that provide ''core'' data consolidate last sale information from all exchanges and trade reporting facilities (''TRFs''). Thus, NLS replicates a subset of the information provided by the SIPs.

NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. Firms with the ability to maintain username/password entitlement systems and/or quote counting mechanisms are eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/NYSE MKT Product. Firms that are unable to maintain username/password

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[34] 15 U.S.C. 78f(b)(5).

[35] 15 U.S.C. 78s(b)(2).

[36] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] This filing reflects the change of the name of the product from ''NASDAQ Last Sale for NYSE/Amex'' to ''NASDAQ Last Sale for NYSE/NYSE MKT'' in the text of Rule 7039, due to the change in the name of NYSE Amex to NYSE MKT.

entitlement systems and/or quote counting mechanisms also have multiple options for purchasing the NASDAQ Last Sale data. These firms choose between a ''Unique Visitor'' model for internet delivery or a ''Household'' model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ's sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offered a reduction in fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms.

NASDAQ also established a cap on the monthly fee, currently set at $50,000 per month for all NASDAQ Last Sale products. The fee cap enables NASDAQ to compete effectively against other exchanges that also offer last sale data for purchase or at no charge.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/NYSE MKT products pay a single $1,500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The $1,500 monthly fee applies to all distributors and does not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Section 6(b)(4) of the Act,[5] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data. In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers (''BDs'') increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

NASDAQ believes that its NASDAQ Last Sale market data products are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[6]

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. ''In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.' *NetCoalition,* at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' ''[7]

The Court in *NetCoalition,* while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record *in that case* did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSE Arca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition* case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.[8] Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ last sale data product that replicates a subset of the information available through ''core'' data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition.* Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. NASDAQ's ability to price its Last Sale Data Products is constrained by (1) Competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data.

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

[7] *NetCoalition,* at 535.

[8] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. Although this change in the law does not alter the Commission's authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

exchange, as well as other entities, in a vigorously competitive market.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.,* if the software can be downloaded over the internet after being purchased).[9] In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are *the* source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, NASDAQ believes that products such as NLS can enhance order flow to NASDAQ by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. NASDAQ pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an ''excessive'' price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall

[9] *See* William J. Baumol and Daniel G. Swanson, ''The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power,'' *Antitrust Law Journal,* Vol. 70, No. 3 (2003).

profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, BATS, and Direct Edge.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NLS, the data provided through that product appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in last-sale products of competing venues.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available *at no cost* with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

The competitive nature of the market for products such as NLS is borne out by the performance of the market. In May 2008, the internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product several other major content providers, including MSN and Morningstar, use the BATS product.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. ''No one disputes that competition for order flow is 'fierce'.'' *NetCoalition* at 24. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NLS would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NLS data revenues, the value of NLS as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and the value of its other data products.

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all

users. The existence of numerous alternatives to NLS, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NLS product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Three comment letters were filed regarding the proposed rule change as originally published for comment NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at *http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml.* In addition, in response to prior filings to extend the NLS pilot,[10] the Securities Industry and Financial Markets Association (''SIFMA'') and NetCoalition filed comment letters contending that the SEC should suspend and institute disapproval proceedings with respect to the filing.[11] SIFMA and NetCoalition have filed petitions seeking review by the United States Court of Appeals for the District of Columbia Circuit with respect to the NLS pricing pilots in effect from July 1, 2011 through September 30, 2011, October 1, 2011 through December 31, 2011, and from July 1, 2012 through September 30, 2012. These appeals have been stayed pending resolution of the consolidated case *NetCoalition* v. *SEC,* Nos. 10–1421, 10–1422, 11–1001, and 11–1065 (''*NetCoalition II*)'', which is awaiting a decision by the Court following oral arguments in November 2012.

While containing a few superficial modifications from prior letters, SIFMA and NetCoalition's most recently submitted letter continues to mischaracterize the import of the original *NetCoalition* case. Specifically, the court made findings about the extent of the Commission's record in support of determinations about a depth-of-book product offered by NYSE Arca. In making this limited finding, the court nevertheless squarely rejected contentions that cost-based review of market data fees was required by the Act:

> The petitioners believe that the SEC's market-based approach is prohibited under the Exchange Act because the Congress intended ''fair and reasonable'' to be determined using a cost-based approach. The SEC counters that, because it has statutorily-granted flexibility in evaluating market data fees, its market-based approach is fully consistent with the Exchange Act. We agree with the SEC.[12]

While the court noted that cost data could sometimes be relevant in determining the reasonableness of fees, it acknowledged that submission of cost data may be inappropriate where there are ''difficulties in calculating the direct costs * * * of market data,'' *id.* at 539. That is the case here, due to the fact that the fixed costs of market data production are inseparable from the fixed costs of providing a trading platform, and the marginal costs of market data production are minimal or even zero. Because the costs of providing execution services and market data are not unique to either of the provided services, there is no meaningful way to allocate these costs among the two ''joint products''—and any attempt to do so would result in inherently arbitrary cost allocations.[13]

SIFMA and NetCoalition further contend the prior filing lacked evidence supporting a conclusion that the market for NLS is competitive, asserting that arguments about competition for order flow and substitutability were rejected in *NetCoalition.* While the court did determine that the record before it was not sufficient to allow it to endorse those theories on the facts of that case, the court did not itself make any conclusive findings about the actual presence or absence of competition or the accuracy of these theories: rather, it simply made a finding about the state of the SEC's record. Moreover, analysis about competition in the market for depth-of-book data is only tangentially relevant to the market for last sale data. As discussed above and in prior filings, perfect and partial substitutes for NLS exist in the form of real-time core market data, free delayed core market data, and the last sale products of competing venues, additional competitive entry is possible, and evidence of competition is readily apparent in the pricing behavior of the venues offering last sale products and the consumption patterns of their customers. Thus, although NASDAQ believes that the competitive nature of the market for all market data, including depth-of-book data, will ultimately be established, SIFMA and NetCoalition's letters not only mischaracterize the *NetCoalition* decision, they also fail to address the characteristics of the product at issue and the evidence already presented.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–053 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[10] Securities Exchange Act Release No. 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR–NASDAQ–2012–145); Securities Exchange Act Release No. 67376 (July 9, 2012), 77 FR 41467 (July 13, 2012) (SR–NASDAQ–2012–078); Securities Exchange Act Release No. 65488 (October 5, 2011), 76 FR 63334 (October 21, 2011) (SR–NASDAQ–2011–132); Securities Exchange Act Release No. 64856 (July 12, 2011), 76 FR 41845 (July 15, 2011) (SR–NASDAQ–2011–092); Securities Exchange Act Release No. 64188 (April 5, 2011), 76 FR 20054 (April 11, 2011) (SR–NASDAQ–2011–044).

[11] See, e.g., Letter from Ira D. Hammerman, Senior Managing Director & General Counsel, SIFMA, and Markham Erickson, Executive Director & General Counsel, NetCoalition, to Elizabeth M. Murphy, Secretary, Commission (January 30, 2013).

[12] NetCoalition, 615 F3d. at 534.

[13] The court also explicitly acknowledged that the ''joint product'' theory set forth by NASDAQ's economic experts in *NetCoalition* (and also described in this filing) could explain the competitive dynamic of the market and explain why consideration of cost data would be unavailing. The court found, however, that the Commission could not rely on the theory because it was not in the Commission's record. *Id.* at 541 n.16. For the purpose of providing a complete explanation of the theory, NASDAQ is further submitting as Exhibit 3 to this filing a study that was submitted to the Commission in SR–NASDAQ–2011–010. *See* Statement of Janusz Ordover and Gustavo Bamberger at 2–17 (December 29, 2010).

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–053. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–053 and should be submitted on or before April 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–07586 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69247; File No. SR–NYSEMKT–2013–24]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the NYSE Amex Options Fee Schedule To Establish Fees for Mini-Options Contracts

March 27, 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 March 18, 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, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Amex Options Fee Schedule to Establish Fees for Mini-Options Contracts. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 modify the Fee Schedule to establish fees for Minis.[4]

The Exchange represented in its filing with the Commission to establish Minis that, ''the current schedule of Fees will not apply to the trading of mini-options contracts. The Exchange will not commence trading of mini-option contracts until specific fees for mini-options contracts trading have been filed with the Commission.'' [5] As the Exchange intends to begin trading Minis on March 18, 2013 it is submitting this filing to describe the transaction fees that will be applicable to the trading of Minis.

Minis have a smaller exercise and assignment value due to the reduced number of shares they deliver as compared to standard option contracts. As such, the Exchange is proposing generally lower per contract fees as compared to standard option contracts, with some exceptions to be fully described below. Despite the smaller exercise and assignment value of a Mini, the cost to the Exchange to process quotes and orders in Minis, perform regulatory surveillance and retain quotes and orders for archival purposes is the same as a for a standard contract. This leaves the Exchange in a position of trying to strike the right balance of fees applicable to Minis—too low and the costs of processing Mini quotes and orders will necessarily cause the Exchange to either raise fees for everyone or only for participants trading Minis; too high and participants may be deterred from trading Minis, leaving the Exchange less able to recoup costs associated with development of the product, which is designed to offer investors a way to take less risk in high dollar securities. The Exchange, therefore, believes that adopting fees for Minis that are in some cases lower than fees for standard contracts, and in other cases the same as for standard contracts, is appropriate, not unreasonable, not unfairly discriminatory and not burdensome on competition between

[4] In addition to the changes discussed below, the Exchange also proposes to make clarifying changes to the endnotes to the Fee Schedule to describe the impact, or lack thereof, of the introduction of Minis, including within endnotes 1, 5, 6, 7, 9, 10, 12, 13, 15, 16 and 17.

[5] See File No. SR–NYSEMKT–2013–23 available at *http://www.nyse.com/nyseotices/nyseamex/rule-filings/pdf;jsessionid=941DFBD950F4931B5A5B9153CB857BDB?file_no=SR-NYSEMKT-2013-23&seqnum=1.*

participants, or between the Exchange and other exchanges in the listed options market place.

General Options and Trading Permit (ATP) Fees

The following is a discussion of the existing Fee Schedule as it relates to the treatment of Mini options as compared to standard option contracts.

Trading Permit Fees: The number of Trading Permits or ATPs required by participants is unchanged by the introduction of Mini options.

Specialist/e-Specialist/DOMM Rights Fees: The monthly rights fees charged to Specialists, e-Specialists and Directed Order Market Makers (''DOMMs'') will continue to apply to them for transactions executed in Mini options. For purposes of calculating the Rights Fee, a transaction in a Mini option shall be counted the same as a transaction in a standard option contract from a volume perspective (i.e., one contract in a Mini will equal one contract in a standard option contract).

Premium Product Issues List—Monthly NYSE Amex Options Market Maker Participation Fee: Currently, the Premium Product Issues List is comprised of SPY, AAPL, IWM, QQQ, BAC, EEM, GLD, JPM, XLF and VXX. The Exchange notes that of these, three will have Mini options available for trading, specifically AAPL, GLD and SPY. To the extent that a NYSE Amex Options Market Maker transacts in any option series associated with a Premium Product Issue, including Mini option series, it will become liable for the associated Monthly Fee of $1,000 per product, which is capped at $7,000 per NYSE Amex Options Market Maker per month.

Options Regulatory Fee: Presently the Exchange charges an Options Regulatory Fee (''ORF'') of $0.005 per contract. The ORF is assessed on each ATP Holder for all options transactions executed or cleared by the ATP Holder that are cleared by The Options Clearing Corporation (''OCC'') in the customer range, regardless of the exchange on which the transaction occurs. The Exchange is proposing to charge the same rate for transactions in Mini options, $0.005 per contract, since, as noted, the costs to the Exchange to process quotes, orders, trades and the necessary regulatory surveillance programs and procedures in Minis are the same as for standard option contracts. As such, the Exchange feels that it is appropriate to charge the ORF at the same rate as the standard option contract. The Exchange is proposing a non-substantive change to remove obsolete text describing a recent effective date for a change in the rate of the ORF.[6]

Per Contract Trade Related Charges, Including Qualified Contingent Cross (''QCC'') Orders

Below, the Exchange will discuss the newly proposed per contract transaction charges applicable to Minis. The table below will show the per contract charge applicable to electronic, manual, electronic complex orders, and QCC executions in Minis for various participants on the Exchange:

	Electronic executions		Manual executions		Electronic complex order executions		QCC executions	
	Fee/rebate	Marketing charge	Fee/rebate	Marketing charge	Fee/rebate	Marketing charge	Fee/rebate	Marketing charge
Customer	$0.00	N/A	$0.00	N/A	$0.00	N/A	$0.00	N/A
NYSE Amex Options Market Maker.	0.02	$.02 Penny/ $.06 Non Penny.	0.02	N/A	0.02	$.02 Penny/ $.06 Non Penny.	0.10	N/A
Firm	0.09	N/A	0.09	N/A	0.09	N/A	0.10	N/A
Non-NYSE Amex Options Market Maker.	0.09	N/A	0.09	N/A	0.09	N/A	0.10	N/A
Broker Dealer	0.09	N/A	0.09	N/A	0.09	N/A	0.10	N/A
Professional Customer.	0.09	N/A	0.09	N/A	0.09	N/A	0.10	N/A
NYSE Amex Options Floor Broker.	N/A	N/A	N/A	N/A	N/A	N/A	(0.02)	N/A

As with standard options, Customers transacting Mini options on the Exchange will trade for free. Mini options contracts on the Exchange will NOT count toward the Customer Electronic average daily volume (''ADV'') Tiers or associated rebates paid to Order Flow Providers (''OFPs'') described in endnote 17 to the current Fee Schedule.[7] As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. This, coupled with the lower per contract transaction fees charged to other participants, makes it impractical to offer OFPs a rebate for any Customer electronic Mini options volume they transact.

NYSE Amex Options Market Makers trading Mini options will be charged $.02 per contract, except for QCC executions, where the charge will be $.10 per contract. As with standard options, when an NYSE Amex Options Market Maker trades contra to a Customer electronic order or Customer electronic Complex order, it will be subject to marketing charges. The marketing charges for Mini options will be $.02 for Penny Pilot names and $.06 for non-Penny Pilot names. These charges are generally anywhere from slightly less than 1/10th to slightly more than 1/10th of the charges incurred by NYSE Amex Options Market Makers today for standard option contract

[6] *See* Securities Exchange Act Release No. 68183 (November 8, 2012), 77 FR 68186 (November 15, 2012) (SR–NYSEMKT–2012–54).

[7] *See* NYSE Amex Options fee schedule dated January 2, 2013, available at *http://global derivatives.nyx.com/sites/global derivatives.nyx.com/files/nyse_amex_options_fee_schedule_010213.pdf.* However, the Exchange proposes to specify in endnote 17 that Total Industry Customer equity and ETF option average daily volume includes OCC calculated Customer volume of all types, including Complex Order Transactions, QCC transactions, and mini options transactions, in equity and ETF options.

transactions. One important distinction is that, unlike standard contracts, transactions in Minis will NOT be eligible for the $350,000 fee cap applicable to NYSE Amex Options Market Makers described in endnote 5 of the current Fee Schedule, nor will Mini volumes count towards the 50,000 ADV threshold described in endnote 5 to the current Fee Schedule. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options; therefore the Exchange does not wish to include NYSE Amex Options Market Maker trades in Mini options in the monthly fee cap.

Firm transactions in Mini options will be charged at the rate of $.09 per contract, except for QCC trades, where they will be charged $.10 per contract, and Firm Facilitation trades, which will be charged $.00 per contract. Additionally, the existing Firm Proprietary monthly fee cap for manual or open outcry trades described in endnote 6 of the current Fee Schedule will NOT apply to Mini transactions. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options, therefore the Exchange does not wish to include Firm trades in Mini options in the monthly fee cap. Further, the proposed charge is higher than 1/10th of the current charges applicable to Firm Proprietary trades. This relatively higher rate is necessitated by the fact that the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. However, the Exchange does recognize that Firms can be an important source of liquidity when they facilitate their own customer's trading activity and, as such, the Firm Facilitation rate of $.00, as described in endnote 6 of the current Fee Schedule, will continue to apply to Firm Facilitation trades in Minis.

Non-NYSE Amex Options Market Makers in Mini options will be charged at the rate of $.09 per contract, except for QCC trades, where they will be charged $.10 per contract ($.05 charge per contract side). The proposed charge is higher than 1/10th of the current charges applicable to non-NYSE Amex Options Market Makers. This relatively higher rate is necessitated by the fact that the cost to the Exchange to process quotes, orders and trades in Minis is the same as standard options.

Professional Customer and Broker Dealer participants in Mini options will be charged at the rate of $.09 per contract, except for QCC trades, where they will be charged $.10 per contract. The proposed charge is higher than 1/10th of the current charges applicable to Professional Customers and Broker Dealers. This relatively higher rate is necessitated by the fact that the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. Mini options volumes will NOT count towards the existing Professional Customer and Broker Dealer Electronic ADV Tiers For Taking Liquidity, as described in endnote 16 of the current Fee Schedule. This exclusion is warranted in the Exchange's view since, as noted, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options.

NYSE Amex Floor Brokers who execute Mini options will be eligible for a $.02 per contract rebate for Mini options trades executed as a QCC trade. As with standard options, the rebate will NOT be paid for Customer to Customer QCC trades, as described in endnote 15 to the current Fee Schedule.

Routing Surcharge: In order to comply with the requirements of the Distributive Linkage Plan,[8] the Exchange uses various means of accessing better priced interest located on other exchanges. Presently, the Exchange charges a Routing Surcharge of $.11 per contract plus a pass through of the fees associated with the execution of the routed order on the other exchanges. The $.11 is designed to recover the Exchanges costs in routing orders to the other exchanges. Those costs include clearance charges imposed by The OCC and per contract routing fees charged by the broker dealers who charge the Exchange for the use of their systems to route orders to other exchanges. The Exchange has spoken with both The OCC and the broker dealers who have informed the Exchange that their charges applicable to Mini options will be the same as for standard option contracts, as their cost to process a contract (i.e., routing or clearing) is the same irrespective of the exercise and assignment value of the contract. As such, the Exchange intends to charge the same Routing Surcharge for Mini options as it presently does for standard options, as described in endnote 7 of the current Fee Schedule. The Exchange notes that participants can avoid the Routing Surcharge in several ways. First, they can simply route to the exchange with the best priced interest. The Exchange, in recognition of the fact that markets can move while orders are in flight, also offers participants the ability to utilize order types that do not route to other exchanges. Specifically, the Post No Preference (''PNP'') order modifier is one such order that would never route to another exchange. In addition, there are others, such as PNP Blind and PNP Plus,[9] which also would never route to another exchange. Given this ability to avoid the Routing Surcharge, coupled with the fixed third-party costs associated with routing, the Exchange believes it is reasonable to charge the same Routing Surcharge for Mini options that is charged for standard option contracts.

Limit Of Fees On Options Strategy Executions: Presently, the Exchange has a $750 cap on transaction fees for Strategy Executions involving reversals and conversions, box spreads, short stock interest spreads, merger spreads and jelly rolls. The fees for these Strategy Executions are further capped at $25,000 per month per initiating firm.

The Exchange will NOT include Mini option transactions as being eligible for any part of these per trade or per month Strategy Execution caps. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. Given that the per contract transaction fees are already substantially lower than the per contract fees for standard options, inclusion of Mini options in these fee caps is not warranted.

Excessive Bandwidth Utilization Fees

Order To Trade Ratio Fee: For purposes of calculating the Order To Trade Ratio Fee, an order and an execution in Mini options will be counted the same as an order and an execution in standard option contracts.

Messages To Contracts Traded Ratio Fee: For purpose of calculating the Messages to Contracts Traded Ratio Fee, quotes, orders and any executed contracts in Mini options will be counted the same as quotes, orders and any executed contracts involving standard option contracts.

Cancellation Fee: For purposes of calculating the Cancellation Fee, orders and executions in Mini options will be counted as being equivalent to an order or execution for a standard option contract.

As noted, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options and, as such, treating Minis the same as standard option contracts for the purposes of calculating any of the Excessive Bandwidth Utilization Fees is reasonable and equitable.

[8] *See* Rule 990NY, Rule 991NY, Rule 992NY and Rule 993NY.

[9] *See* Rule 900.3NY(p), Rule 900.3NY(w), and Rule 900.3NY(x).

The Exchange proposes to implement these changes on March 18, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

General Options and Trading Permit (ATP) Fees

For purposes of the Fee Schedule relating to ATP fees, Specialist/e-Specialist/DOMM Rights Fees, the Premium Product Issues List—Monthly NYSE Amex Options Market Maker Participation Fee and the regulatory fees, including the ORF, the Exchange is not proposing any changes as a result of the introduction of Minis. This is due to, in part, the fact that the Exchange intends to have the Minis trade with the existing Specialist, e-Specialists and NYSE Amex Options Market Makers who trade AAPL. The Exchange is doing so as it believes it will foster transparency and better price discovery in Minis. This means that for example, the existing Specialist, e-Specialist, and NYSE Amex Options Market Makers will be able, and in fact obligated, to quote and trade AAPL Minis. This being the case, the Exchange believes it is entirely appropriate and, in fact, necessary, to treat Mini options the same as standard options with respect to the fees listed above. The fees listed above for standard options have not been deemed to be unreasonable, inequitable, or unfairly discriminatory and the introduction of Mini options raises no new issues with respect to such fees. Hence, the treatment of Minis in the same manner as standard option contracts for purposes of the ATP fees, Specialist/e-Specialist/DOMM Rights Fees, the Premium Product Issues List—Monthly NYSE Amex Options Market Maker Participation Fee and the regulatory fees, including the ORF, is reasonable, equitable and not unfairly discriminatory. Further, the Exchange notes, particularly in the context of the ORF, that the cost to perform surveillance to ensure compliance with various Exchange and industry-wide rules is no different for a Mini option than it is for a standard option contract. Reducing the ORF for Mini options could result in a higher ORF for standard options. Such an outcome would arguably be discriminatory towards investors in standard options for the benefit of investors in Minis. As such, the appropriate approach is to treat both Minis and standard options the same with respect to the amount of the ORF that is being charged.

Per Contract Trade Related Charges, Including QCCs

The Exchange noted earlier that, while Minis have a smaller exercise and assignment value due to the reduced number of shares to be delivered as compared to standard option contracts, and despite the smaller exercise and assignment value of a Mini, the cost to the Exchange to process quotes and orders in Minis, perform regulatory surveillance and retain quotes and orders for archival purposes is the same as for a standard contract. This leaves the Exchange in a position of trying to strike the right balance of fees applicable to Minis—too low and the costs of processing Mini quotes and orders will necessarily cause the Exchange to either raise fees for everyone or only for participants trading Minis; too high and participants may be deterred from trading Minis, leaving the Exchange less able to recoup costs associated with development of the product, which is designed to offer investors a way to take less risk in high dollar securities. Given these realities, the Exchange believes that adopting fees for Minis that are in some cases lower than standard contracts, and in other cases the same as for standard contracts, is appropriate, not unreasonable, not unfairly discriminatory and not burdensome on competition between participants, or between the Exchange and other exchanges in the listed options market place.

In the case of most trade related charges, the Exchange has decided to offer lower per contract fees to participants as part of trying to strike the right balance between recovering costs associated with trading Minis and encouraging use of the new Mini option contracts, which are designed to allow investors to reduce risk in high dollar underlying securities.

The Exchange proposal to charge Customers $.00 per contract is reasonable, as Customers have long traded for free all options on the Exchange. The ability to trade for free attracts Customer order flow to the Exchange, which is beneficial to all other participants on the Exchange who generally seek to trade with Customer order flow. The proposed fee of $.00 per contract is the same fee charged to Customer orders in standard option contracts, which is an effective fee on the Exchange and has not been determined to be inequitable or unfairly discriminatory. Therefore, the proposed Customer pricing for Minis is equitable and not unfairly discriminatory. The Exchange feels that different rates for Customer transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers.

The Exchange proposal to exclude volumes attributable to Customer executions in Mini options from the Customer Electronic ADV Tiers and associated rebates paid to OFPs described in endnote 17 to the current Fee Schedule is reasonable, equitable and not unfairly discriminatory for the following reasons. First, as noted above, the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. Given the overall lower expected revenues from Mini options, it is reasonable to exempt Mini option volumes from qualifying for the OFP rebate paid on standard option contracts. It is also equitable, since paying the rebate on Mini option volumes would likely necessitate either reducing the rebates paid to OFPs for all activity, or raising other participant fees. It is not unfairly discriminatory, as it will apply equally to all Customer executions in Mini options, regardless of the market participant submitting the order.

The Exchange proposal to charge NYSE Amex Market Makers, including Specialists, e-Specialists, Non-DOMMs and DOMMs a flat rate of $.02 per contract, plus either $.02 (for Penny Pilot issues) or $.06 (for non-Penny Pilot issues) per contract in Marketing Charges when they trade contra to an electronic Customer order or an electronic Customer complex order, is reasonable. Generally, these fees range from slightly more than, to slightly less than, 10% of what the various NYSE Amex Options Market Maker participants pay today. Charging all types of NYSE Amex Options Market Makers the same fees to trade Minis is not unfairly discriminatory, as it applies to all of them equally. The fees are reasonable in light of the fact that the Minis do have a smaller exercise and

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

assignment value, specifically 1/10th that of a standard contract, and, as such, levying fees that are approximately 10% of what an NYSE Amex Options Market Maker pays today is reasonable and equitable.[12] The Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. Considering the lower per contract fees that are proposed for NYSE Amex Options Market Makers, it is reasonable to exclude Mini option volumes from any part of the monthly NYSE Amex Options Market Maker fee cap of $350,000 as well as the 50,000 contract ADV threshold applicable to standard options. As this exclusion will apply to all Mini option volumes executed by all NYSE Amex Options Market Makers, it is also equitable and not unfairly discriminatory.

The Exchange feels that different rates for NYSE Amex Market Maker transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because NYSE Amex Market Makers have obligations that are not required of Firms and Broker Dealers and because NYSE Amex Market Makers have additional costs that are not applicable to Firms and Broker Dealers. For example, NYSE Amex Options Market Makers are required to have trading permits in order to stream quotes. The number of permits is variable based on the number of options traded, and can cost as much as $26,000 per month to quote all issues on the Exchange as an NYSE Amex Options Market Maker. Conversely, Firms pay a monthly permit fee of $1,000 per month and broker dealers, Professional Customers and Non-NYSE Amex Options Market Makers typically access the facilities of the Exchange through either a Firm or Order Flow Provider who may or may not pass along the $1,000 per month permit fee cost. Consequently, when all fees are taken together, the difference charged to NYSE Amex Options Market Makers as compared to Professional Customers, broker dealers, Non-NYSE Amex Options Market Makers and Firms is reasonable, equitable and not unfairly discriminatory. The Exchange further notes that there are no limits on the number of NYSE Amex Options Market Makers that are permitted to quote in a given option and that any of the other participant types are free to apply to the Exchange to become a NYSE Amex Options Market Maker to avail themselves of the transaction charges applicable to NYSE Amex Options Market Makers presuming they are willing to accept the quoting obligations applicable to NYSE Amex Options Market Makers, which serve to foster price discovery and transparency.

The Exchange proposal to charge Firm proprietary trades $.09 per contract, charge Firm Facilitation trades $.00 and to exclude Mini options from the Firm monthly fee cap is reasonable, equitable and not unfairly discriminatory. First, the per contract charge is lower than what Firms pay for a standard contract in acknowledgement of the smaller exercise and assignment value. Although more than 10% of the rate paid by a Firm for a standard contract, this is warranted by the fact that the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. In this regard the proposal is reasonable and it is also equitable, as it allows the Exchange to offer this innovative product to investors without raising fees for other investors who may have no interest in trading Minis. Likewise, excluding Mini option volumes from the Firm monthly fee cap for manual trades is reasonable and equitable in light of the Exchange's desire to fund the costs associated with Minis with revenues from only those participants who trade them. Offering a fee cap for a product with reduced fees might necessitate raising costs for other participants; therefore, the Exchange believes that the exclusion from the Firm monthly fee cap for manual trades is both reasonable and equitable. The per contract Mini pricing for all Firms is the same, the proposal is also not unfairly discriminatory. Finally, as noted earlier, the Exchange recognizes that Firms can be an important source of liquidity when they facilitate their own customer volumes. Firm Facilitation trades add transparency and promote price discovery to the benefit of all market participants. For these reasons, the proposal to bill Firm Facilitation trades in Minis at the rate of $.00 per contract is both reasonable and equitable. It is also not unfairly discriminatory as it applies equally to all Firms and their customers whose business is facilitated by the Firms.

The Exchange proposal to charge non-NYSE Amex Options Market Maker Mini trades $.09 per contract is reasonable, equitable and not unfairly discriminatory. First, the per contract charge is lower than what non-NYSE Amex Options Market Makers pay for a standard contract, in acknowledgement of the smaller exercise and assignment value. Although more than 10% of the rate paid by a non-NYSE Amex Options Market Maker for a standard contract, this is warranted by the fact that the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. In this regard, the proposal is reasonable and it is also equitable as it allows the Exchange to offer this innovative product to investors without raising fees for other investors who may have no interest in trading Minis. As the per contract Mini pricing for all non-NYSE Amex Options Market Makers is the same, the proposal is also not unfairly discriminatory.

The Exchange feels that different rates for non-NYSE Amex Options Market Maker transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers, including non-NYSE Amex Market Makers, because NYSE Amex Options Market Makers have obligations that are not required of Firms and Broker Dealers, including non-NYSE Amex Market Makers, and because NYSE Amex Market Makers have additional costs that are not applicable to Firms and Broker Dealers, including non-NYSE Amex Market Makers. For example, as noted earlier, NYSE Amex Options Market Makers are required to have trading permits in order to stream quotes. The number of permits is variable based on the number of options traded, and can cost as much as $26,000 per month to quote all issues on the Exchange as an NYSE Amex Options Market Maker. Conversely, Firms pay a monthly permit fee of $1,000 per month and broker dealers, Professional Customers and Non-NYSE Amex Options Market Makers typically access the facilities of the Exchange through either a Firm or Order Flow Provider who may or may not pass along the $1,000 per month permit fee cost. Consequently, when all fees are taken together, the difference charged to NYSE Amex Options Market Makers as compared to Professional Customers, broker dealers, Non-NYSE Amex Options Market Makers and Firms is reasonable, equitable and not unfairly discriminatory. The Exchange further notes that there are no limits on the number of NYSE Amex Options Market Makers that are permitted to quote in a given option and that any of the other participant types are free to apply to the

[12] NYSE Amex Options Market Makers who are not capped pay between $.10 and $.20 per contract plus Marketing Charges of $.25 for Penny Pilot names and $.65 for Non-Penny Pilot names when they trade contra to electronic Customer orders and electronic Customer complex orders.

Exchange to become a NYSE Amex Options Market Maker to avail themselves of the transaction charges applicable to NYSE Amex Options Market Makers presuming they are willing to accept the quoting obligations applicable to NYSE Amex Options Market Makers, which serve to foster price discovery and transparency.

The Exchange proposal to charge Professional Customer and Broker Dealer Mini trades $.09 per contract and exclude Mini option volumes from the Professional Customer and Broker Dealer Electronic ADV Tiers For Taking Liquidity, as described in endnote 16 of the current Fee Schedule, is reasonable, equitable and not unfairly discriminatory. First, the per contract charge is lower than what Professional Customers and Broker Dealers pay for a standard contract, in acknowledgement of the smaller exercise and assignment value. Although more than 10% of the rate paid by a Professional Customer and Broker Dealers for a standard contract, this is warranted by the fact that the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. In this regard, the proposal is reasonable and it is also equitable as it allows the Exchange to offer this innovative product to investors without raising fees for other investors who may have no interest in trading Minis. As the per contract Mini pricing for all Professional Customer and Broker Dealers is the same, the proposal is also not unfairly discriminatory. The Exchange proposal to exclude volumes attributable to Professional Customer and Broker Dealer executions in Mini options from the Professional Customer and Broker Dealer Electronic ADV Tiers For Taking Liquidity, as described in endnote 16 of the current Fee Schedule, is reasonable, equitable and not unfairly discriminatory for the following reasons. First, as noted above, the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. Given the overall lower expected revenues from Mini options, it is reasonable to exempt Mini option volumes from Professional Customer and Broker Dealer Electronic ADV Tiers For Taking Liquidity, as the per contract charge for Minis is quite low to begin with—for example, the lowest fee charged to the highest volume Professional Customer and Broker Dealer is $.23 per contract, which is still more than double the proposed Mini pricing of $.09 per contract. It is also equitable since paying the rebate on Mini option volumes would likely necessitate either reducing the rebates paid to Professional Customers and Broker Dealers for standard option contracts volumes, or raising other participant fees. It is not unfairly discriminatory as it will apply equally to all Professional Customer and Broker Dealer executions in Mini options.

The Exchange feels that different rates for Professional Customer and Broker Dealer transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Professional Customers, Firms and Broker Dealers because NYSE Amex Market Makers have obligations that are not required of Professional Customer, Firms and Broker Dealers and because NYSE Amex Market Makers have additional costs that are not applicable to Professional Customers, Firms and Broker Dealers. For example, as noted earlier, NYSE Amex Options Market Makers are required to have trading permits in order to stream quotes. The number of permits is variable based on the number of options traded, and can cost as much as $26,000 per month to quote all issues on the Exchange as an NYSE Amex Options Market Maker. Conversely, Firms pay a monthly permit fee of $1,000 per month and broker dealers, Professional Customers and Non-NYSE Amex Options Market Makers typically access the facilities of the Exchange through either a Firm or Order Flow Provider who may or may not pass along the $1,000 per month permit fee cost. Consequently, when all fees are taken together, the difference charged to NYSE Amex Options Market Makers as compared to Professional Customers, broker dealers, Non-NYSE Amex Options Market Makers and Firms is reasonable, equitable and not unfairly discriminatory. The Exchange further notes that there are no limits on the number of NYSE Amex Options Market Makers that are permitted to quote in a given option and that any of the other participant types are free to apply to the Exchange to become a NYSE Amex Options Market Maker to avail themselves of the transaction charges applicable to NYSE Amex Options Market Makers presuming they are willing to accept the quoting obligations applicable to NYSE Amex Options Market Makers, which serve to foster price discovery and transparency.

The Exchange proposal for QCC pricing for Minis is to charge Customers $.00, as is the case with standard options, and all non-Customers will be charged $.10 per contract, as compared with $.20 per contract for standard options. The Exchange will also offer NYSE Amex Floor Brokers a rebate of $.02 per contract for all Mini options they execute as a QCC trade, as compared to $.07 per contract rebate for standard options. The Exchange believes that this pricing is reasonable, equitable and not unfairly discriminatory. First, the Exchange has always charged a premium for non-Customer participants for QCC trades in standard options due to the fact that qualifying QCC trades are executed immediately, upon entry, without exposure or any opportunity for other participants to participate on the trade. This pricing proposal preserves that premium and, as such, is reasonable. It is equitable since, as noted, the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options, so charging a relatively small premium for the opportunity to trade without exposure is warranted, given the Exchange's need to cover the costs of participants trading Minis so as to avoid sharing those costs with other participants who are not trading Minis. The proposal is also not unfairly discriminatory as it applies equally to all Customers. Likewise all non-Customers are treated the same under this proposal. The Floor Broker rebate of $.02 is reasonable and equitable as it is designed to allow Floor Brokers to compete for QCC volumes that might otherwise execute on an exchange that offers a front end order entry system, like ISE PrecISE Trade application [13] or CBOE's HyTS,[14] which would allow participants to potentially avoid paying a brokerage fee. The Floor Broker rebate is not unfairly discriminatory as it applies equally to all NYSE Amex Floor Brokers who execute Mini options as QCC trades.

The Exchange feels that different rates for QCC fees for different market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers. The Exchange notes that QCC pricing for standard options is $.20 for non-Customers and $.00 for Customers. Such differential has been shown by virtue of its effectiveness for

[13] *See http://www.ise.com/WebForm/viewPage.aspx?categoryId=129.*

[14] *See https://www.cboe.org/hybrid/HyTs.aspx.*

many months with respect to standard options contracts, to be reasonable, equitable and not unfairly discriminatory; therefore the Exchange believes that the proposed Mini QCC pricing of $.10 for non-Customers and $.00 for Customers is reasonable, equitable and not unfairly discriminatory as well.

The Exchange proposal to treat Mini options the same as standard options for purposes of the Routing Surcharge is reasonable, equitable and not unfairly discriminatory for the following reasons. Presently, the Exchange charges a Routing Surcharge of $.11 per contract plus a pass through of the fees associated with the execution of the routed order on the other exchanges. The $.11 is designed to recover the Exchange's costs in routing orders to the other exchanges. Those costs include clearance charges imposed by The OCC and per contract routing fees charged by the broker dealers who charge the Exchange for the use of their systems to route orders to other exchanges. The Exchange has spoken with both The OCC and the broker dealers, who have informed the Exchange that their charges applicable to Mini options will be the same as for standard option contracts, as their cost to process a contract (i.e., routing or clearing) is the same irrespective of the exercise and assignment value of the contract. As such, the Exchange intends to charge the same Routing Surcharge for Mini options as it presently does for standard options, as described in endnote 7 of the current Fee Schedule. The Exchange notes that participants can avoid the Routing Surcharge in several ways. First they can simply route to the exchange with the best priced interest. The Exchange, in recognition of the fact that markets can move while orders are in flight, also offers participants the ability to utilize order types that do not route to other exchanges. Specifically, the PNP order modifier is one such order that would never route to another exchange. In addition, there are others, such as PNP Blind and PNP Plus,[15] which also would never route to another exchange. Given this ability to avoid the Routing Surcharge, coupled with the fixed third party costs associated with routing, the Exchange feels it is reasonable and equitable to charge the same Routing Surcharge for Mini options that is charged for standard option contracts. Since the Routing Surcharge will apply to all participants in Minis as it is applied for standard options, and because such surcharge has not previously been found to be unreasonable, inequitable or unfairly discriminatory, the Exchange believes it is the case for Minis as well.

The Exchange is proposing to exclude Mini option volumes from being eligible for the Limit Of Fees On Options Strategy Executions. Presently the Exchange has a $750 cap on transaction fees for Strategy Executions involving reversals and conversions, box spreads, short stock interest spreads, merger spreads and jelly rolls. The fees for these Strategy Executions are further capped at $25,000 per month per initiating firm. The Exchange will NOT include Mini option transactions as being eligible for any part of these per trade or per month Strategy Execution caps. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. Given that the per contract transaction fees for Minis are already substantially lower than the per contract fees for standard options, inclusion of Mini options in these fee caps is not warranted, and is reasonable and equitable. Further, it is not unfairly discriminatory as the exclusion on Mini volumes from the cap on fees for Strategy Executions applies equally to all participants on the Exchange.

Excessive Bandwidth Utilization Fees

The Exchange proposes to treat Mini options the same as standard options for purposes of the Excessive Bandwidth Utilization Fees, which include the Order To Trade Ratio Fee, the Messages to Contracts Traded Ratio Fee and the Cancellation Fees. As noted, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options and, as such, treating Minis the same as standard option contracts for the purposes of calculating any of the Excessive Bandwidth Utilization Fees is reasonable and equitable. It is also not unfairly discriminatory, as such treatment will apply to all participants equally.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [16] of the Act and subparagraph (f)(2) of Rule 19b–4 [17] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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) [18] 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–2013–24 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2013–24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[15] *See* Rule 900.3NY(p), Rule 900.3NY(w), and Rule 900.3NY(x).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(2).

[18] 15 U.S.C. 78s(b)(2)(B).

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–2013–24 and should be submitted on or before April 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–07620 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 69246; File No. SR–NYSEArca–2013–25]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the NYSE Arca Options Fee Schedule To Establish Fees for Mini-Options Contracts

March 27, 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 March 18, 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 Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Arca Options Fee Schedule (the ''Fee Schedule'') to establish fees for mini-options contracts (''Minis''). The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to modify the Fee Schedule to establish fees for Minis.[4]

The Exchange represented in its filing with the Commission to establish Minis that ''the current schedule of Fees will not apply to the trading of mini-options contracts. The Exchange will not commence trading of mini-option contracts until specific fees for mini-options contracts trading have been filed with the Commission.''[5] As the Exchange intends to begin trading Minis on March 18, 2013, it is submitting this filing to describe the transaction fees that will be applicable to the trading of Minis.

Minis have a smaller exercise and assignment value due to the reduced number of shares they deliver as compared to standard option contracts. As such, the Exchange is proposing generally lower per contract fees as compared to standard option contracts, with some exceptions to be fully described below. Despite the smaller exercise and assignment value of a Mini, the cost to the Exchange to process quotes and orders in Minis, perform regulatory surveillance and retain quotes and orders for archival purposes is the same as a for a standard contract. This leaves the Exchange in a position of trying to strike the right balance of fees applicable to Minis—too low and the costs of processing Mini quotes and orders will necessarily cause the Exchange to either raise fees for everyone or just for participants trading Minis; too high and participants may be deterred from trading Minis, leaving the Exchange less able to recoup costs associated with development of the product, which is designed to offer investors a way to take less risk in high dollar securities. The Exchange believes, therefore, that adopting fees for Minis that are in some cases lower than fees for standard contracts, and in other cases the same as for standard contracts, is appropriate, not unreasonable, not unfairly discriminatory and not burdensome on competition between participants, or between the Exchange and other exchanges in the listed options market place.

General Options and Trading Permit (OTP) Fees

What follows is a discussion of the existing Fee Schedule as it relates to the treatment of Mini options as compared to standard option contracts.

Trading Permit Fees: The number of Trading Permits or OTPs required by participants is unchanged by the introduction of Mini options.

Lead Market Maker (''LMM'') Rights Fees: The monthly rights fees charged to LMMs will continue to apply to them for transactions executed in Mini options. For purposes of calculating the Rights Fee, a transaction in a Mini option shall be counted the same as a transaction in a standard option contract from a volume perspective (i.e., one contract in a Mini will equal one contract in a standard option contract).

Options Regulatory Fee: Presently the Exchange charges an Options Regulatory Fee (''ORF'') of $0.005 per contract. The ORF is assessed on each OTP Holder for all options transactions executed or cleared by the OTP Holder that are cleared by The Options Clearing Corporation (''OCC'') in the customer range, regardless of the exchange on which the transaction occurs. The Exchange is proposing to charge the same rate for transactions in Mini options, $0.005 per contract, since, as noted, the costs to the Exchange to process quotes, orders, trades and the necessary regulatory surveillance

[19] 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] In addition to the changes discussed below, the Exchange also proposes to make clarifying changes to the endnotes to the Fee Schedule to describe the impact, or lack thereof, of the introduction of Minis, including within endnotes 2, 8, 9 and 12.

[5] *See* Securities Exchange Act Release No. 67948 (September 28, 2012), 77 FR 60735 (October 4, 2012) (SR–NYSEArca–2012–64).

programs and procedures in Minis are the same as for standard option contracts. As such, the Exchange believes that it is appropriate to charge the ORF at the same rate as the standard option contract.

Per Contract Trade Related Charges, Including Qualified Contingent Cross (''QCC'') Orders

The Exchange discusses below the newly proposed per contract transaction charges applicable to Minis. The tables below show the per contract charge applicable to electronic, manual, electronic complex orders, and QCC executions in Minis for various participants on the Exchange: [6]

MINI OPTIONS TRANSACTION FEES—PER CONTRACT

	Manual Executions
Order Type:	
NYSE Arca Market Maker	$0.02
Firm and Broker Dealer	0.09
Customer	0.00

	Electronic executions in penny pilot issues		Electronic executions in non-penny pilot issues	
	Post liquidity	Take liquidity	Post liquidity	Take liquidity
Order Type:				
NYSE Arca Market Maker	($0.04)	$0.07	($0.06)	$0.10
Firm and Broker Dealer	(0.01)	0.09	0.00	0.12
Customer	(0.03)	0.06	(0.04)	0.08

COMPLEX ORDERS—TRANSACTION FEE—PER CONTRACT

	Order type		Fees
Complex Order to Complex Order	Customer	Penny Pilot Issues	($0.03)
		Non-Penny Pilot Issues	(0.04)
	Non Customer	Penny Pilot Issues	0.08
		Non-Penny Pilot Issues	0.10
Complex Order against Consolidated Book	Customer	Penny Pilot Issues	0.06
		Non-Penny Pilot Issues	0.08
	NYSE Arca Market Maker	Penny Pilot Issues	0.07
		Non-Penny Pilot Issues	0.10
	Firm and Broker Dealer	Penny Pilot Issues	0.09
		Non-Penny Pilot Issues	0.12

QCC Fees	$0.05	per side.
Floor Broker Rebate.	0.01	per side.

As with standard options, Customers manually transacting Mini options on the Exchange will trade for free. Mini options contracts on the Exchange will NOT count toward the Customer Monthly Posting Credit Tiers or Super Tier and Qualifications for Executions in Penny Pilot Issues and SPY or associated rebates paid to Order Flow Providers (''OFPs'') described in endnote 8 to the current Fee Schedule.[7] As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. This, coupled with the lower per contract transaction fees charged to other participants, makes it impractical to offer OFPs a rebate for any Customer Mini options volume they transact.

Customers electronically transacting Mini options in Penny Pilot issues will receive a rebate of $.03 when they post liquidity and be charged $.06 when they take liquidity. Customers electronically transacting Mini options in non-Penny Pilot issues will receive a rebate of $.04 when they post liquidity and be charged $.08 when they take liquidity. For Complex Order to Complex Order executions, Customers electronically transacting Mini options will receive a rebate of $.03 in Penny Pilot issues and will receive a rebate of $.04 in non-Penny Pilot issues. For Complex Orders that execute against the Consolidated Book, Customers electronically transacting Mini options will be charged $.06 in Penny Pilot issues and will be charged $.08 in non-Penny Pilot issues.

For Mini option transactions, all NYSE Arca Market Makers, including Lead Market Makers, will have the same rates and charges applied. NYSE Arca Options Market Makers manually trading Mini options will be charged $.02 per contract. NYSE Arca Options Market Makers electronically transacting Mini options in Penny Pilot issues will receive a rebate of $.04 when they post liquidity and be charged $.07 when they take liquidity. NYSE Arca Options Market Makers electronically transacting Mini options in non-Penny Pilot issues will receive a rebate of $.06 when they post liquidity and be charged $.10 when they take liquidity. For Complex Order to Complex Order executions, NYSE Arca Options Market Makers electronically transacting Mini options will be charged $.08 in Penny Pilot issues and will be charged $.10 in non-Penny Pilot issues. For Complex Orders that execute against the Consolidated Book, NYSE Arca Options Market Makers electronically transacting Mini options will be charged $.07 in Penny Pilot issues and will be charged $.10 in non-Penny Pilot issues. These NYSE Arca Options Market Maker charges are generally anywhere from slightly less than 1/10th to slightly more than 1/10th of the charges incurred by NYSE Arca Options Market Makers today for standard option contract transactions.

[6] The Exchange proposes to create a duplicative reference to Routing Fees under the section of fees applicable to Minis.

[7] *See* NYSE Arca Options fee schedule dated March 1, 2013, available at *https://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse_arca_options_fee_schedule__eff_3_01_13.pdf.* However, the Exchange proposes to specify in endnote 8 that Total Industry Customer equity and ETF option average daily volume includes OCC calculated Customer volume of all types, including Complex Order Transactions, QCC transactions, and mini options transactions, in equity and ETF options.

Firm and Broker Dealer manual transactions, in Mini options will be charged at the rate of $.09 per contract. Firms and Broker Dealers electronically transacting Mini options in Penny Pilot issues will receive a rebate of $.01 when they post liquidity and be charged $.09 when they take liquidity. Firms and Broker Dealers electronically transacting Mini options in non-Penny Pilot issues will neither be charged nor receive a credit (*i.e.,* free) when they post liquidity and will be charged $.12 when they take liquidity. For Complex Order to Complex Order executions, Firms and Broker Dealers electronically transacting Mini options will be charged $.08 in Penny Pilot issues and will be charged $.10 in non-Penny Pilot issues. For Complex Orders that execute against the Consolidated Book, Firms and Broker Dealers electronically transacting Mini options will be charged $.09 in Penny Pilot issues and will be charged $.12 in non-Penny Pilot issues. These Firms and Broker Dealer charges are generally anywhere from slightly less than 1/10th to slightly more than 1/10th of the charges incurred by NYSE Arca Options Market Makers today for standard option contract transactions.

Additionally, the existing $75,000 cap per month of fees on Firm and Broker Dealer open outcry trades described in endnote 9 of the current Fee Schedule will NOT include Mini transactions. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options, therefore the Exchange does not wish to include Firm and Broker Dealer trades in Mini options in the monthly fee cap. Further, the proposed charge is slightly higher than 1/10th of the current charges applicable to Firm Proprietary trades. This relatively higher rate is necessitated by the fact that the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options.

OTP Holders or OTP Firms that execute QCC transactions in Minis will be charged $0.05 per contract side. QCC transactions in Minis executed by a Floor Broker on the Floor of the Exchange will be eligible for a $0.01 rebate per contract side rebate.

Routing Surcharge: In order to comply with the requirements of the Distributive Linkage Plan,[8] the Exchange uses various means of accessing better priced interest located on other exchanges. Presently, the Exchange charges a Routing Surcharge of $.11 per contract plus a pass through of the fees associated with the execution of the routed order on the other exchanges. The $.11 is designed to recover the Exchange's costs in routing orders to the other exchanges. Those costs include clearance charges imposed by the OCC and per contract routing fees charged by the Broker Dealers who charge the Exchange for the use of their systems to route orders to other exchanges. The Exchange has spoken with both the OCC and the Broker Dealers who have informed the Exchange that their charges applicable to Mini options will be the same as for standard option contracts, as their cost to process a contract (*i.e.*, routing or clearing) is the same irrespective of the exercise and assignment value of the contract. As such, the Exchange intends to charge the same Routing Surcharge for Mini options as it presently does for standard options. The Exchange notes that participants can avoid the Routing Surcharge in several ways. First, they can simply route to the exchange with the best priced interest. The Exchange, in recognition of the fact that markets can move while orders are in flight, also offers participants the ability to utilize order types that do not route to other exchanges. Specifically, the Post No Preference (''PNP'') order modifier is one such order that would never route to another exchange. In addition, there are others, such as PNP Blind and PNP Plus,[9] which also would never route to another exchange. Given this ability to avoid the Routing Surcharge, coupled with the fixed third-party costs associated with routing, the Exchange believes it is reasonable to charge the same Routing Surcharge for Mini options that is charged for standard option contracts.

Limit Of Fees On Options Strategy Executions: Presently, the Exchange has a $750 cap on transaction fees for Strategy Executions involving reversals and conversions, box spreads, short stock interest spreads, merger spreads and jelly rolls. The fees for these Strategy Executions are further capped at $25,000 per month per initiating firm. The Exchange will NOT include Mini option transactions as being eligible for any part of these per trade or per month Strategy Execution caps. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. Given that the per contract transaction fees are already substantially lower than the per contract fees for standard options, inclusion of Mini options in these fee caps is not warranted.

Ratio Threshold Fee

Order To Trade Ratio Fee: For purposes of calculating the Order To Trade Ratio Fee, an order and an execution in Mini options will be counted the same as an order and an execution in standard option contracts.

The Exchange proposes to implement these changes on March 18, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[10] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[11] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

General Options and Trading Permit (OTP) Fees

For purposes of the Fee Schedule relating to OTP fees, LMM Rights Fees, and the regulatory fees, including the ORF, the Exchange is not proposing any changes as a result of the introduction of Minis. This is due to, in part, the fact that there will be no separate allocation for Minis—the existing LMMs and NYSE Arca Options Market Makers who trade AAPL, for example, will automatically be able, and obligated, to quote and trade AAPL Minis. Since this is the case, the Exchange believes it is entirely appropriate and, in fact, necessary, to treat Mini options the same as standard options with respect to the fees listed above. The fees listed above have not been deemed to be unreasonable, inequitable, or unfairly discriminatory, and the introduction of Mini options raises no new issues with respect to such fees. Therefore, the treatment of Minis in the same manner as standard option contracts for purposes of the OTP fees, LMM Rights Fees, and the regulatory fees, including the ORF, is reasonable, equitable and not unfairly discriminatory. Further, the Exchange notes, particularly in the context of the ORF, that the cost to perform surveillance to ensure compliance with various Exchange and industry-wide rules is no different for a Mini option than it is for a standard option contract. Reducing the ORF for Mini options could result in a higher ORF for standard options. Such an outcome would arguably be discriminatory towards investors in standard options for the benefit of

[8] *See* Rule 6.92, Rule 6.94, Rule 6.95 and Rule 6.96.

[9] *See* Rule 6.62(p), Rule 6.62(u), and Rule 6.62(y).

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(4) and (5).

investors in Minis. As such, the appropriate approach is to treat both Minis and standard options the same with respect to the amount of the ORF that is being charged.

Per Contract Trade Related Charges, Including QCCs

The Exchange noted earlier that, while Minis have a smaller exercise and assignment value due to the reduced number of shares to be delivered as compared to standard option contracts, and despite the smaller exercise and assignment value of a Mini, the cost to the Exchange to process quotes and orders in Minis, perform regulatory surveillance and retain quotes and orders for archival purposes is the same as for a standard contract. This leaves the Exchange in a position of trying to strike the right balance of fees applicable to Minis—too low and the costs of processing Mini quotes and orders will necessarily cause the Exchange to either raise fees for everyone or just for participants trading Minis; too high and participants may be deterred from trading Minis, leaving the Exchange less able to recoup costs associated with development of the product, which is designed to offer investors a way to take less risk in high dollar securities. The Exchange believes, therefore, that adopting fees for Minis that are in some cases lower than standard contracts, and in other cases the same as for standard contracts, is appropriate, not unreasonable, not unfairly discriminatory and not burdensome on competition between participants, or between the Exchange and other exchanges in the listed options market place.

In the case of most trade related charges, the Exchange has decided to offer lower per contract fees to participants as part of trying to strike the right balance between recovering costs associated with trading Minis and encouraging use of the new Mini option contracts, which are designed to allow investors to reduce risk in high dollar underlying securities.

The Exchange proposal to charge Customers $.00 per contract for manual orders is reasonable, as Customers have long traded manual orders for free on all options on the Exchange. The ability to trade manual orders for free attracts Customer order flow to the Exchange, which is beneficial to all other participants on the Exchange who generally seek to trade with Customer order flow. The proposed fee of $.00 per contract is the same fee charged to Customer manual orders in standard option contracts, which is an effective fee on the Exchange and has not been determined to be inequitable or unfairly discriminatory. Therefore, the proposed Customer pricing for Minis is equitable and not unfairly discriminatory. The Exchange feels that different rates for Customer manual transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers.

The Exchange proposal to credit Customers electronically transacting Mini options in Penny Pilot and non-Penny Pilot issues $.03 and $.04, respectively, per contract when they post liquidity and charging them $.06 and $.08, respectively, when they take liquidity is reasonable, as Customers are currently subject to the same pricing structure (albeit at higher rates) for standard options. The rates proposed for Customer Minis transactions for Complex Order to Complex Order executions (a rebate of $.03 in Penny Pilot issues and a rebate of $.04 in non-Penny Pilot issues) and Complex Orders that execute against the Consolidated Book (a charge of $.06 in Penny Pilot issues and a charge of $.08 in non-Penny Pilot issues) is also reasonable, as Customers are currently subject to the same pricing structure (albeit at higher rates) for standard options. The Exchange feels that different rates for Customer electronic transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers.

The Exchange proposal to exclude Mini options from the Customer Monthly Posting Credit Tiers or Super Tier and Qualifications for Executions in Penny Pilot Issues and SPY and associated rebates paid to OFPs described in endnote 8 to the current Fee Schedule is reasonable, equitable and not unfairly discriminatory for the following reasons. First, as noted above, the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. Given the overall lower expected revenues from Mini options, it is reasonable to exempt Mini option volumes from qualifying for the OFP rebates paid on standard option contracts. It is also equitable, since paying the rebate on Mini option volumes would likely necessitate either reducing the rebates paid to OFPs for all activity, or raising other participant fees. It is not unfairly discriminatory, as it will apply equally to all Customer executions in Mini options, regardless of the market participant submitting the order.

The Exchange proposal to charge NYSE Arca Market Makers manually trading Mini options $.02 per contract is reasonable. Additionally, the Exchange proposal for NYSE Arca Market Makers electronically trading Mini options in Penny Pilot issues to receive a rebate of $.04 or $.06 when they post liquidity in Penny Pilot and non-Penny Pilot classes, respectively, and to be charged $.07 or $.10 when they take liquidity in Penny Pilot and non-Penny Pilot classes, respectively, is also reasonable. The Complex Order rates proposed for NYSE Arca Options Market Makers electronically transacting Mini options are also reasonable. Generally, these fees range from slightly more than, to slightly less than, 10% of what the various NYSE Arca Options Market Maker participants pay today. Charging all types of NYSE Arca Options Market Makers, including Lead Market Makers, the same fees to trade Minis is certainly not unfairly discriminatory, as it applies to all of them equally. The fees are reasonable in light of the fact that the Minis do have a smaller exercise and assignment value, specifically 1/10th that of a standard contract, and, as such, levying fees that are approximately 10% of what an NYSE Arca Options Market Maker pays today is reasonable and equitable. The Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options.

The Exchange feels that different rates for Market Maker transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers. For example, NYSE Arca Options Market Makers are required to have trading permits in

order to stream quotes. The number of permits is variable based on the number of options traded, and can cost as much as $16,000 per month to quote all issues on the Exchange as an NYSE Arca Options Market Maker. Conversely, Firms pay a monthly permit fee of $1,000 per month and Broker Dealers, typically access the facilities of the Exchange through either a Firm or Order Flow Provider who may or may not pass along the $1,000 per month permit fee cost. Consequently, when all fees are taken together, the difference charged to NYSE Arca Options Market Makers as compared to Broker Dealers, and Firms is reasonable, equitable and not unfairly discriminatory. The Exchange further notes that there are no limits on the number of NYSE Arca Options Market Makers that are permitted to quote in a given option and that any of the other participant types are free to apply to the Exchange to become a NYSE Arca Options Market Maker to avail themselves of the transaction charges applicable to NYSE Arca Options Market Makers presuming they are willing to accept the quoting obligations applicable to NYSE Arca Options Market Makers, which serve to foster price discovery and transparency.

The Exchange proposal to charge Firms and Broker Dealers,, the rates proposed herein for their transactions in Minis and to exclude Mini options from the $75,000 cap per month of fees on Firm and Broker Dealer open outcry executions described in endnote 9 of the current Fee Schedule is reasonable, equitable and not unfairly discriminatory. First, the per contract charges proposed are lower than what Firms and Broker Dealers pay for a standard contract in acknowledgement of the smaller exercise and assignment value. Although some of these proposed rates are more than 10% of the rate paid by a Firm or Broker Dealer for a standard contract, this is warranted by the fact that the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options. In this regard the proposal is reasonable and it is also equitable, as it allows the Exchange to offer this innovative product to investors without raising fees for other investors who may have no interest in trading Minis. Likewise, excluding Mini option volumes from the monthly fee cap for Firm and Broker Dealer open outcry executions is reasonable and equitable in light of the Exchange's desire to fund the costs associated with Minis with revenues from only those participants who trade them. Offering a fee cap for a product with reduced fees might necessitate raising costs for other participants; therefore, the Exchange believes that the exclusion from the monthly fee cap for Firm and Broker Dealer open outcry executions is both reasonable and equitable. As the per contract Mini pricing for all Firms and Broker Dealers is the same, the proposal is also not unfairly discriminatory.

The Exchange feels that different rates for Firm and Broker Dealer transaction fees as compared to other market participants is equitable and not unfairly discriminatory because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and is equitable and not unfairly discriminatory to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers. For example, NYSE Arca Options Market Makers are required to have trading permits in order to stream quotes. The number of permits is variable based on the number of options traded, and can cost as much as $16,000 per month to quote all issues on the Exchange as an NYSE Arca Options Market Maker. Conversely, Firms pay a monthly permit fee of $1,000 per month and Broker Dealers, typically access the facilities of the Exchange through either a Firm or Order Flow Provider who may or may not pass along the $1,000 per month permit fee cost. Consequently, when all fees are taken together, the difference charged to NYSE Arca Options Market Makers as compared to Broker Dealers, and Firms is reasonable, equitable and not unfairly discriminatory. The Exchange further notes that there are no limits on the number of NYSE Arca Options Market Makers that are permitted to quote in a given option and that any of the other participant types are free to apply to the Exchange to become a NYSE Arca Options Market Maker to avail themselves of the transaction charges applicable to NYSE Arca Options Market Makers presuming they are willing to accept the quoting obligations applicable to NYSE Arca Options Market Makers, which serve to foster price discovery and transparency.

The Exchange proposal for QCC pricing for Minis is to charge Customers and non-Customers $.10 per contract ($.05 charge per contract side), as compared with $.20 per contract for standard options ($.10 charge per contract side). The Exchange will also offer NYSE Arca Floor Brokers a rebate of $.02 per contract ($.01 rebate per contract side) for all Mini options they execute as a QCC trade, as compared to $.07 per contract rebate for standard options ($.035 rebate per contract side). The Exchange believes that this pricing is reasonable, equitable and not unfairly discriminatory. First, the Exchange has always charged for QCC trades in standard options due to the fact that qualifying QCC trades are executed immediately, upon entry, without exposure or any opportunity for other participants to participate on the trade. This pricing proposal preserves this, and, as such, is reasonable. It is equitable since, as noted, the Exchange's cost to process quotes, orders and trades in Minis is the same as for standard options, so charging a relatively small premium for the opportunity to trade without exposure is warranted, given the Exchange's need to cover the costs of participants trading Minis so as to avoid sharing those costs with other participants who are not trading Minis. The proposal is also not unfairly discriminatory as it applies equally to all Customers and non-Customers. The Floor Broker rebate of $.02 ($.01 rebate per contract side) is reasonable and equitable as it is designed to allow Floor Brokers to compete for QCC volumes that might otherwise execute on an exchange that offers a front end order entry system, like ISE PrecISE Trade application [12] or CBOE's HyTS,[13] which would allow participants to potentially avoid paying a brokerage fee. The Floor Broker rebate is not unfairly discriminatory as it applies equally to all NYSE Arca Floor Brokers who execute Mini options as QCC trades.

The Exchange proposal to treat Mini options the same as standard options for purposes of the Routing Surcharge is reasonable, equitable and not unfairly discriminatory for the following reasons. Presently, the Exchange charges a Routing Surcharge of $.11 per contract plus a pass through of the fees associated with the execution of the routed order on the other exchanges. The $.11 is designed to recover the Exchange's costs in routing orders to the other exchanges. Those costs include clearance charges imposed by The OCC and per contract routing fees charged by the Broker Dealers who charge the Exchange for the use of their systems to route orders to other exchanges. The Exchange has spoken with both The OCC and the Broker Dealers, who have informed the Exchange that their charges applicable to Mini options will be the same as for standard option contracts, as their cost to process a contract (i.e., routing or clearing) is the

[12] *See http://www.ise.com/WebForm/viewPage.aspx?categoryId=129.*

[13] *See https://www.cboe.org/hybrid/HyTs.aspx.*

same irrespective of the exercise and assignment value of the contract. As such, the Exchange intends to charge the same Routing Surcharge for Mini options as it presently does for standard options. The Exchange notes that participants can avoid the Routing Surcharge in several ways. First they can simply route to the exchange with the best priced interest. The Exchange, in recognition of the fact that markets can move while orders are in flight, also offers participants the ability to utilize order types that do not route to other exchanges. Specifically, the PNP order modifier is one such order that would never route to another exchange. In addition, there are others, such as PNP Blind and PNP Plus,[14] which also would never route to another exchange. Given this ability to avoid the Routing Surcharge, coupled with the fixed third party costs associated with routing, the Exchange believes it is reasonable and equitable to charge the same Routing Surcharge for Mini options that is charged for standard option contracts. Because the Routing Surcharge will apply to all participants in Minis as it is applied for standard options, and because such surcharge has not previously been found to be unreasonable, inequitable or unfairly discriminatory, the Exchange believes such surcharge is reasonable and equitable with respect to Minis as well.

The Exchange is proposing to exclude Mini option volumes from being eligible for the Limit Of Fees On Options Strategy Executions. Presently the Exchange has a $750 cap on transaction fees for Strategy Executions involving reversals and conversions, box spreads, short stock interest spreads, merger spreads and jelly rolls. The fees for these Strategy Executions are further capped at $25,000 per month per initiating firm. The Exchange will NOT include Mini option transactions as being eligible for any part of these per trade or per month Strategy Execution caps. As noted earlier, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options. Given that the per contract transaction fees for Minis are already substantially lower than the per contract fees for standard options, inclusion of Mini options in these fee caps is not warranted, and is reasonable and equitable. Further, it is not unfairly discriminatory as the exclusion of Mini volumes from the cap on fees for Strategy Executions applies equally to all participants on the Exchange.

[14] *See* Rule 6.62(p), Rule 6.62(u), and Rule 6.62(y).

Ratio Threshold Fee

The Exchange proposes to treat Mini options the same as standard options for purposes of the Ratio Threshold Fee. As noted, the cost to the Exchange to process quotes, orders and trades in Minis is the same as for standard options and, as such, treating Minis the same as standard option contracts for the purposes of calculating the Ratio Threshold Fee is reasonable and equitable. It is also not unfairly discriminatory, as such treatment will apply to all participants equally.

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 change designed to provide greater specificity and precision within the Fee Schedule with respect to the fees that will be applicable to Minis when they begin trading on the Exchange on March 18, 2013.

The Exchange believes that adopting fees for Minis that are in some cases lower than for standard contracts, but in other cases the same as for standard contracts, strikes the appropriate balance between fees applicable to standard contracts versus fees applicable to Mini's, and will not impose a burden on competition among various market participants on the Exchange, or between the Exchange and other exchanges in the listed options market place, that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange feels that different rates for different market participants will not impose a burden on competition because non-Customers wish to have Customer orders attracted to the Exchange by having lower fees, and will not impose a burden on competition to Firms and Broker Dealers because Market Makers have obligations that are not required of Firms and Broker Dealers and because Market Makers have additional costs that are not applicable to Firms and Broker Dealers. Further the Exchange notes that for standard options a greater difference in fees for various participants already exists than that which is being proposed for Minis. For example, Customers already trade for lower Take Liquidity fees than an NYSE Arca Options Market Maker. An NYSE Arca Market Maker who trades with a Customer electronically in a non-Penny name can pay as much as $0.80 per contract. Similarly, Firms and Broker Dealers pay $0.85 per contract when they Take Liquidity in non-Penny Pilot names opposed to Customers, who pay a lower Take Liquidity rate in the same issues of $0.79 per contract in standard options. For Minis, the greatest differential being proposed is in Manual Trades in mini-options, where Customers will trade for free, and Firms and Broker Dealers will pay $0.09 per contract. Firms and Broker Dealers pay $.25 per contract versus $.00 per contract for Customers, in standard options. The differential for mini-options is de minimus as compared to the differential for standard options.

The Exchange notes that the difference in fees for various participants in standard options has not proven to be a burden on competition. Therefore, the fee differential for Minis, being quite a bit smaller, should not prove to be a burden on competition at all. In this regard, as Minis are a new product being introduced into the listed options marketplace, the Exchange is unable at this time to absolutely determine the impact that the fees and rebates proposed herein will have on trading in Minis. That said, however, the Exchange believes that the rates proposed for Minis, on their face, would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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.

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) [15] of the Act and subparagraph (f)(2) of Rule 19b–4 [16] thereunder, because it establishes a due,

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(2).

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) [17] 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–2013–25 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–2013–25. 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–2013–25 and should be submitted on or before April 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–07619 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

[17] 15 U.S.C. 78s(b)(2)(B).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69243; File No. SR–ICC–2013–01]

Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change, as Modified by Amendments No. 1 and 2 Thereto, To Update Chapter 26 and Remove Schedule 502 of the ICE Clear Credit Rules

March 27, 2013.

I. Introduction

On January 31, 2013, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–ICC–2013–01 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on February 21, 2013.[3] On March 7, 2013, ICC filed Amendment No. 1 to the proposed rule change.[4] On March 14, 2013, ICC filed Amendment No. 2 to the proposed rule change.[5] The Commission did not receive comments regarding the proposal. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

II. Description

The purpose of the proposed rule change is to update Chapter 26 (Cleared CDS Products) of the ICC Rules and remove Schedule 502 (List of Pre-Approved Products) from the ICC Rules. The proposed rule change also includes a conforming edit within Chapter 5 (Risk Committee) of the ICC Rules. This update will provide direct reference within the ICC Rules to the cleared products list always available on the ICC Web site (''Approved Products List'') and add additional standards for certain ICC cleared products. ICC agrees that rule submissions for updates to ICC's cleared product offering will be required under certain circumstances (e.g., certain financial single names, additional single-name constituents of the Emerging Markets Index, and High Yield single names).

ICC proposes to amend Chapter 26 of its rules to update the definitions of Eligible CDX.NA Untranched Index (Rule 26A–102), Eligible SNAC Reference Entities (Rule 26B–102), Eligible SNAC Reference Obligations (Rule 26B–102), Eligible CDX.EM Untranched Index (Rule 26C–102), Eligible SES Reference Entities (Rule 26D–102), Eligible SES Reference Obligations (Rule 26D–102), Eligible iTraxx Europe Untranched Index (Rule 26F–102), Eligible SDEC Reference Entities (Rule 26G–102) and Eligible SDEC Reference Obligations (Rule 26G–102) to include the requirement that the products must be determined by ICC to be eligible.

ICC proposes to amend Chapter 26 of its rules to update the definitions of List of Eligible CDX.NA Untranched Indexes (Rule 26A–102), List of Eligible SNAC Reference Entities (Rule 26B–102), List of Eligible CDX.EM Untranched Indexes (Rule 26C–102), List of Eligible SES Reference Entities (Rule 26D–102), List of Eligible iTraxx Europe Untranched Indexes (Rule 26F–102) and List of Eligible SDEC Reference Entities (Rule 26G–102) to include the reference that the Approved Products List will be maintained, updated and published on the ICC Web site.

ICC proposes to amend Chapter 26 of its rules to add the definition of Eligible SNAC Sector in Rule 26B–102 of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 68928 (Feb. 14, 2013), 78 FR 12125 (Feb. 21, 2013).

[4] In Amendment No. 1, ICC amended the filing to remove European index CDS and European single-name CDS from Schedule 502 of the ICC Rulebook (''ICC Rules''), which were added to the ICC Rules subsequent to ICC filing this proposed rule change. The amendment also included conforming changes to the chapters of the ICC Rules referencing iTraxx Europe index CDS and European single-name CDS to reflect the removal of Schedule 502.

[5] In Amendment No. 2, ICC amended the filing to remove certain index series listings scheduled to occur on March 20, 2013, and March 27, 2013, which were added to Schedule 502 subsequent to ICC filing this proposed rule change. ICC also amended Chapter 26G of the ICC Rules to change the abbreviation for ''Standard European Corporate'' from ''SNEC'' to ''SDEC''.

ICC Rules. The listed Eligible SNAC Sectors are: Basic Materials, Consumer Goods, Consumer Services, Energy, Financials, Healthcare, Industrials, Technology, Telecommunications Services, and Utilities. The requirement to list the Eligible SNAC Sector on the List of Eligible SNAC Reference Entities is also added to the definition of List of Eligible SNAC Reference Entities in Rule 26B–102.

ICC proposes to amend Chapter 26 of its rules to add the definition of Eligible SDEC Sector in Rule 26G–102 of the ICC Rules. The listed Eligible SDEC Sectors are: Basic Materials, Consumer Goods, Consumer Services, Energy, Financials, Healthcare, Industrials, Technology, Telecommunications Services, and Utilities. The requirement to list the Eligible SDEC Sector on the List of Eligible SDEC Reference Entities is also added to the definition of List of Eligible SDEC Reference Entities in Rule 26G–102.

ICC proposes to amend Chapter 26 of its rules to include within the definition of List of Eligible SES Reference Entities in Rule 26D–102 the requirement to list the Sector, Government, in the List of Eligible SES Reference Entities.

ICC proposes to remove Schedule 502 from the ICC Rules as Schedule 502 provides information available in the Approved Products List on the ICC Web site. The Approved Products List provides the information currently available in Schedule 502 as well as all additional product information listed in the definitions of List of Eligible CDX.NA Untranched Indexes (Rule 26A–102), List of Eligible SNAC Reference Entities (Rule 26B–102), List of Eligible CDX.EM Untranched Indexes (Rule 26C–102), List of Eligible SES Reference Entities (Rule 26D–102), List of Eligible iTraxx Europe Untranched Indexes (Rule 26F–102) and List of Eligible SDEC Reference Entities (Rule 26G–102).

ICC proposes to make one conforming amendment to Chapter 5 of its rules, specifically Rule 502(a), to change a reference to Schedule 502 of the ICC Rules to reference the Approved Products List on the ICC Web site.

The proposed changes to the ICC Rules will provide direct reference within the ICC Rules to the cleared products list available on the ICC Web site and add additional standards for certain ICC cleared products. The proposed rule changes do not require any changes to the ICC risk management framework including the ICC margin methodology, guaranty fund methodology, pricing parameters and pricing model.

III. Discussion

Section 19(b)(2)(C) of the Act [6] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(F) of the Act [7] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and, to the extent applicable, derivative agreements, contracts, and transactions.

The Commission finds that the proposed rule change is consistent with the requirements of Section 17A of the Act [8] and the rules and regulations thereunder applicable to ICC. The proposed rule change would provide direct reference within the ICC Rules to the Approved Products List available on the ICC Web site and add additional standards for certain ICC cleared products to assure that Clearing Participants are informed of the ICC approved products, thereby promoting the prompt and accurate clearance and settlement of swaps and security-based swaps transactions.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act [9] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (File No. SR–ICC–2013–01), as modified by Amendments No. 1 and 2, be, and hereby is, approved.[11]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–07583 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(2)(C).

[7] 15 U.S.C. 78q–1(b)(3)(F).

[8] 15 U.S.C. 78q–1.

[9] *Id.*

[10] 15 U.S.C. 78s(b)(2).

[11] In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69231; File No. SR–NASDAQ–2013–051]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees

March 25, 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 March 19, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to amend Chapter XV, entitled ''Options Pricing,'' at Section 2 governing pricing for NASDAQ members using the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options. Specifically, NOM proposes to amend its Routing Fees.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on April 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ proposes to amend its Routing Fees at Chapter XV, Section 2(3) of the Exchange Rules in order to recoup costs that the Exchange incurs for routing and executing orders in equity options to various away markets.

Today, the Exchange calculates Routing Fees by assessing certain Exchange costs related to routing orders to away markets plus the away market's transaction fee. The Exchange assesses a $0.05 per contract [3] fixed Routing Fee when routing orders to NASDAQ OMX PHLX LLC (''PHLX'') and NASDAQ OMX BX, Inc. (''BX Options'') and a $0.11 per contract [4] fixed Routing Fee to all other options exchanges in addition to the actual transaction fee or rebate paid by the away market. The fixed Routing Fee is based on costs that are incurred by the Exchange when routing to an away market in addition to the away market's transaction fee. For example, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC (''NOS''), a member of the Exchange and the Exchange's exclusive order router,[5] to route orders in options listed and open for trading to destination markets. Each time NOS routes to away markets NOS incurs a clearing-related cost [6] and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange also incurs administrative and technical costs associated with operating NOS, membership fees at away markets, Options Regulatory Fees (''ORFs'') and technical costs associated with routing options. The transaction fee assessed by the Exchange is based on the away market's actual transaction fee or rebate for a particular market participant at the time that the order was entered into the Exchange's trading system. This transaction fee is calculated on an order-by-order basis, since different away markets charge different amounts. In the event that there is no transaction fee or rebate assessed by the away market, the only fee assessed is the fixed Routing Fee. With respect to the rebate, the Exchange pays a market participant the rebate offered by an away market where there is such a rebate. Any rebate available is netted against a fee assessed by the Exchange.[7]

C2 recently filed a rule change to amend its transaction fees and rebates for simple, non-complex orders, in equity options classes which became operative on February 1, 2013.[8] As a result of that filing the Exchange amended its Pricing Schedule and today assesses non-Customer simple, non-complex orders in equity options (single stock) that are routed to C2 a Routing Fee which includes a fixed cost of $0.11 per contract plus a flat rate of $0.85 per contract, except with respect to Customers.[9] With respect to Customers, the Exchange does not pass the rebate offered by C2, rather, Customer simple, non-complex orders in equity options (single stock) that are routed to C2 are assessed $0.00 per contract.

The Exchange is proposing to further simplify its Routing Fees by assessing a flat rate of $0.95 per contract on all non-Customer orders routed to any away market. The Exchange would no longer pass any rebate paid by an away market for non-Customer orders. With respect to Customer orders, the Exchange is proposing to continue to assess Customer orders routed to PHLX a fixed fee of $0.05 per contract (''Fixed Fee'') in addition to the actual transaction fee assessed by the away market. This fee is not changing. With respect to Customer orders that are routed to BX Options, the Exchange will not assess a Routing Fee and will not pass the rebate. Today, BX Options pays a Customer Rebate to Remove Liquidity as follows: Customers are paid $0.12 per contract in IWM, SPY and QQQ, $0.32 per contract in All Other Penny Pilot Options and $0.70 per contract in Non-Penny Pilot Options.[10] The Exchange is proposing to not assess a Routing Fee when routing orders to BX Options because that exchange pays a rebate. Instead of netting the customer rebate paid by BX Options against the fixed fee,[11] the Exchange would simply not assess a fee. Although market participants routing to BX Options will not receive a credit, as is the case today, market participants will not pay a Customer Routing Fee when their orders are routed to BX Options with this proposal. The Exchange proposes to assess a Customer Routing Fee of $0.11 per contract (''Fixed Fee'') in addition to the actual transaction fee when routing to an options exchange other than PHLX and BX Options, as is the case today. The Exchange is amending the payment of rebates and will no longer pay rebates when routing Customer orders to an away market, instead the Exchange will not assess a Routing Fee if a Customer order is routed to an away market that pays a rebate.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

2. Statutory Basis

NASDAQ believes that its proposal to amend its pricing is consistent with Section 6(b) of the Act [12] in general, and furthers the objectives of Section 6(b)(4) of the Act,[13] in particular, in that it is an equitable allocation of reasonable fees and other charges among its Participants.

The Exchange believes that its proposal to amend its non-Customer Routing Fees from a fixed fee plus actual transaction charges to a flat rate is reasonable because the flat rate makes it easier for market participants to anticipate the Routing Fees which they would be assessed at any given time. The Exchange believes that assessing all non-Customer orders the same flat rate will provide market participants with certainty with respect to Routing Fees. While, each destination market's transaction charge varies and there is a

[3] In a previous rule filing, the Exchange discussed the manner in which it analyzed costs related to routing to BX Options and PHLX and determined the costs are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders. In that filing the Exchange noted that because PHLX, BX Options and NOM all utilize NOS, the cost to the Exchange is less as compared to routing to other away markets. In addition the fixed costs are reduced because NOS is owned and operated by NASDAQ OMX and the three exchanges and NOS share common technology and related operational functions. *See* Securities Exchange Act Release No. 68718 (January 24, 2013), 78 FR 6386 (January 30, 2013) (SR–NASDAQ–2012–010).

[4] The $0.11 per contract Fixed Fee would apply to all options exchanges other than BX Options and PHLX, which are discussed separately in this proposal. The Exchange anticipates that if other options exchanges are approved by the Commission after the filing of this proposal, those exchanges would be assessed the $0.11 per contract fee applicable to ''all other options exchanges.''

[5] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[6] The Options Clearing Corporation (''OCC'') assesses a clearing fee of $0.01 per contract side. *See* Securities Exchange Act Release No. 68025 (October 10, 2012), 77 FR 63398 (October 16, 2012) (SR–OCC–2012–18).

[7] For example, if a Customer order is routed to BOX, and BOX offers a customer rebate of $0.20 per contract, the Exchange would assess a $0.11 per contract fixed fee which would net against the rebate ($0.20 per contract in this example). The market participant for whom the Customer contract was routed would receive a $0.09 per contract rebate.

[8] *See* Securities Exchange Act Release No. 68792 (January 31, 2013), 78 FR 8621 (February 6, 2013) (SR–C2–2013–004).

[9] *See* Securities Exchange Act Release No. 68976 (February 25, 2013), 78 FR 13928 (March 1, 2013) (SR–NASDAQ–2013–029).

[10] *See* BX Options Rules at Chapter XV, Section 2(1).

[11] BX Options does not assess a Customer a Fee to Remove Liquidity in any symbols today. *See* Chapter V, Section 2(1) of the BX Options Rules.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4).

cost incurred by the Exchange when routing orders to away markets, including clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options, the Exchange believes that the proposed Routing Fees will enable it to recover the costs it incurs to route non-Customer orders to away markets. Other exchanges similarly assess a fixed rate fee to route non-Customer orders.[14]

The Exchange believes that its proposal to amend the non-Customer Routing Fees from a fixed fee plus actual transaction charges to a flat rate is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same Routing Fees to all non-Customer market participants. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for non-Customer orders routed to and executed at away markets. The proposed Routing Fee for non-Customer orders is an approximation of the maximum fees the Exchange will be charged for such executions, including costs, at away markets. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services for non-Customer orders. The Exchange believes that the fixed rate non-Customer Routing Fee is equitable and not unfairly discriminatory because market participants have the ability to directly route orders to an away market and avoid the Routing Fee. Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[15] The Exchange routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) (''NBBO'') price and based on price first.[16]

The Exchange believes that its proposal to not pass a rebate that is offered by an away market for non-Customer orders is reasonable because to the extent that another market is paying a rebate, the Exchange will assess a $0.95 per contract fee as its total cost in each instance. The Routing Fee is transparent and simple. If a market participant desires the rebate, the market participant has the option to direct the order to that away market. Other options exchanges today do not pass the rebate.[17] The Exchange believes that its proposal to not pass a rebate that is offered by an away market for non-Customer orders is equitable and not unfairly discriminatory because the Exchange would not pay such a rebate on any non-Customer order.

The Exchange believes that amending the Customer Routing Fee to BX Options from $0.05 per contract in addition to the actual transaction fee to $0.00 is reasonable, because, unlike PHLX,[18] BX Options pays a Customer Rebate to Remove Liquidity as follows: Customers are paid $0.12 per contract in IWM, SPY and QQQ, $0.32 per contract in All Other Penny Pilot Options and $0.70 per contract in Non-Penny Pilot Options.[19] The Exchange believes that not assessing a fee for routing orders to BX Options, instead of netting the customer rebate paid by BX Options against the fixed fee[20] is reasonable because although market participants routing orders to BX Options will not receive a credit, as is the case today with respect to Customer orders routed to BX Options, the Routing Fee will be more transparent. Market participants will not pay a Customer Routing Fee when routing orders to BX Options with this proposal instead of the $0.05 per contract fee netted against the rebate, as is the case today. The Exchange believes that the proposed Customer Routing Fee to BX Options is equitable and not unfairly discriminatory because the proposal would apply uniformly to all market participants.

Further, the Exchange believes that it is reasonable to also not assess a Customer Routing Fee when routing to all other options exchanges, except PHLX and BX Options, if the away market pays a rebate. The Exchange will continue to assess a Fixed Fee of $0.11 per contract plus the actual transaction charge assessed by the away market when routing to all other options exchanges, except PHLX and BX Options, but instead of paying the rebate, as is the case today, the Exchange will not assess a Customer Routing Fee to that away market because the Exchange will collect the rebate to offset the fee. The Exchange believes that market participants will have more certainty as to the Customer Routing Fee that will be assessed by the Exchange. The Exchange believes that the proposed pricing for the Customer Routing Fee to all other away markets, except PHLX and BX Options, is equitable and not unfairly discriminatory because while the Exchange may operate at a slight gain or a slight loss when routing Customer orders to the away market, depending on the rebate paid by the away market, the proposal would apply uniformly to all market participants when routing to an away market that pays a rebate.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to assess Customer orders that are routed to PHLX a Fixed Fee of $0.05 per contract and orders that are routed to other away markets, other than PHLX and BX Options, a Fixed Fee of $0.11 per contract because the cost, in terms of actual cash outlays, to the Exchange to route to PHLX (and BX Options)[21] is lower. For example, costs related to routing to PHLX are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.[22] NOS and the three NASDAQ OMX options markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs when routing orders. The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to PHLX.

Finally, the Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess different fees for Customers orders as compared to

[14] BATS Exchange, Inc. (''BATS'') assesses non-Customer fixed rates of $0.57 and $0.95 per contract when routing to away markets. *See* BATS BZX Exchange Fee Schedule. The Chicago Board Options Exchange Incorporated (''CBOE'') assesses non-Customer orders a $0.50 per contract routing fee in addition to the customary CBOE execution charges. *See* CBOE's Fees Schedule.

[15] *See* NASDAQ Rules at Chapter VI, Section 11(e) (Order Routing).

[16] *Id.*

[17] *See* CBOE's Fees Schedule and International Securities Exchange LLC's (''ISE'') Fee Schedule.

[18] The PHLX Customer Routing Fee is not being amended by this proposal. The Exchange would continue to assess Customer orders routed to PHLX a $0.05 per contact Fixed Fee along plus the actual transaction fee.

[19] *See* BX Options Rules at Chapter XV, Section 2(1).

[20] BX Options does not assess a Customer a Fee to Remove Liquidity in any symbols today. *See* Chapter V, Section 2(1) of the BX Options Rules.

[21] With this proposal, the Exchange would not assess the $0.05 per contract Fixed Fee for routing orders to BX Options because that exchange pays Customer rebates, which the Exchange would retain to offset its cost.

[22] *See* Chapter VI, Section 11 of the NASDAQ and BX Options Rules and PHLX Rule 1080(m)(iii)(A).

non-Customer orders because the Exchange has traditionally assessed lower fees to Customers as compared to non-Customers. Customers will continue to receive the lowest fees or no fees when routing orders, as is the case today. Other options exchanges also assess lower Routing Fees for customer orders as compared to non-customer orders.[23]

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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 does not believe that the proposal creates intra-market competition because the Exchange is applying the same Routing Fees and credits to all market participants in the same manner dependent on the routing venue, with the exception of Customers. The Exchange has proposed separate Customer Routing Fees. Customers will continue to receive the lowest fees or no fees when routing orders, as is the case today. Other options exchanges also assess lower Routing Fees for customer orders as compared to non-customer orders.[24]

The Exchange's proposal would allow the Exchange to recoup its costs when routing orders to away markets when such orders are designated as available for routing by the market participant. The Exchange is passing along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to PHLX and is providing those saving to all market participants. Participants may choose to mark the order as ineligible for routing to avoid incurring these fees.[25] Today, other options exchanges also assess fixed routing fees to recoup costs incurred by the Exchange to route orders to away markets.[26]

The Exchange operates in a highly competitive market, comprised of eleven exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, the fees that are assessed by the Exchange must remain competitive with fees charged by other venues and therefore must continue to be reasonable and equitably allocated to those Participants that opt to direct orders to the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[27] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2013–051 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–2013–051. 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–NASDAQ–2013–051, and should be submitted on or before April 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–07548 Filed 4–1–13; 8:45 am]

BILLING CODE 8011–01–P

[23] BATS assesses lower customer routing fees as compared to non-customer routing fees per the away market. For example BATS assesses ISE customer routing fees of $0.30 per contract and an ISE non-customer routing fee of $0.57 per contract. *See* BATS BZX Exchange Fee Schedule.

[24] *Id.*

[25] *See supra* note 15.

[26] *See* CBOE's Fees Schedule and ISE's Fee Schedule.

[27] 15 U.S.C. 78s(b)(3)(A)(ii).

[28] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions and an extension of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer

and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, Email address: *OIRA_Submission@omb.eop.gov.*

(SSA)

Social Security Administration, DCRDP, Attn: Reports Clearance Director, 107 Altmeyer Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–966–2830, Email address: *OR.Reports.Clearance@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than June 3, 2013. Individuals can obtain copies of the collection instruments by writing to the above email address.

1. Request to be Selected as a Payee—20 CFR 404.2010–404.2055, 416.601–416.665—0960–0014. An individual applying to be a representative payee for a Social Security beneficiary or Supplemental Security Income (SSI) recipient must first complete Form SSA–11–BK. SSA obtains information from applicant payees regarding their relationship to the beneficiary, personal qualifications, concern for the beneficiary's well-being, and intended use of benefits if appointed as payee. The respondents are individuals, private sector businesses and institutions, and State and local government institutions and agencies applying to become representative payees.

Type of Request: Revision of an OMB approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Individuals/Households (90%)				
Representative Payee System	1,438,200	1	11	263,670
Paper Version	91,800	1	11	16,830
Total	1,530,000			280,500
Private Sector (9%)				
Representative Payee System	149,940	1	11	27,489
Paper Version	3,060	1	11	561
Total	153,000			28,050
State/Local/Tribal Government (1%)				
Representative Payee System	16,660	1	11	3,054
Paper Version	340	1	11	62
Total	17,000			3,116
Grand Total	1,700,000			311,666

2. Representative Payee Evaluation Report—20 CFR 404.2065 & 416.665—0960–0069. Sections 205(j) and 1631(a)(2) of the Social Security Act (Act) state SSA may appoint a representative payee to receive title II benefits or title XVI payments on behalf of individuals unable to manage or direct the management of those funds themselves. SSA requires appointed representative payees to report once each year on how they used or conserved those funds. When a representative payee fails to adequately report to SSA as required, SSA conducts a face-to-face interview with the payee and completes Form SSA–624, Representative Payee Evaluation Report, to determine the continued suitability of the representative payee to serve as a payee. The respondents are individuals or organizations serving as representative payees for individuals receiving title II benefits or title XVI payments who fail to comply with SSA's statutory annual reporting requirement.

Type of Request: Revision of an OMB-approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–624	266,000	1	30	133,000

3. Child Care Dropout Questionnaire—20 CFR 404.211(e)(4)—0960–0474. If individuals applying for title II disability benefits cared for their own or their spouse's children under age 3 and had no steady earnings during that time period, they may exclude that period of care from the disability computation period. We call this the child-care dropout exclusion. SSA uses the information from Form SSA–4162 to determine if an individual qualifies for

this exclusion. Respondents are applicants for title II disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–4162	2,000	1	5	167

4. Beneficiary Recontact Form—20 CFR 404.703, 404.705—0960–0502. SSA investigates recipients of disability payments to determine their continuing eligibility for payments. Research indicates recipients may fail to report circumstances that affect their eligibility. Two such cases are: (1) When parents receiving disability benefits for their child marry and (2) the removal of an entitled child from parents' care. SSA uses Form SSA–1588–OCR–SM to ask mothers or fathers about their marital status and children currently in their care to detect overpayments and to avoid continuing payment to those no longer entitled. Respondents are recipients of mothers' or fathers' Social Security benefits.

Type of Request: Revision of an OMB-approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1588–OCR–SM	171,506	1	5	14,292

5. Program Discrimination Complaint—0960–0585. SSA collects information on Form SSA–437 to investigate and formally resolve complaints of discrimination based on disability, race, color, national origin (including limited English language proficiency), sex, sexual orientation, age, religion, or retaliation for having participated in a proceeding under this administrative complaint process in connection with an SSA program or activity. Individuals who believe SSA discriminated against them on any of the above bases may file a written complaint of discrimination. SSA uses the information to (1) Identify the complaint; (2) identify the alleged discriminatory act; (3) establish the date of such alleged action; (4) establish the identity of any individual(s) with information about the alleged discrimination; and (5) establish other relevant information that would assist in the investigation and resolution of the complaint. Respondents are individuals who believe SSA or SSA employees, contractors or agents in programs or activities conducted by SSA discriminated against them.

Type of Request: Revision on an OMB-approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–437	255	1	60	255

6. Waiver of Supplemental Security Income Payment Continuation—20 CFR 416.1400–416.1422—0960–0783. SSI recipients who wish to discontinue their SSI payments while awaiting a determination on their appeal complete Form SSA–263–U2, Waiver of Supplemental Security Income Payment Continuation, to inform SSA of this decision. SSA collects the information to determine whether the SSI recipient meets the provisions of the Act regarding waiver of payment continuation and as proof respondents no longer want their payments to continue. Respondents are recipients of SSI payments who wish to discontinue receiving payment while awaiting a determination on their appeal.

Type of Request: Revision of an OMB-approved information collection.

Modality of collection	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–263–U2	3,000	1	5	250

II. SSA submitted the information collections below to OMB for clearance. Your comments regarding the information collections would be most useful if OMB and SSA receive them 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than May 2, 2013. Individuals can obtain copies of the OMB clearance packages by writing to *OR.Reports.Clearance@ssa.gov.*

1. Supplemental Statement Regarding Farming Activities of Person Living Outside the U.S.A.—0960–0103. When a beneficiary or claimant reports farm work from outside the United States, SSA documents this work on Form SSA–7163A–F4. Specifically, SSA uses the form to determine if we should apply foreign work deductions to the recipient's title II benefits. We collect the information either annually or every other year, depending on the respondent's country of residence.

Respondents are Social Security recipients engaged in farming activities outside the United States.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–7163A–F4	1,000	1	60	1,000

2. Internet Direct Deposit Application—31 CFR 210—0960–0634. SSA requires all applicants and recipients of Social Security Old Age, Survivors, and Disability Insurance (OASDI) benefits, or SSI payments to receive these benefits and payments via direct deposit at a financial institution. SSA receives Direct Deposit/Electronic Funds Transfer (DD/EFT) enrollment information from OASDI beneficiaries and SSI recipients to facilitate DD/EFT of their funds with their chosen financial institution. We also use this information when an enrolled individual wishes to change their DD/EFT information. For the convenience of the respondents, we collect this information through several modalities, including an Internet application, in-office or telephone interviews, and our automated telephone system. In addition to using the direct deposit information to enable DD/EFT of funds to the recipient's chosen financial institution, we also use the information through our Direct Deposit Fraud Indicator to ensure the correct recipient receives the funds. Respondents are OASDI beneficiaries and SSI recipients requesting that we enroll them in the Direct Deposit program or change their direct deposit banking information.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
Internet DD	188,129	1	10	31,355
Non-Electronic Services (FO, 800#-ePath, MSSICS, SPS, MACADE, POS, RPS)	6,455,815	1	12	1,291,163
Automated 800# Response System	237,065	1	8	31,609
Direct Deposit Fraud Indicator	10,000	1	2	333
Totals	6,891,009	.....	.....	1,354,460

3. International Direct Deposit—31 CFR 210—0960–0686. SSA's International Direct Deposit (IDD) Program allows beneficiaries living abroad to receive their payments via direct deposit to an account at a financial institution outside the United States. SSA uses Form SSA–1199–(Country) to enroll title II beneficiaries residing abroad in IDD, and to obtain the direct deposit information for foreign accounts. Routing account number information varies slightly for each foreign country, so we use a variation of the Treasury Department's Form SF–1199A for each country. The respondents are Social Security beneficiaries residing abroad who want SSA to deposit their benefits payments directly to a foreign financial institution.

Type of Request: Revision of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Estimated total annual burden (hours)
SSA–1199–(Country)	5,000	1	5	417

Dated: March 28, 2013.

Faye Lipsky,

Reports Clearance Director, Social Security Administration.

[FR Doc. 2013–07616 Filed 4–1–13; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 8266]

Designation & Determination Pursuant to the Foreign Missions Act; Concerning the Provision of Application Services for Visas, Passports and Similar Documents by Private Entities to Foreign Missions in the United States

Sections 202(a), 203, 204, and 207 of the Foreign Missions Act (codified at 22 U.S.C. 4301 *et seq.*) (hereinafter ''the Act'') authorize the Secretary of State to designate benefits and provide or assist in the grant of benefits for or on behalf of a foreign mission. Therefore, pursuant to such authority, vested in me by Delegation of Authority No. 198, dated September 16, 1992, in order to protect the interests of the United States and to adjust for costs and procedures of obtaining benefits for missions of the United States abroad, I hereby designate the provision of application services with respect to visas, passports and similar documents by private entities on behalf of foreign missions in the United States as a benefit under the Act. For

this purpose, such application services include, but are not limited to, appointment management, fee collection, document delivery, and the collection of biometric data from applicants.

Additionally, I hereby determine the provision of such application services by private entities for foreign missions in the United States to be subject to such terms and conditions as may be established by the Department's Office of Foreign Missions and that any state or local laws to the contrary are hereby preempted.

In accordance with § 211(a) of the Act, it shall be unlawful for any person to make available any benefits to a foreign mission that are contrary to the Act. The United States, acting on its own behalf or on behalf of a foreign mission, has standing to bring or intervene in an action to obtain compliance with this chapter, including any action for injunctive or other equitable relief.

Dated: March 18th, 2013.

Patrick F. Kennedy,

Under Secretary for Management.

[FR Doc. 2013–07628 Filed 4–1–13; 8:45 am]

BILLING CODE 4710–43–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2013–0011]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

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

ACTION: Notice of final disposition.

SUMMARY: FMCSA announces its decision to exempt 19 individuals from its rule prohibiting persons with insulin-treated diabetes mellitus (ITDM) from operating commercial motor vehicles (CMVs) in interstate commerce. The exemptions will enable these individuals to operate CMVs in interstate commerce.

DATES: The exemptions are effective April 2, 2013. The exemptions expire on April 2, 2015.

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Room W64–224, Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

You may see all the comments online through the Federal Document Management System (FDMS) at: *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* and/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.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's 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, or other entity). You may review DOT's Privacy Act Statement for the Federal Docket Management System (FDMS) published in the **Federal Register** on December 29, 2010 (75 FR 82132), or you may visit *http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf.*

Background

On February 4, 2013, FMCSA published a notice of receipt of Federal diabetes exemption applications from 19 individuals and requested comments from the public (78 FR 7852). The public comment period closed on March 6, 2013, and no comments were received.

FMCSA has evaluated the eligibility of the 19 applicants and determined that granting the exemptions to these individuals would achieve a level of safety equivalent to or greater than the level that would be achieved by complying with the current regulation 49 CFR 391.41(b)(3).

Diabetes Mellitus and Driving Experience of the Applicants

The Agency established the current requirement for diabetes in 1970 because several risk studies indicated that drivers with diabetes had a higher rate of crash involvement than the general population. The diabetes rule provides that ''A person is physically qualified to drive a commercial motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control'' (49 CFR 391.41(b)(3)).

FMCSA established its diabetes exemption program, based on the Agency's July 2000 study entitled ''A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes Mellitus to Operate in Interstate Commerce as Directed by the Transportation Act for the 21st Century.'' The report concluded that a safe and practicable protocol to allow some drivers with ITDM to operate CMVs is feasible. The September 3, 2003 (68 FR 52441), **Federal Register** notice in conjunction with the November 8, 2005 (70 FR 67777), **Federal Register** notice provides the current protocol for allowing such drivers to operate CMVs in interstate commerce.

These 19 applicants have had ITDM over a range of 4 to 44 years. These applicants report no severe hypoglycemic reactions resulting in loss of consciousness or seizure, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning symptoms, in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the past 5 years. In each case, an endocrinologist verified that the driver has demonstrated a willingness to properly monitor and manage his/her diabetes mellitus, received education related to diabetes management, and is on a stable insulin regimen. These drivers report no other disqualifying conditions, including diabetes-related complications. Each meets the vision requirement at 49 CFR 391.41(b)(10).

The qualifications and medical condition of each applicant were stated and discussed in detail in the February 4, 2013, **Federal Register** notice and they will not be repeated in this notice.

Discussion of Comments

FMCSA received no comments in this proceeding.

Basis for Exemption Determination

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the diabetes requirement in 49 CFR 391.41(b)(3) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. The exemption allows the applicants to operate CMVs in interstate commerce.

To evaluate the effect of these exemptions on safety, FMCSA considered medical reports about the applicants' ITDM and vision, and reviewed the treating endocrinologists' medical opinion related to the ability of the driver to safely operate a CMV while using insulin.

Consequently, FMCSA finds that in each case exempting these applicants from the diabetes requirement in 49 CFR 391.41(b)(3) is likely to achieve a level of safety equal to that existing without the exemption.

Conditions and Requirements

The terms and conditions of the exemption will be provided to the applicants in the exemption document and they include the following: (1) That each individual submit a quarterly monitoring checklist completed by the treating endocrinologist as well as an annual checklist with a comprehensive medical evaluation; (2) that each individual reports within 2 business days of occurrence, all episodes of severe hypoglycemia, significant complications, or inability to manage diabetes; also, any involvement in an accident or any other adverse event in a CMV or personal vehicle, whether or not it is related to an episode of hypoglycemia; (3) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (4) that each individual provide a copy of the annual medical certification to the employer for retention in the driver's qualification file, or keep a copy in his/her driver's qualification file if he/she is self-employed. The driver must also have a copy of the certification when driving, for presentation to a duly authorized Federal, State, or local enforcement official.

Conclusion

Based upon its evaluation of the 19 exemption applications, FMCSA exempts Nicholas C. Bolton (NY), Isaias Gomez (IN), Brandon E. Hamlett (NV), Douglas F. Keller (MI), Mark R. Loesel (WI), Steven A. Marion (MA), Jason E. McAnnally (AL), Robert W. Moen (IA), Craig S. Moran (CA), Wayne A. Ondrusek (PA), Lenicia R. Riley (TX), Mark L. Sandager (MN), Samuel L. Sergio (MA), Jason L. Shaw (OK), Paul M. Shierk (OR), Kailey J. Skroko (IN), Samantha K. Tsuchiya (CA), David W. West (MO), and Eugene Zollner, II (OH) from the ITDM requirement in 49 CFR 391.41(b)(3), subject to the conditions listed under ''Conditions and Requirements'' above.

In accordance with 49 U.S.C. 31136(e) and 31315 each exemption will be valid for two years unless revoked earlier by FMCSA. The exemption will be revoked if the following occurs: (1) The person fails to comply with the terms and conditions of the 1/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. If the exemption is still effective at the end of the 2-year period, the person may apply to FMCSA for a renewal under procedures in effect at that time.

Issued on: March 21, 2013.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2013–07459 Filed 4–1–13; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

United States Mint

National Baseball Hall of Fame Commemorative Coin Program Design Competition

ACTION: Notification of the Opening of the National Baseball Hall of Fame Commemorative Coin Program Design Competition on April 11, 2013.

SUMMARY: The United States Mint announces the opening of a national coin design competition that will culminate in the Secretary of the Treasury's selection of the image for the obverse (heads side) of the 2014 National Baseball Hall of Fame Commemorative Coins. The competition, which is open to all United States citizens and permanent residents ages 14 and over, begins on April 11, 2013, at 12 noon Eastern Daylight Time (EDT). The submission period will end at 12 noon EDT on April 26, 2013, if 10,000 or more entries have been received by that time. If fewer than 10,000 entries have been received by 12 noon EDT on April 26, 2013, then the submission period will remain open until 10,000 entries have been received, but will end no later than May 11, 2013, at 12 noon EDT. The winner of the design competition will be awarded $5,000, and the winner's initials will appear on the minted coins.

The National Baseball Hall of Fame Commemorative Coin Act (Act), Public Law 112–152 (Aug. 3, 2012), requires the Secretary of the Treasury to mint and issue three 2014 commemorative coins to recognize and celebrate the National Baseball Hall of Fame: up to 50,000 $5 gold coins, up to 400,000 $1 silver coins, and up to 750,000 half-dollar clad coins. The Act requires a competition, which Challenge.gov is hosting, to select a common obverse design emblematic of the game of baseball. Additionally, the Act expresses Congress's sense that the $5 gold and $1 silver coins have a shape such that the obverse is concave and the reverse is convex.

Entries will be evaluated during a selection process consisting of an initial screening for minimum requirements and four evaluation rounds. The Citizens Coinage Advisory Committee, the U.S. Commission of Fine Arts, and the National Baseball Hall of Fame will review the finalist designs, after which the United States Mint will put forward a recommended design to the Secretary of the Treasury for selection.

Official rules, guidelines, and entry instructions for the United States Mint National Baseball Hall of Fame Commemorative Coin Program Design Competition can be found at *www.usmint.gov/batterup* and at *www.batterup.challenge.gov.*

FOR FURTHER INFORMATION CONTACT: The United States Mint's Competition Administrator is Leslie Schwager, Program Specialist. She can be reached at *baseballcompetition@usmint.treas.gov.*

Authority: National Baseball Hall of Fame Commemorative Coin Act, Public Law 112–152.

Dated: March 27, 2013.

David Motl,

Chief Financial Officer, United States Mint.

[FR Doc. 2013–07622 Filed 4–1–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

United States Mint

United States Mint Kids' Baseball Coin Design Challenge

ACTION: Notification of the Opening of the United States Mint Kids' Baseball Coin Design Challenge on April 11, 2013.

SUMMARY: The United States Mint announces the opening of a national kids' baseball coin design challenge on April 11, 2013, that seeks design entries from contestants age 13 years or younger on the theme, ''What's Great about Baseball.'' As part of the United States Mint's education initiative, this challenge is designed to provide learning materials for children, teachers, and parents on the United States Mint and its coins and medals, to build awareness of the bureau's operations and programs, and to complement the United States Mint National Baseball Hall of Fame Commemorative Coin Program Design Competition, which is a national competition for individuals 14 or older to create the design for the common obverse (front) of coins to be issued under the 2014 National Baseball Hall of Fame Commemorative Coin Program.

In creating their design entries, contestants are allowed to use any medium—acrylics, watercolor, pencil, charcoal, marker, spray paint, crayon,

pastels, or digital software. All contestants will receive a letter of acknowledgement. Eligible entries will be posted on Challenge.gov, and the design with the most public votes in each age bracket (0–5 years, 6–10 years, and 11–13 years) will be considered the overall winner for that age bracket. Each of these grand prize winners will receive a National Baseball Hall of Fame $1 Silver Commemorative Coin. Each of the four runners up in each age bracket will receive a National Baseball Hall of Fame Half-Dollar Clad Commemorative Coin.

On behalf of each contestant, a parent or guardian must submit a completed application on Challenge.gov, including uploading the design entry and agreeing to the Parent/Legal Guardian Consent Form and Rights Transfer Agreement. Entries must be submitted no later than May 23, 2013, at 11:59 p.m. Eastern Daylight Time. Official rules, guidelines, and entry instructions for the United States Mint Kids' Baseball Coin Design Challenge can be found at *www.usmint.gov/kids* and at *www.challenge.gov.*

FOR FURTHER INFORMATION CONTACT: The United States Mint's Kids' Challenge Administrator is Mr. K. Jenkins, Education Coordinator. He can be reached at *kidsbatterup@usmint.treas.gov.*

Authority: America COMPETES Reauthorization Act of 2010, Public Law 111–358.

Dated: March 27, 2013.

David Motl,

Chief Financial Officer, United States Mint.

[FR Doc. 2013–07625 Filed 4–1–13; 8:45 am]

BILLING CODE P

FEDERAL REGISTER

Vol. 78 Tuesday,

No. 63 April 2, 2013

Part II

Environmental Protection Agency

40 CFR Part 98

2013 Revisions to the Greenhouse Gas Reporting Rule and Proposed Confidentiality Determinations for New or Substantially Revised Data Elements; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 98

[EPA–HQ–OAR–2012–0934; FRL–9789–1]

RIN 2060–AR52

2013 Revisions to the Greenhouse Gas Reporting Rule and Proposed Confidentiality Determinations for New or Substantially Revised Data Elements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to amend the Greenhouse Gas Reporting Rule and to clarify or change specific provisions. Particularly, the EPA is proposing to amend a table in the General Provisions, to reflect revised global warming potentials of some greenhouse gases that have been published by the Intergovernmental Panel on Climate Change and to add global warming potentials for certain fluorinated greenhouse gases not currently listed in the table. This action also proposes confidentiality determinations for the reporting of new or substantially revised (i.e., requiring additional or different data to be reported) data elements contained in these proposed amendments to the Greenhouse Gas Reporting Rule.

DATES: *Comments.* Comments must be received on or before May 17, 2013.

Public Hearing. The EPA does not plan to conduct a public hearing unless requested. To request a hearing, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this preamble by April 9, 2013. If requested, the hearing will be conducted on April 17, 2013, in the Washington, DC area. The EPA will provide further information about the hearing on its Web page if a hearing is requested.

ADDRESSES: You may submit your comments, identified by Docket ID No. EPA–HQ–OAR–2012–0934 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email: MRR_Corrections@epa.gov.* Include Docket ID No. EPA–HQ–OAR–2012–0934 or RIN No. 2060–AR52 in the subject line of the message.
- *Fax:* (202) 566–1741.
- *Mail:* Environmental Protection Agency, EPA Docket Center (EPA/DC), Mailcode 6102T, Attention Docket ID No. EPA–HQ–OAR–2012–0934, 1200 Pennsylvania Avenue NW., Washington, DC 20004.
- *Hand/Courier Delivery:* EPA Docket Center, Public Reading Room, EPA West Building, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004. Such deliveries are accepted only during the normal hours of operation of the Docket Center, and special arrangements should be made for deliveries of boxed information.

Additional Information on Submitting Comments: To expedite review of your comments by agency staff, you are encouraged to send a separate copy of your comments, in addition to the copy you submit to the official docket, to Carole Cook, U.S. EPA, Office of Atmospheric Programs, Climate Change Division, Mail Code 6207–J, Washington, DC, 20460, telephone (202) 343–9263, email address: *GHGReporting@epa.gov.*

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2012–0934, 2013 Revisions to the Greenhouse Gas Reporting Rule and Proposed Confidentiality Determinations for New or Substantially Revised Data Elements. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute.

Should you choose to submit information that you claim to be CBI, clearly mark the part or all of the information that you claim to be CBI. For information that you claim to be CBI in a disk or CD ROM that you mail to the 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 marked as CBI will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI to only the mail or hand/courier delivery address listed above, attention: Docket ID No. EPA–HQ–OAR–2012–0934. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means the 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 the EPA without going through *http://www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the 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 the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Docket, EPA/DC, EPA West Building, Room 3334, 1301 Constitution Ave. NW., Washington, DC. This Docket Facility 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 Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: Carole Cook, Climate Change Division, Office of Atmospheric Programs (MC–6207J), Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 343–9263; fax number: (202) 343–2342; email address: *GHGReportingRule@epa.gov.* For technical information, please go to the Greenhouse Gas Reporting Rule Program Web site *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.* To submit a question, select Rule Help Center, followed by ''Contact Us.''

Worldwide Web (WWW). In addition to being available in the docket, an electronic copy of today's proposal will also be available through the WWW.

Following the Administrator's signature, a copy of this action will be posted on EPA's greenhouse gas reporting rule Web site at *http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.*

SUPPLEMENTARY INFORMATION:

Regulated Entities. The Administrator determined that this action is subject to the provisions of Clean Air Act (CAA) section 307(d). See CAA section 307(d)(1)(V) (the provisions of CAA section 307(d) apply to ''such other actions as the Administrator may determine''). These are proposed amendments to existing regulations. If finalized, these amended regulations would affect certain owners and operators of facilities that directly emit greenhouse gases (GHGs) as well as certain suppliers. Regulated categories and examples of affected entities include those listed in Table 1 of this preamble.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY

Category	NAICS	Examples of affected facilities
General Stationary Fuel Combustion Sources.	.....	Facilities operating boilers, process heaters, incinerators, turbines, and internal combustion engines.
	211	Extractors of crude petroleum and natural gas.
	321	Manufacturers of lumber and wood products.
	322	Pulp and paper mills.
	325	Chemical manufacturers.
	324	Petroleum refineries, and manufacturers of coal products.
	316, 326, 339	Manufacturers of rubber and miscellaneous plastic products.
	331	Steel works, blast furnaces.
	332	Electroplating, plating, polishing, anodizing, and coloring.
	336	Manufacturers of motor vehicle parts and accessories.
	221	Electric, gas, and sanitary services.
	622	Health services.
	611	Educational services.
Electricity Generation	221112	Fossil-fuel fired electric generating units, including units owned by federal and municipal governments and units located in Indian Country.
Acid Gas Injection Projects.	211111 or 211112	Projects that inject natural gas containing CO_2 underground.
Adipic Acid Production ..	325199	Adipic acid manufacturing facilities.
Aluminum Production	331312	Primary Aluminum production facilities.
Ammonia Manufacturing	325311	Anhydrous and aqueous ammonia manufacturing facilities.
Cement Production	327310	Portland cement manufacturing plants.
CO_2 Enhanced Oil and Gas Recovery Projects.	211	Oil and gas extraction projects using CO_2 enhanced oil and gas recovery.
Electrical Equipment Use.	221121	Electric bulk power transmission and control facilities.
Electrical Equipment Manufacture or Refurbishment.	33531	Power transmission and distribution switchgear and specialty transformers manufacturing facilities.
Electronics Manufacturing.	334111	Microcomputers manufacturing facilities.
	334413	Semiconductor, photovoltaic (solid-state) device manufacturing facilities.
	334419	LCD unit screens manufacturing facilities. MEMS manufacturing facilities.
Ethanol Production	325193	Ethyl alcohol manufacturing facilities.
Ferroalloy Production	331112	Ferroalloys manufacturing facilities.
Fluorinated GHG Production.	325120	Industrial gases manufacturing facilities.
Food Processing	311611	Meat processing facilities.
	311411	Frozen fruit, juice, and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
Glass Production	327211	Flat glass manufacturing facilities.
	327213	Glass container manufacturing facilities.
	327212	Other pressed and blown glass and glassware manufacturing facilities.
GS Sites	NA	CO_2 geologic sequestration projects.
HFC–22 Production and HFC–23 Destruction.	325120	Chlorodifluoromethane manufacturing facilities.
Hydrogen Production	325120	Hydrogen manufacturing facilities.
Importers and Exporters of Pre-charged Equipment and Closed-Cell Foams.	423730	Air-conditioning equipment (except room units) merchant wholesalers.
	333415	Air-conditioning equipment (except motor vehicle) manufacturing.
	423620	Air-conditioners, room, merchant wholesalers.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	NAICS	Examples of affected facilities
	443111	Household Appliance Stores.
	326150	Polyurethane foam products manufacturing.
	335313	Circuit breakers, power, manufacturing.
	423610	Circuit breakers merchant wholesalers.
Industrial Waste Landfills.	562212	Solid waste landfills.
	221320	Sewage treatment facilities.
	322110	Pulp mills.
	322121	Paper mills.
	322122	Newsprint mills.
	322130	Paperboard mills.
	311611	Meat processing facilities.
	311411	Frozen fruit, juice and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
Industrial Wastewater Treatment.	322110	Pulp mills.
	322121	Paper mills.
	322122	Newsprint mills.
	322130	Paperboard mills.
	311611	Meat processing facilities.
	311411	Frozen fruit, juice, and vegetable manufacturing facilities.
	311421	Fruit and vegetable canning facilities.
	325193	Ethanol manufacturing facilities.
	324110	Petroleum refineries.
Iron and Steel Production.	331111	Integrated iron and steel mills, steel companies, sinter plants, blast furnaces, basic oxygen process furnace shops.
Lead Production	331419	Primary lead smelting and refining facilities.
	331492	Secondary lead smelting and refining facilities.
Lime Production	327410	Calcium oxide, calcium hydroxide, dolomitic hydrates manufacturing facilities.
Magnesium Production	331419	Primary refiners of nonferrous metals by electrolytic methods.
Municipal Solid Waste Landfills.	562212	Solid waste landfills.
	221320	Sewage treatment facilities.
Nitric Acid Production	325311	Nitric acid manufacturing facilities.
Oil and Natural Gas Systems.	486210	Pipeline transportation of natural gas.
	221210	Natural gas distribution facilities.
	325212	Synthetic rubber manufacturing facilities.
Petrochemical Production.	32511	Ethylene dichloride manufacturing facilities.
	325199	Acrylonitrile, ethylene oxide, methanol manufacturing facilities.
	325110	Ethylene manufacturing facilities.
	325182	Carbon black manufacturing facilities.
Petroleum Refineries	324110	Petroleum refineries.
Phosphoric Acid Production.	325312	Phosphoric acid manufacturing facilities.
Petroleum and Natural Gas Systems.	486210	Pipeline transportation of natural gas.
	221210	Natural gas distribution facilities.
	211	Extractors of crude petroleum and natural gas.
	211112	Natural gas liquid extraction facilities.
Pulp and Paper Manufacturing.	322110	Pulp mills.
	322121	Paper mills.
	322130	Paperboard mills.
Soda Ash Manufacturing	325181	Alkalies and chlorine manufacturing facilities.
Silicon Carbide Production.	327910	Silicon carbide abrasives manufacturing facilities.
Sulfur Hexafluoride (SF_6) from Electrical Equipment.	221121	Electric bulk power transmission and control facilities.
Titanium Dioxide Production.	325188	Titanium dioxide manufacturing facilities.
Underground Coal Mines.	212113	Underground anthracite coal mining operations.
	212112	Underground bituminous coal mining operations.
Zinc Production	331419	Primary zinc refining facilities.

TABLE 1—EXAMPLES OF AFFECTED ENTITIES BY CATEGORY—Continued

Category	NAICS	Examples of affected facilities
	331492	Zinc dust reclaiming facilities, recovering from scrap and/or alloying purchased metals.
Suppliers of Industrial Greenhouse Gases.	325120	Industrial gas manufacturing facilities.
Suppliers of Petroleum Products.	324110	Petroleum refineries.
Suppliers of Natural Gas and Natural Gas Liquids.	221210	Natural gas distribution facilities.
	211112	Natural gas liquid extraction facilities.
Suppliers of Carbon Dioxide (CO_2).	325120	Industrial gas manufacturing facilities.

Table 1 of this preamble is not intended to be exhaustive, but rather provides a guide for readers regarding facilities likely to be affected by this action. Other types of facilities than those listed in the table could also be subject to reporting requirements. To determine whether you are affected by this action, you should carefully examine the applicability criteria found in 40 CFR part 98, subpart A or the relevant criteria in the sections related to suppliers and direct emitters of GHGs. If you have questions regarding the applicability of this action to a particular facility, consult the person listed in the preceding **FOR FURTHER GENERAL INFORMATION CONTACT** Section.

Acronyms and Abbreviations. The following acronyms and abbreviations are used in this document.

AF&PA American Forest & Paper Association
AR4 Fourth Assessment Report
BAMM best available monitoring methods
CAA Clean Air Act
CBI confidential business information
CBP U.S. Customs and Border Protection
CEMS continuous emissions monitoring system
CFC chlorofluorocarbon
CFR Code of Federal Regulations
CH_4 methane
CO_2 carbon dioxide
CO_2e carbon dioxide equivalent
DOC degradable organic carbon
EAF electric arc furnace
e-GGRT Electronic Greenhouse Gas Reporting Tool
EF emission factor
EIA Energy Information Administration
EO Executive Order
EPA U.S. Environmental Protection Agency
°F degrees Fahrenheit
FR **Federal Register**
GHG greenhouse gas
GHGRP Greenhouse Gas Reporting Program
GWP global warming potential
HFC hydrofluorocarbon
HHV high heat value
IPCC Intergovernmental Panel on Climate Change
ISBN International Standard Book Number
F–GHG fluorinated greenhouse gas
F–HTF fluorinated heat transfer fluid
kg kilograms
LDC Local Distribution Company
Mscf thousand standard cubic feet
MSW municipal solid waste
N_2O nitrous oxide
NAICS North American Industry Classification System
NCASI National Council for Air and Stream Improvement
NGL natural gas liquid
OMB Office of Management and Budget
ORIS Office of the Regulatory Information System
PFC perfluorocarbon
QA/QC quality assurance/quality control
RFA Regulatory Flexibility Act
SAR Second Assessment Report
SF_6 sulfur hexafluoride
SNAP Significant New Alternative Policy
TAR Third Assessment Report
UNFCCC United Nations Framework Convention on Climate Change
U.S. United States
UMRA Unfunded Mandates Reform Act of 1995

Organization of This Document. The following outline is provided to aid in locating information in this preamble.

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I. Background

A. How is this preamble organized?

The first section of this preamble contains background information regarding the origin of the proposed amendments. This section also discusses EPA's legal authority under the Clean Air Act (CAA) to promulgate (including subsequent amendments to) 40 CFR part 98 of the Greenhouse Gas Reporting Rule (hereinafter referred to as ''Part 98''). Section II of this preamble is organized by Part 98 subpart and contains detailed information on the proposed revisions to the GHG Reporting Rule and the rationale for the proposed amendments. Section III of this preamble discusses the effective date of the proposed revisions for new and existing reporters and the options EPA is considering for revising and republishing emissions estimates for the reporting years 2010, 2011, and 2012. Section IV of this preamble discusses the proposed confidentiality determinations for new or substantially revised (i.e., requiring additional or different data to be reported) data reporting elements. Section V of this preamble discusses the impacts of the proposed amendments, primarily for current and new reporters of gases proposed to have revised or new global warming potentials (GWPs) listed in Part 98. Finally, Section VI of this preamble describes the statutory and executive order requirements applicable to this action.

B. Background on the Proposed Action

Part 98 was published in the **Federal Register** on October 30, 2009 (74 FR 56260). Part 98 became effective on December 29, 2009, and requires reporting of GHGs from certain facilities and suppliers. Subsequent notices were published in 2010 promulgating the requirements for subparts T, FF, II, and TT (75 FR 39736, July 12, 2010); subparts I, L, DD, QQ, and SS (75 FR 74774, December 1, 2010); and subparts RR and UU (75 FR 75060, December 1, 2010). A number of subparts have been revised since promulgation (75 FR 79092, December 17, 2010; 76 FR 73866, November 29, 2011; 77 FR 10373, February 22, 2012; 77 FR 51477, August 24, 2012). The EPA is proposing to further revise Part 98. This proposed revision includes technical corrections, clarifying revisions, and additional amendments to Part 98.

Changes proposed in this notice for certain source categories include, among other things, clarifying the data reporting requirements for certain facilities; correcting ambiguities or minor inconsistencies in greenhouse gas monitoring, calculation, and reporting requirements; amending monitoring and quality assurance methods to provide flexibility for certain facilities; and making other corrections identified as a result of working with the affected sources during rule implementation and outreach. In conjunction with this action, we are proposing confidentiality determinations for the new and substantially revised (i.e., requiring additional or different data to be reported) data elements under this proposed amendment.

In the first two years of implementation of Part 98, the EPA responded to thousands of questions from reporters and engaged in a stakeholder and public testing process to help improve development of EPA's electronic reporting system. Through these extensive outreach efforts, the EPA has improved our understanding of the technical challenges and burden associated with implementation of Part 98 provisions. The proposed changes would improve the Greenhouse Gas Reporting Program (GHGRP) by clarifying compliance obligations and reducing confusion for reporters, improving the consistency of the data collected, and ensuring that data collected through the GHGRP is representative of industry and comparable to other inventories.

The EPA is also proposing amendments to Table A–1 to Subpart A, General Provisions, of Part 98 to revise the values for the GWP of some GHGs and adding some GHGs (with associated GWP values) that are not currently included in the table.[1] The newly added GWP values are from the Intergovernmental Panel for Climate Change (IPCC) Fourth Assessment Report[2] (AR4) and EPA assessments of data supporting GWP estimates for certain GHGs identified since promulgation. Data supporting the proposed GWP estimates include information provided by chemical manufacturers currently reporting under the GHGRP as well as published literature. The EPA is proposing these changes to ensure comparability of data collected in the GHGRP to the *Inventory of U.S. Greenhouse Gas Emissions and Sinks* (hereinafter referred to as ''Inventory'') that the EPA compiles annually to meet international commitments and to GHG inventories prepared by other countries; to reflect improved scientific understanding; and to promote consistency across the estimation methods used in the rule.

C. Legal Authority

The EPA is proposing these rule amendments under its existing CAA authority provided in CAA section 114. As stated in the preamble to the 2009 final GHG reporting rule (74 FR 56260, October 30, 2009), CAA section 114(a)(1) provides the EPA broad authority to require the information proposed to be gathered by this rule because such data would inform and are relevant to the EPA's carrying out a wide variety of CAA provisions. See the preambles to the proposed (74 FR 16448, April 10, 2009) and final Part 98 (74 FR 56260) for further information.

In addition, the EPA is proposing confidentiality determinations for certain new or substantially revised data elements required under the proposed GHG Reporting Rule under its authorities provided in sections 114, 301 and 307 of the CAA. As mentioned above, CAA section 114 provides the EPA authority to obtain the information in Part 98. Section 114(c) requires that EPA make publicly available information obtained under section 114 except for information (excluding emission data) that qualify for confidential treatment. The Administrator has determined that this action (proposed amendments and confidentiality determinations) is subject to the provisions of section 307(d) of the CAA.

II. Technical Corrections and Other Amendments

The EPA is proposing to revise Part 98 to introduce technical corrections, clarifying revisions, and other amendments to Part 98 to improve the

[1] The GWP, a metric that incorporates both the heat-trapping ability and atmospheric lifetime of each GHG, can be used to develop comparable numbers by adjusting all GHGs relative to the GWP of CO_2. When quantities of the different GHGs are multiplied by their GWPs, the different GHGs can be compared on a CO_2 basis. The GWP of CO_2 is 1.0, and the GWP of other GHGs are expressed relative to CO_2. IPCC GWP values are based on the effects of the greenhouse gases over a 100-year time horizon. See 74 FR 16448, 53 (April 10, 2009).

[2] IPCC Fourth Assessment Report (AR4), 2007. *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change.*

quality and consistency of the data collected by the EPA in response to feedback received from stakeholders during program implementation. The proposed amendments include the following types of changes:

- Revising GWPs for GHGs defined in Table A–1 of subpart A of Part 98 for consistency with the Inventory, and adding GWPs for fluorinated greenhouse gases (F–GHGs) used by Part 98 facilities that are not currently included in Table A–1 to reflect industry practices.
- Changes to clarify the applicability of calculation methods to certain sources at a facility.
- Corrections to terms and definitions in certain equations to provide clarity or better reflect actual operating conditions.
- Changes to correct typographical errors or cross references within and between subparts.
- Amending monitoring and quality assurance methods to provide flexibility for certain facilities.
- Corrections to data reporting requirements so that they more closely conform to the information used to perform emission calculations.
- Adding readily available data reporting requirements that would allow the EPA to verify the data submitted and assess the reasonableness of the data reported.
- Other amendments or corrections related to certain issues identified during rule implementation and outreach.

Sections II.A through II.AA of this preamble describe the more substantive corrections, clarifying, and other amendments we are proposing for each subpart. The proposed amendments discussed in this preamble include: Changes that affect the applicability of a subpart, changes that affect the applicability of a calculation method to a specific source at a facility, changes or corrections to calculation methods that substantially revise the calculation method or output of the equation, revisions to data reporting requirements that would substantively clarify the reported data element or introduce a new data element, clarifications of general monitoring and quality assurance requirements, and new terms and definitions. To reduce the length of this preamble, we have summarized less substantive corrections for each subpart in the memorandum, ''Table of 2013 Revisions to the Greenhouse Gas Reporting Rule'' (hereafter referred to as the ''Table of Revisions'') available in the docket for this rulemaking (EPA–HQ–OAR–2012–0934). The proposed changes discussed in the Table of Revisions are straightforward clarifications of requirements to better reflect the EPA's intent, simple corrections to calculation terms or cross-references that do not affect the output of calculations, harmonizing changes within a subpart (such as changes to terminology), simple editorial and minor error corrections, or removal of redundant text. The Table of Revisions describes each proposed change within a subpart, including those itemized in this preamble, and provides the current rule text and the proposed correction. Where the proposed change is listed only in the Table of Revisions, the rationale for the proposed change is also listed there. You may comment on those proposed technical corrections, clarifying and other amendments identified in the Table of Revisions as well as any other part of this proposal.

A. Subpart A—General Provisions

1. Proposed Amendments to Subpart A—Global Warming Potentials

In today's action, we are proposing to revise Table A–1 of subpart A of Part 98 (hereafter referred to as ''Table A–1'') by updating the GWP values of certain compounds and adding certain F–GHGs and their GWPs not previously included in Table A–1. These proposed changes relate to facilities and suppliers under Part 98 reporting the following greenhouse gases: methane (CH_4), nitrous oxide (N_2O), sulfur hexafluoride (SF_6), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and other F–GHGs.[3]

The changes are being proposed for two reasons. First, we propose to revise GWPs for GHGs currently in Table A–1 to ensure continued consistency with the Inventory as the Inventory begins to use GWPs from the IPCC Fourth Assessment Report. Second, we propose to add GWPs for F–GHGs that are not currently included in Table A–1 but that are emitted in significant quantities or for which newly available data or literature supports the establishment of a GWP in Table A–1. The background and general rationale for these proposed amendments are discussed in Section II.A.1.a of this preamble. The proposed changes to the GWPs currently in Table A–1 and the GWP determinations for new proposed compounds in Table A–1 are discussed in Sections II.A.1.b and II.A.1.c of this preamble. The schedule for the proposed amendments is discussed in Section III.A of this preamble.

The EPA is also considering options for revising and republishing emissions estimates for the reporting years 2010, 2011, and 2012 using the revised GWPs in Table A–1. The EPA is seeking comment on these options, which are discussed in Section III.B of this preamble. Because reporters affected by the GHG reporting rule use the GWPs in Table A–1 to calculate annual GHG emissions (or GHGs supplied, as applicable), and, for source categories with a carbon dioxide equivalent (CO_2e)-based threshold, to determine whether they are required to report, the proposed new and revised GWPs could change the number of reporters and the magnitude of emissions reported for some source categories. If these amendments are finalized, some facilities to which the rule did not previously apply may be required to report based on increases in calculated GHG quantities that affect applicability (see Section V of this preamble for additional information). These impacts and the potential compliance costs of the proposed amendments for affected subparts are discussed in Section V of this preamble.

a. Background and General Rationale for GWP Revisions

U.S. GHG reporting programs and the IPCC Fourth Assessment Report. As a party to the United Nations Framework Convention on Climate Change (UNFCCC), the United States participates in ongoing negotiations with the international community to promote global cooperation on climate change. The UNFCCC treaty, ratified by the U.S. in 1992, sets an overall framework for intergovernmental efforts to address the challenges posed by climate change.[4] As part of its commitment to the UNFCCC, the U.S. submits the *Inventory of U.S. Greenhouse Gas Emissions and Sinks* to the Secretariat of the UNFCCC as an annual reporting requirement.[5] The Inventory is a comprehensive assessment of U.S. GHG emissions based on national-level data and is prepared by EPA's Office of Air and

[3] *Fluorinated greenhouse gases,* as defined in 40 CFR 98.6, include sulfur hexafluoride, nitrogen trifluoride, and any fluorocarbon except for controlled substances as defined at 40 CFR part 82, subpart A and substances with vapor pressures of less than 1 mm of Hg absolute at 25 degrees C.

[4] See United Nations Framework Convention on Climate Change, 1992. Available at: *http://unfccc.int/resource/docs/convkp/conveng.pdf.* For more information about the UNFCCC, please refer to: *http://www.unfccc.int.*

[5] See Articles 4 and 12 of the Convention on Climate Change. Parties to the Convention, by ratifying, ''shall develop, periodically update, publish and make available * * * national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies * * *.''

Radiation in coordination with other federal agencies. To ensure consistency and comparability with national inventory data submitted by other UNFCCC Parties, the Inventory submitted to the UNFCCC uses internationally-accepted methods agreed upon by the Parties (including the United States) to develop and characterize emission estimates.

As described in the preamble of the proposed GHG Reporting Rule (74 FR 16448, April 10, 2009), the GHGRP is intended to supplement and complement existing U.S. government programs related to climate policy and research, including the Inventory submitted to the UNFCCC. The GHGRP provides data to develop and inform inventories and other U.S. climate programs by advancing the understanding of emission processes and monitoring methodologies for particular source categories or sectors. Specifically, the GHGRP complements the Inventory and other U.S. programs by providing data from individual facilities and suppliers above certain thresholds.

Collected facility, unit, and process-level GHG data from the GHGRP will provide or confirm the national statistics and emission estimates presented in the Inventory, which are calculated using aggregated national data. The EPA has received encouragement from stakeholders to use GHG data from the GHGRP to complement the Inventory, such as from EPA's stakeholder workshop for natural gas systems.[6]

During the development of the GHG Reporting Rule, the EPA generally proposed and finalized estimation methodologies and reporting metrics that were based on recent scientific data and that were consistent with the international reporting standards under the UNFCCC. This approach allows the data collected under the GHGRP to be easily compared to the data in the Inventory and to data from other national and international programs. Specifically, the EPA generally promulgated GWP values published in the IPCC Second Assessment Report (hereinafter referred to as ''SAR GWP values'') to convert mass emissions (or supply) of each GHG into a common unit of measure, CO_2e, for final reporting. At the time that Part 98 was finalized, in order to comply with international reporting standards under the UNFCCC, official emission estimates were to be reported by the United States and other parties using SAR GWP values. Although the IPCC published its Fourth Assessment Report (AR4) prior to publication of the final GHG reporting rule (74 FR 56260), the UNFCCC continued to require the use of SAR GWP values for reporting. For consistency and comparability of the data collected between the GHGRP and the Inventory, the EPA adopted the SAR GWP values in Table A–1 to subpart A of Part 98, with the exception of GWPs for certain F–GHGs adopted from the IPCC AR4.[7]

The IPCC AR4 was published in 2007 and is among the most current and comprehensive peer-reviewed assessments of climate change. The AR4 provides revised GWPs of several GHGs relative to the values provided in previous assessment reports, following advances in scientific knowledge on the radiative efficiencies and atmospheric lifetimes of these GHGs and of CO_2. Because the GWPs provided in the AR4 reflect an improved scientific understanding of the radiative effects of these gases in the atmosphere, the values provided are more appropriate for supporting the overall goal of the reporting program to collect GHG data than the SAR GWP values currently included in Table A–1. While we recognize that GWPs reflecting further scientific advances may become available in the near future (e.g., the IPCC Fifth Assessment Report, currently in development), it is not now EPA's intent to revise the GWPs in Table A–1 each time new data are published. Rather, we understand that it is also important for stakeholders to have consistent, predictable requirements to avoid confusion and additional burden. As discussed below, we are not proposing to adopt GWP values from the Fifth Assessment Report because it is our intent to have the GHGRP complement the requirements of the Inventory.

On March 15, 2012, the UNFCCC published a decision, reached by UNFCCC member parties, to require countries submitting an annual report in 2015 and beyond to use GWP values from the IPCC AR4 (hereinafter referred to as the ''AR4 GWP values'').[8] Accordingly, the United States has a commitment to submit the Inventory for 2015 and future years using the revised AR4 GWP values. The Inventory for 2015 will contain national level estimates of emissions for each year from 1990–2013. In order to ensure that the GHGRP continues to complement and inform the Inventory submitted to the UNFCCC and relies on recent scientific data, we are proposing to revise the GWP values in Table A–1 of Part 98 to reflect the updated AR4 GWP values. The proposed changes would keep the reporting metrics in Part 98 consistent with the updated international reporting standards followed by the Inventory. Additionally, the proposed changes would allow for improved understanding of the radiative forcing from reported GHG emissions and supply, based on GWP values that are more up-to-date relative to the values currently provided in Table A–1. The proposed changes to Table A–1 would also ensure that the data collected in the GHGRP can be compared to other national and international inventories. These proposed changes are in keeping with the Agency's decision to use methods consistent with UNFCCC guidelines in the development of the October 30, 2009 GHG Reporting Rule.

We recognize that some other EPA programs use the GWP values in Table A–1 to determine applicability of the program to direct emitters or suppliers above certain thresholds. For example, EPA's Greenhouse Gas Tailoring Rule (75 FR 31514; June 3, 2010) cross-references Table A–1 for calculating GHG emissions under the PSD and title V permitting programs. See, e.g., 40 CFR 52.21(b)(49)(ii)(a). Because the permitting applicability is based partly on CO_2e emissions, which are calculated using the GWP values codified in Table A–1, an amendment to Table A–1 may affect program applicability for a source. As a result, a source that is assessing applicability under the PSD or title V permitting program should be aware of the

[6] Stakeholder Workshop on the U.S. GHG Inventory for Natural Gas Systems. September 13–14, 2012, Washington, DC. See *http://www.epa.gov/climatechange/ghgemissions/Sept2012stakeholderworkshop.html.*

[7] For certain F–GHGs that were not addressed by the SAR but were included in Part 98 (e.g., NF_3), the EPA promulgated up-to-date GWPs from the IPCC AR4. (The one exception was sevoflurane, whose GWP was based on a study by Langbein et al. as explained in the February 6, 2009 *Technical Support Document for Industrial Gas Supply: Production, Transformation, and Destruction of Fluorinated GHGs and N_2O.*) This approach was consistent with the GWP values used for F–GHGs in the Inventory prepared by the EPA as part of the U.S. commitment to the UNFCCC.

[8] Please refer to *http://unfccc.int/.* See Decision 15/CP.17, Revision of the UNFCCC reporting guidelines on annual inventories for Parties included in Annex I to the Convention. Parties of the Convention ''* * * *Decide[s] that,* from 2015 until a further decision by the Conference of the Parties, the global warming potentials used by Parties to calculate the carbon dioxide equivalence of anthropogenic emissions by sources and removals by sinks of greenhouse gases shall be those listed in the column entitled ''Global warming potential for given time horizon'' in table 2.14 of the errata to the contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change * * *.''

proposed changes to Table A–1 that may affect the CO_2e emissions of the source once the Table A–1 amendment is promulgated and effective.[9] To the extent that a Table A–1 amendment raises permitting implementation questions or concerns, EPA's regional offices and the Office of Air Quality Planning and Standards, which manage the PSD and title V programs, will work with permitting authorities and other stakeholders as necessary to provide guidance on their issues and concerns. While we are seeking comments on specific GWP values proposed in this action, we are not reopening for comment the decision made in the Tailoring Rule, or any other rules or programs, to reference Table A–1.

Use of the AR4 GWPs is also in keeping with other EPA programs. For example, the Agency decided to use these values in rules published jointly with the Department of Transportation, National Highway Traffic Safety Administration, the ''Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards'' (75 FR 25324, May 7, 2010).[10]

Section II.A.1.b of this preamble lists the changes we are proposing to incorporate as a result of the updated AR4 GWPs.

Identification of GWPs in the scientific literature.

During implementation of Part 98, the EPA has collected data on the range and volume of F–GHGs emitted and supplied in the U.S. market by various F–GHG producers, importers, exporters, and manufacturers using F–GHGs in their production processes (e.g., electronics manufacturing, magnesium production).[11] The EPA reviewed available production and usage data for existing and newly synthesized gases and assessed available data substantiating the GWP calculation for gases for which a GWP value was not included in Table A–1 in the October 30, 2009 final rule. In this action, we are proposing to amend Table A–1 to add F–GHGs emitted or supplied by reporters under subparts I (Electronics Manufacturing), L (Fluorinated Gas Production), T (Magnesium Production), OO (Industrial GHG Suppliers), and QQ (Importers and Exporters of G–GHGs Contained in Pre-Charged Equipment and Closed-Cell Foams). Section II.A.1.c of this preamble lists the changes we are proposing to incorporate the additional F–GHGs into Table A–1.

The EPA is proposing to amend Table A–1 to subpart A of Part 98 to add 26 F–GHGs for which we have identified a GWP based on an assessment of recent scientific literature. Table A–1 to subpart A is a compendium of GWP values of select GHGs that are required to be reported under one or more subparts of Part 98, and where the EPA has identified the GWP in the IPCC AR4 report or other sources. As acknowledged in the preamble to the final Part 98 (74 FR 56260, October 30, 2009), Table A–1 is not a complete listing of current or potential compounds, but reflects only those GWPs for listed materials that had been synthesized, their atmospheric properties investigated, and the results published and reviewed prior to promulgation of the final rule. Currently, some Part 98 source categories provide calculation methodologies and reporting requirements for F–GHGs for which GWP values were not available in the IPCC SAR, TAR, AR4, or other scientific assessments at promulgation. As noted in the preamble to the final Part 98 (74 FR 56260), it is the EPA's intent to periodically update Table A–1 as GWPs are evaluated or re-evaluated by the scientific community.

b. Proposed Revisions From the IPCC Fourth Assessment Report

The proposed amendments to Table A–1 would revise the GWPs for 23 GHGs to reflect the 100-year GWP values adopted by the UNFCCC and published in the IPCC AR4. Table 2 of this preamble lists the GHGs whose GWP values we are proposing to revise, along with the GWP values currently listed in Table A–1 and the proposed revised GWP values from the IPCC AR4.

TABLE 2—GHGS WITH PROPOSED REVISED GWPS FOR TABLE A–1

Name	CAS No.	Current global warming potential [a]	Proposed global warming potential [b]
Methane	74–82–8	21	25
Nitrous oxide	10024–97–2	310	298
HFC–23	75–46–7	11,700	14,800
HFC–32	75–10–5	650	675
HFC–41	593–53–3	150	92
HFC–125	354–33–6	2,800	3,500
HFC–134	359–35–3	1,000	1,100
HFC–134a	811–97–2	1,300	1,430
HFC–143	430–66–0	300	353
HFC–143a	420–46–2	3,800	4,470
HFC–152a	75–37–6	140	124
HFC–227ea	431–89–0	2,900	3,220
HFC–236fa	690–39–1	6,300	9,810
HFC–245ca	679–86–7	560	693
HFC–43–10mee	138495–42–8	1,300	1,640
Sulfur hexafluoride	2551–62–4	23,900	22,800
PFC–14 (Perfluoromethane)	75–73–0	6,500	7,390
PFC–116 (Perfluoroethane)	76–16–4	9,200	12,200
PFC–218 (Perfluoropropane)	76–19–7	7,000	8,830

[9] This reliance of other EPA programs on Table A–1 promotes implementation consistency and avoids having to revise the other rules each time a GWP revision occurs. As noted in the Tailoring Rule preamble, ''[a]ny changes to Table A–1 of the mandatory GHG reporting rule regulatory text must go through an appropriate regulatory process. In this manner, the values used for the permitting programs will reflect the latest values adopted for usage by EPA after a regulatory process and will be consistent with those values used in the EPA's mandatory GHG reporting rule.'' (75 FR at 31522; June 3, 2010).

[10] While we are seeking comments on specific GWP values proposed in this action, we are not reopening for comment the decision made in the Light Duty Vehicle Rule, or any other rules or programs, to use AR4 GWPs.

[11] *Fluorinated heat transfer fluids* are defined as F–GHGs used for temperature control, device testing, cleaning substrate surfaces and other parts, and soldering in certain types of electronics manufacturing production processes. Under subpart I, the lower vapor pressure limit of 1 mm Hg in absolute at 25 °C in the definition of *fluorinated greenhouse gas* in 40 CFR 98.6 does not apply.

TABLE 2—GHGS WITH PROPOSED REVISED GWPS FOR TABLE A–1—Continued

Name	CAS No.	Current global warming potential [a]	Proposed global warming potential [b]
PFC–3–1–10 (Perfluorobutane)	355–25–9	7,000	8,860
Perfluorocyclobutane	115–25–3	8,700	10,300
PFC–4–1–12 (Perfluoropentane)	678–26–2	7,500	9,160
PFC–5–1–14 (Perfluorohexane)	355–42–0	7,400	9,300

[a] From Table A–1 to subpart A of the October 30, 2009 GHG Reporting Rule.
[b] From Table 2.14 of the errata to Working Group 1 of the IPCC AR4.

We are proposing to adopt only GWP values based on a 100-year time horizon, although other time horizons are available in the IPCC AR4 (e.g., 20-year or 500-year GWPs). As acknowledged in the April 10, 2009 proposed GHG reporting rule (74 FR 16448), the parties to the UNFCCC agreed to use GWPs based upon a 100-year time horizon. Therefore, 100-year GWPs are used as the metric in the Inventory. Because the proposed changes are intended to make the GHGRP reporting methods more consistent with the Inventory, we are not considering the use of GWPs based on other time horizons.

As noted above, Table A–1 already includes AR4 GWPs for chemicals for which GWPs were not presented in the SAR (e.g., fluorinated ethers); the EPA is therefore proposing to retain the current GWPs for these chemicals (and for sevoflurane, which has not been included in any IPCC assessment but already is included in Table A–1). A complete listing of the current GWPs in Table A–1 to subpart A and the AR4 GWP values may be found in the memorandum, ''Assessment of Emissions and Cost Impacts of 2013 Revisions to the Greenhouse Gas Reporting Rule'' (hereafter referred to as ''Impacts Analysis'') (see Docket ID No. EPA–HQ–OAR–2012–0934).

For one set of chemicals, fluorinated ethers and alcohols, the EPA is seeking comment on adopting GWPs from an international scientific assessment published more recently than AR4, the WMO (World Meteorological Organization) *Scientific Assessment of Ozone Depletion: 2010* (Global Ozone Research and Monitoring Project-Report No. 52, 516 pp., Geneva, Switzerland, 2011). Like the IPCC Assessment Reports, the WMO Scientific Assessments include regularly updated international reviews of the scientific findings on the lifetimes and impacts of trace gases in the atmosphere. While the primary focus of the WMO Scientific Assessments is depletion of stratospheric ozone, they have also included estimated GWPs for a number of fluorocarbons that do not deplete stratospheric ozone (many of which are substitutes for ozone-depleting substances) since 1989.

The current Table A–1 includes AR4 GWPs for several fluorinated ethers and alcohols, including several hydrofluoroethers (HFEs), which could be updated through the WMO Scientific Assessments. These fluorinated ethers and alcohols are not required to be included in national GHG inventories reported under the UNFCCC. In general, the compounds required to be reported under the GHGRP go beyond the minimum reporting requirements of the UNFCCC (e.g., NF_3 or fluorinated heat transfer fluids). These compounds were included in Part 98 because they are long-lived in the atmosphere, have high GWPs, and, in many cases, are used in expanding industries or as substitutes for HFCs (see 74 FR 16464, April 10, 2009). Thus, adopting GWPs for these compounds from an international assessment that is more recent than the AR4 would not conflict with UNFCCC reporting.

The 2010 WMO Scientific Assessment includes significant updates to the GWPs for several HFEs in commerce, reflecting improved understanding of the atmospheric lifetimes and radiative efficiencies of these chemicals. In a number of cases, estimated 100-year GWPs for HFEs have approximately doubled; in one, (for HFE–338mmz1), the estimated 100-year GWP rose by over a factor of six, from 380 to 2570. (The changes to the estimated GWPs of other fluorinated GHGs, such as the HFCs and PFCs, were far smaller.) To ensure consistency between the GHGRP and UNFCCC reporting, the EPA is not proposing to adopt GWPs from the 2010 WMO Scientific Assessment for chemicals other than fluorinated ethers and alcohols. However, the EPA requests comment on adopting GWPs from the 2010 WMO Scientific Assessment for a subset of chemicals, fluorinated ethers and alcohols, that are not reported under the Inventory.

We are not proposing to include GWPs for ozone-depleting substances controlled by the Montreal Protocol [12] and by Title VI of the CAA (e.g., chlorofluorocarbons, hydrochlorofluorocarbons, and halons) in Table A–1, although the IPCC AR4 includes updated GWPs for them. These controlled substances are specifically excluded from the definition of GHG, F–GHG, and F–HTF under Part 98 (and thus not required to be reported under Part 98), as these substances are already effectively reported under 40 CFR part 82. Furthermore, the reduction of these substances is controlled under the Montreal Protocol. The UNFCCC does not cover these substances or require reporting of these substances by UNFCCC parties,[13] so collecting data on these substances is unnecessary to complement or supplement the Inventory.

c. Proposed Additional F–GHGs and GWPs for Table A–1

We are proposing to include 26 new F–GHGs in Table A–1 of subpart A for which the EPA has identified scientific assessments of the GWPs. These F–GHGs were not included in AR4 for a variety of reasons.[14] As discussed in Section II.A.1.a of this preamble, the F–GHGs we are proposing to include in Table A–1 are emitted or supplied by reporters under subparts I, L, T, OO, and QQ. Including GWP values in Table A–1 for these compounds would ensure that their atmospheric impacts are accurately reflected in annual reports, threshold determinations, or other calculations, as appropriate for each subpart in Part 98. In general, those F–

[12] *The Montreal Protocol on Substances that Deplete the Ozone Layer* is an international treaty that controls and phases out various ozone-depleting substances including chlorofluorocarbons, hydrochlorofluorocarbons and halons. These compounds are regulated in the U.S. under Title VI of the CAA. The UNFCCC does not cover these substances, and instead defers their treatment to the Montreal Protocol.

[13] Refer to: *http://www.unfccc.int.* See Article 4 of the Convention on Climate Change.

[14] In some cases, the F–GHGs had not been developed or had not become commercially important in time for inclusion in AR4; in others, the F–GHGs were known to have short atmospheric lifetimes and/or low GWPs.

GHGs whose GWPs are currently not listed in Table A–1 are not currently included in threshold calculations for applicability or in the CO_2e totals reported by facilities and suppliers [15] (although they are currently reported in metric tons of substance emitted or supplied (40 CFR 98.3(c)(4))). Where their GWPs are low, these compounds may have little effect on facility CO_2e totals. However, where their GWPs are high, they may have a large effect on those totals.

In some cases, the proposed additions to Table A–1 would help to ensure that all Part 98 facilities emitting or supplying the identified F–GHGs would use consistent GWPs to calculate emissions of CO_2e. For example, GWPs are used in 40 CFR 98.123(c)(1), a provision of subpart L of Part 98 (Fluorinated Gas Production), to determine the emission estimation method for continuous process vents.[16] Under 40 CFR 98.123(c)(1)(v), subpart L reporters must use the GWPs in Table A–1 to convert F–GHG emissions to CO_2e for a preliminary estimate of emissions. For F–GHGs whose GWPs are not listed in Table A–1, subpart L reporters must use a default GWP of 2,000 unless they submit a request to use provisional GWPs for those F–GHGs following the requirements of 40 CFR 98.123(c)(1)(vi) and the EPA approves the request. Provisional GWPs may be used only in the calculations in 40 CFR 98.123(c)(1) and only by the facilities for which they have been approved.[17] Therefore, although the EPA may have reviewed and substantiated provisional GWP values for select F–GHGs for certain producers to use in determining the emission estimation method for continuous process vents under subpart L, the provisional GWPs may not be used by other Part 98 facilities. Including the proposed F–GHGs in Table A–1 would reduce burden for facilities that may otherwise be required to perform stack testing based on the default GWP (e.g., if the default GWP overstates the radiative efficiency of the F–GHG). Additionally, including these F–GHGs in Table A–1 would provide more accurate reporting than the use of the default GWPs under subpart L.

The proposed F–GHGs include F–GHGs for which the EPA has previously reviewed scientific assessments from requests for provisional GWPs, F–GHGs submitted by a fluorinated GHG producer with suggested GWPs and supporting data and analysis on August 21, 2012, and F–GHGs for which evaluations of the GWPs were performed by the EPA (e.g., as part of evaluations associated with EPA's Significant New Alternative Policy (SNAP) program), or published in peer-reviewed scientific journals. [18] Specifically, the compounds we are proposing to add to Table A–1 of subpart A include:

- Seven compounds for which the EPA has approved provisional GWPs for purposes of the calculations in 40 CFR 98.123(c)(1). The EPA reviewed scientific assessments of the GWPs for these F–GHGs as provided with provisional GWP requests received from Honeywell International (''Honeywell'') and DuPont de Nemours, Inc. (''DuPont'') and published in the February 3, 2012 Notice of Data Availability (77 FR 5514). The EPA approved provisional GWPs for one F–GHG for Honeywell, and for six F–GHGs for DuPont. The EPA finalized its determinations for these compounds on February 24, 2012 (see Docket ID No. EPA–HQ–OAR–2009–0927–0273). Based on EPA's review of the GWP estimation methods for these compounds, we are proposing to amend Table A–1 to include these seven gases.
- Four compounds submitted with provisional GWP requests for which the EPA did not approve provisional GWPs (including three F–GHGs for DuPont, and one F–GHG for Honeywell). The companies submitted scientific data supporting the GWPs of these four compounds, which was made available in the February 3, 2012 Notice of Data Availability (77 FR 5514). (see Docket ID No. EPA–HQ–OAR–2009–0927–0256 for further discussion of the scientific assessments reviewed). The EPA did evaluate the GWPs of these F–GHGs, but not for the purposes of the calculations in 40 CFR 98.123(c) because the calculated emission rates of these chemicals, when using the default GWP, did not exceed the 10,000 metric tons CO_2e threshold and did not meet the conditions of 40 CFR 98.123(c)(1)(v). The fact that the EPA did not approve the GWPs for purposes of the calculations in 40 CFR 98.123(c)(1) was not due to disagreement with the companies' suggested GWPs. Therefore, the EPA is also proposing to amend Table A–1 to include these four gases.
- Ten F–GHGs submitted by DuPont on August 21, 2012, with supporting data and analysis (see Table 3 of this preamble). We are proposing to include the ten compounds in Table A–1. For each compound, DuPont included peer-reviewed scientific data supporting the suggested GWP.
- Five F–GHGs which were identified from the EPA's review of industrial gases produced for or used in the electronics manufacturing, fluorinated gas production, magnesium production, electrical equipment manufacture or refurbishment, and industrial gas supplier source categories and for which scientific assessments or other documentation of the GWPs were identified through the EPA's SNAP Program or peer-reviewed literature. These compounds are identified under the common names FK–5–1–12 (Novec™ 612), FK–6–1–12 (Novec™ 774), trans-1-chloro-3,3,3-trifluoroprop-1-ene, PFC–6–1–12, and PFC–7–1–18.

Determination of proposed GWPs. To determine the proposed GWPs for each compound, the EPA reviewed the scientific literature for each compound and evaluated the accuracy of the estimation methods and assumptions used to derive the GWP.[19] A detailed description of the EPA's analysis may be found in the memorandum, ''GWP

[15] The one exception to this is F–GHGs reported under subpart L. Under a final rule published on August 24, 2012 (77 FR 51477), fluorinated gas producers are required for RY 2011 and RY 2012 to report total annual emissions in CO_2e and to use either default or best-estimate GWPs for fluorinated GHGs that do not have GWPs listed in Table A–1.

[16] This is part of the provision of subpart L that allows facilities to request to use provisional GWPs to calculate a preliminary estimate of emissions from each process vent. If the preliminary estimate indicates that a vent emits 10,000 metric tons CO_2e or more, the subpart L reporter is required to use stack testing to establish an emission factor for the continuous process vent. If the preliminary estimate indicates that the vent emits less than 10,000 metric tons CO_2e, the subpart L reporter may use engineering calculations or assessments to develop an emission calculation factor.

[17] For reporting years 2011 and 2012, subpart L reporters may use a best estimate of the GWP meeting the data requirements for provisional GWPs in 40 CFR 98.123(c)(1)(vi)(A)(3) as part of their facility-wide reported emissions.

[18] The SNAP program is EPA's program to evaluate substitutes for the ozone-depleting substances that are being phased out under the stratospheric ozone protection provisions of the Clean Air Act (as implemented in 40 CFR part 82). As part of EPA's assessment of a substitute's overall risk to human health and the environment, the EPA reviews scientific assessments of the GWP and considers this, among other criteria, in evaluating a substitute.

[19] The key component of the GWP calculation is the time-integrated radiative forcing of a one-kg emission of the compound over a 100-year time horizon. The accuracy of the radiative forcing calculation depends on the accuracies of the infrared absorption spectrum and the atmospheric lifetime of the compound. The lifetime is affected by the compound's reaction rates through reaction with atmospheric oxidants (e.g., ozone or hydroxyl radicals) or through photolysis (destruction by light). These rates, as well as the radiative efficiency of the compound, depend on the distribution of the compound in the atmosphere with altitude, latitude and longitude. The factors affecting GWPs are discussed in more detail in *Supporting Analysis for Mandatory Reporting Of Greenhouse Gases: Notice Of Preliminary Determinations Regarding Requests to Use Provisional Global Warming Potentials Under the Fluorinated Gas Production Category of the Greenhouse Gas Reporting Rule* (January 23, 2011), which is available in Docket EPA–HQ–OAR–2012–0934.

Determinations for Proposed Additional F–GHGs for Table A–1'', Docket ID No EPA–HQ–OAR–2012–0934. The proposed GWP for each of the 26 compounds is included in Table 3 of this preamble; Table 3 also includes how each compound was identified for inclusion in Table A–1 of subpart A.

TABLE 3—PROPOSED F–GHGS WITH GWPS FOR TABLE A–1

Chemical designation or common name	CAS No.	Chemical formula	Proposed GWP	Origin of compound and GWP assessments
HFC–1234ze(E)	29118–24–9	$C_3H_2F_4$	6	Approved as provisional GWP for Honeywell International (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
hexafluoropropylene (HFP)	116–15–4	C_3F_6	0.25	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
perfluoromethyl vinyl ether (PMVE)	1187–93–5	$CF(CF_3)OCF_3$	3	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
tetrafluoroethylene (TFE)	116–14–3	C_2F_4	0.02	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
trifluoro propene (TFP)	677–21–4	$C_3H_3F_3$	3	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
vinyl fluoride (VF)	75–02–5	C_2H_3F	0.7	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
vinylidine Fluoride (VF2)	75–38–7	$C_2H_2F_2$	0.9	Approved as provisional GWP for DuPont de Nemours (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
carbonyl fluoride	353–50–4	COF_2	2	Submitted with provisional GWP request for DuPont de Nemours, no provisional GWP approved (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
perfluoropropyl vinyl ether	1623–05–8	$C_5F_{10}O$	3	Submitted with provisional GWP request for DuPont de Nemours, no provisional GWP approved (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
perfluoroethyl vinyl ether	10493–43–3	C_4F_8O	3	Submitted with provisional GWP request for DuPont de Nemours, no provisional GWP approved (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
HFC–1234yf	754–12–1	$C_3H_2F_4$	4	Submitted with provisional GWP request for Honeywell International, no provisional GWP approved (see EPA–HQ–OAR–2009–0927–0273, February 24, 2012).
perfluorethyl iodide (2–I)	354–64–3	C_2F_5I	3	Submitted in August 2012 by DuPont de Nemours.
perfluorbutyl iodide (PFBI, 42–I)	423–39–2	C_4F_9I	3	Submitted in August 2012 by DuPont de Nemours.
perfluorhexyl iodide (6–I)	355–43–1	$CF_3CF_2CF_2CF_2CF_2CF_2IC_6F_{13}I$	2	Submitted in August 2012 by DuPont de Nemours.
perfluoroctyl iodide (8–I)	507–63–1	$C_8F_{17}I$	2	Submitted in August 2012 by DuPont de Nemours.
1,1,1,2,2-pentafluoro-4-iodo butane (22–I)	40723–80–6	$C_4H_4F_5I$	2	Submitted in August 2012 by DuPont de Nemours.
1,1,1,2,2,3,3,4,4-nonafluoro-6-iodo hexane (42–I).	2043–55–2	$C_6H_4F_9I$	2	Submitted in August 2012 by DuPont de Nemours.
perfluorobutyl ethene (42–U)	19430–93–4	$C_6H_3F_9$	2	Submitted in August 2012 by DuPont de Nemours
perfluorohexyl ethene (62–U)	25291–17–2	$C_8H_3F_{13}$	1	Submitted in August 2012 by DuPont de Nemours.
perfluorooctyl ethene (82–U);	21652–58–4	$C_{10}H_3F_{17}$	1	Submitted in August 2012 by DuPont de Nemours.

TABLE 3—PROPOSED F–GHGS WITH GWPS FOR TABLE A–1—Continued

Chemical designation or common name	CAS No.	Chemical formula	Proposed GWP	Origin of compound and GWP assessments
1H,1H, 2H,2H-perfluorohexan-1-ol (42–AL)	2043–47–2	$C_6H_5F_9O$	5	Submitted in August 2012 by DuPont de Nemours.
FK–5–1–12; Novec™ 612; FK–5–1–12myy2; n-Perfluorooctane; Octanedecafluorooctane.	756–13–8	$CF_3CF_2C(O)CF(CF_3)_2$	1.8	Published under EPA's SNAP Program (40 CFR part 82) and identified in manufacturer's literature.
FK–6–1–12/Novec™ 774, C7 Fluoroketone	813–44–5 and 813–45–6	$C_7F_{14}O$ Chemical Blend	1	Published under EPA's SNAP Program (40 CFR part 82).
trans-1-chloro-3,3,3-trifluoroprop-1-ene	2730–43–0	$C_3H_2ClF_3$	7	Published under EPA's SNAP Program (40 CFR part 82) and identified in peer reviewed literature.
PFC–6–1–16; Hexadecafluoroheptane	335–57–9	C_7F_{16}	7930	Identified in peer reviewed literature.
PFC–7–1–18; Octadecafluorooctane	307–34–6	C_8F_{18}	8340	Identified in peer reviewed literature.

For the first 11 compounds in Table 3 (seven with approved provisional GWPs and the four without approved provisional GWPs), the EPA determined that the methods used to estimate the GWPs were likely to overestimate the GWPs by an order of magnitude or more (see Docket ID No. EPA–HQ–OAR–2009–0927–0256). These compounds are all relatively short-lived, and the analyses to determine the GWP for these compounds used the simplifying assumptions that the compounds are well-mixed in the atmosphere. In general, the assumption that short-lived compounds are well-mixed overestimates the radiative forcing of these gases and may affect estimates of the atmospheric lifetime. Because of this simplifying assumption, the proposed GWPs are likely to be overestimates. However, the EPA has determined that the proposed GWPs for these short-lived gases represent the most current, peer-reviewed, scientific knowledge of the radiative properties and lifetimes of these gases. For subpart L reporters, the proposed GWPs would provide a more accurate calculation of CO_2e emissions than the default GWPs required under 40 CFR 98.123(a). Furthermore, because the GWP of each of these 11 F–GHGs is very low (i.e., between 0.02 and 6, as shown in Table 3 of this preamble), the EPA has determined that the proposed GWPs would not significantly overestimate source category emissions or supply and are acceptable for the purposes of calculating emissions under Part 98.

For the ten F–GHGs submitted by DuPont on August 21, 2012, the radiative efficiency of each compound is derived using a constant mixing ratio of the compounds in the troposphere (i.e., the methods assume that the compounds are well-mixed). These compounds are all anticipated to be short-lived in the atmosphere. Therefore, the constant mixing ratio likely overestimates the share of these compounds that reside higher in the atmosphere and consequently overestimates the radiative efficiency (and GWP). For four of the 10 compounds, the approach used to calculate the atmospheric lifetimes likely underestimates the lifetimes of these compounds.[20] However, the radiative efficiency calculation is likely to outweigh the underestimated lifetimes. The EPA reviewed recent research that suggests the approach used to determine the radiative efficiency for these compounds can result in overestimates of the 100-year GWP of 49 to 233 percent (see ''GWP Determinations for Proposed Additional F–GHGs for Table A–1,'' Docket ID No EPA–HQ–OAR–2012–0934 for additional information on this analysis). The available estimates for these GWPs are likely upper bounds, because these are short-lived, low-GWP gases. We are proposing to include the GWPs for these ten F–GHGs in Table A–1 of subpart A. Because the GWP of each F–GHG is very low (i.e., between 1 and 5, as shown in Table 3), the EPA has determined that the proposed GWPs would not significantly overestimate source category emissions or supply and are acceptable for the purposes of calculating emissions under Part 98.

For the five F–GHGs identified through scientific assessments published through EPA's SNAP program or in peer-reviewed literature, the EPA evaluated the estimation methods used to determine the GWP for each compound. The EPA's determination for each compound (identified by common name) and the proposed GWPs are as follows:

- *FK–5–1–12* (Novec™ 612, Novec™ 1230). FK–5–1–12 is a fluorinated ketone; it is known under the trade name Novec™ 612 when used as a magnesium cover gas and as Novec™ 1230 when used as a fire suppression agent. Product information provided by the manufacturer provides a GWP estimate of 1 for a 100-year integration using IPCC 2007 calculation methods.[21] An analysis of the GWP of FK–5–1–12 was also performed through EPA's SNAP Program.[22] The SNAP analysis considered two scientific reports that provided estimates of atmospheric lifetime and radiative efficiency, and determined that the total GWP of FK–5–1–12 (integrated over a 100-year time horizon and calculated using the IPCC approach) would likely have a value between 0.6 and 1.8. The total GWP comprises a direct value of less than 1 but greater than zero plus an indirect GWP of 0.56 to 0.84, based on 4 to 6 carbons available for conversion to CO_2. The EPA is conservatively proposing a GWP of 1.8. For the upper-bound value, the methods used to evaluate the radiative efficiency for FK–5–1–12 assumed a constant mixing ratio for the compound, which likely overestimated the radiative efficiency and the GWP. Because the proposed GWP of the compound is so low, we do not anticipate that the proposed value would result in substantial over-reporting for the magnesium production source category.
- *FK–6–1–12* (Novec™ *774, C7 Fluoroketone).* The compound FK–6–1–12 (also produced under the trade name Novec™ 774), is a blend of two isomers: 3-pentanone,1,1,1,2,4,5,5,5-octafluoro-2,4-bis(trifluoromethyl) and 3-

[20] The methods used assumed that these gases were well-mixed; this underestimates the concentration of O_3 and overestimates the concentration of OH to which the compound is actually exposed. The overestimate of the OH concentration has a greater effect on the reaction rate and estimated lifetime of the compound.

[21] 3M Company. ''3M™ Novec™ 1230 Fire Protection Fluid.'' 2009. Available online at: *http://multimedia.3m.com/mws/mediawebserver?mwsId=66666UF6EVsSyXTtlXfyn8TEEVtQEVs6EVs6EVs6E666666-&fn=prodinfo_novec1230.pdf.*

[22] See Docket ID No. EPA–HQ–OAR–2012–0934.

hexanone,1,1,1,2,4,4,5,5,6,6,6-undecafluoro-2-(trifluoromethyl). The GWP of FK–6–1–12 was previously evaluated and published under EPA's SNAP Program.[23] The SNAP analysis provided a 100-year integrated GWP of approximately 1, therefore, we are proposing to include a GWP value of 1 in Table A–1. The compound also has a chemical structure similar to that of FK–5–1–12, therefore, we anticipate a similar lifetime and GWP for these compounds.

• *trans-1-chloro-3,3,3-trifluoroprop-1-ene.* The compound trans-1-chloro-3,3,3-trifluoroprop-1-ene (trade name Solstice™ 1233zd(E)) is a polyurethane foam blowing agent useful in applications such as thermal insulation in appliances and residential and commercial buildings. An analysis of the GWP of trans-1-chloro-3,3,3-trifluoroprop-1-ene was previously performed through EPA's SNAP Program.[24] As part of the SNAP analysis, the EPA considered two studies, Anderson et al. (2008)[25] and Wang et al. (2011),[26] and established a GWP of between 4.7 and 7 and an atmospheric lifetime of approximately 26 to 31 days. In its evaluation, the EPA has given weight to the peer-reviewed analysis by Anderson et al. (2008), which calculates a GWP of 7. We are also considering research by Wang et al. (In draft)[27] which calculates a lifetime of 30.5 days and estimates a GWP of 4.7. The model used by Wang et al. accounts for the shorter lifetime and reduced mixing of the trans-1-chloro-3,3,3-trifluoroprop-1-ene compound, and may provide a more accurate estimate of the GWP. Although the latter two of the studies cited (from the same author) give a GWP of 4.7, the EPA has determined that it is more appropriate to use the GWP from the first study, as it comes from a peer-reviewed journal article. Also, consistent with the reasoning for choosing possibly upper-bound GWPs for other chemicals in Table 3 of this preamble, the EPA has concluded that using the GWP of 7 rather than 4.7 would not significantly overestimate source category emissions or supply and is acceptable for the purposes of calculating emissions under Part 98.

• *PFC 6–1–16 and PFC 7–1–18.* The perfluorocarbons (PFCs) C_7F_{16} and C_8F_{18} are used as heat transfer fluids and in vapor phase reflow soldering in the electronics manufacturing industry. There are no previous estimates of the GWPs for these gases. Ivy et al. (2012)[28] have recently provided emission estimates and measured infrared spectra of these PFCs to estimate the GWPs. These compounds have an estimated atmospheric lifetime of 3,000 years and are expected to be well-mixed in the atmosphere. Because the expected lifetimes of these PFCs are much longer than the 100-year time horizon used to calculate the GWP, they are relatively insensitive to the estimated lifetime. Furthermore, the methods and assumptions used by Ivy et al. (2012) are generally considered reliable for long-lived gases. Therefore, we are proposing the GWPs for these two compounds as presented by Ivy et al., as listed in Table 3 of this preamble.

A complete analysis of each of these compounds and the proposed GWPs are included in the memorandum, ''GWP Determinations for Proposed Additional F–GHGs for Table A–1,'' Docket ID No. EPA–HQ–OAR–2012–0934.

Request for additional information. The GWPs we are proposing in Table A–1 are based on the data available to the EPA at the time of this proposed rulemaking. We specifically solicit comment on the proposed GWPs for the 26 compounds we are proposing in Table A–1, including submittal of additional data or analyses that may support more accurate estimates of the GWP or that support the GWP estimation methods that are currently provided.

For commenters providing new estimates of GWPs for the proposed compounds for inclusion in Table A–1, we request that the commenter submit the following types of scientific data and analyses to support the estimated GWP:

(1) Data and analysis related to the low-pressure gas phase infrared absorption spectrum of the compound;

(2) Data and analysis related to reaction mechanisms and rates such as photolysis and reaction with atmospheric components such as hydroxyl radicals (OH), ozone (O_3), carbon monoxide (CO), and water;

(3) Radiative transfer analyses that integrate the lifetime and infrared absorption spectrum data to calculate the GWP; or,

(4) Published or unpublished studies of the GWP of the compound.

The EPA intends to review and consider additional information submitted during the public comment period to assess the proposed GWPs and consider other accurate estimates of the GWP for each compound. We anticipate requesting comment on additional compounds in a separate action.

2. Other Technical Corrections and Proposed Amendments to Subpart A

In addition to the proposed amendments to global warming potentials in Table A–1, we are also proposing corrections and other clarifications to certain provisions of subpart A of Part 98. The more substantive corrections, clarifying, and other amendments to subpart A are found here. Additional minor corrections are discussed in the Table of Revisions to this rulemaking (see Docket ID No. EPA–HQ–OAR–2012–0934).

The EPA is proposing to revise the reporting requirements of 40 CFR 98.3(c)(1). Section 98.3(c)(1) requires reporting of the physical address of the facility where the emissions occur (not the parent company address). Some facilities do not have a physical street address assigned to them and their mailing address is not co-located with their facility operations. In order to more accurately report the physical location of these facilities, the EPA is proposing that those without a physical address at their operations site provide latitude and longitude coordinates instead. This proposed addition is not intended as an option for any facility whose physical address coincides with their facility operations. It also is not intended for use by suppliers and importers and/or exporters covered by Part 98, or facilities reporting under subpart W in the natural gas distribution (40 CFR 98.230(a)(8)) or onshore petroleum and natural gas production (40 CFR 98.230(a)(2)) industry segments.

We are proposing to add a requirement to 40 CFR 98.3(c)(13) for all facilities with a power generating unit to report the facility Office of the Regulatory Information System (ORIS)

[23] See ''Protection of Stratospheric Ozone: Determination 27 for Significant New Alternatives Policy Program,'' Docket ID No. EPA–HQ–OAR–2012–0934.

[24] See ''Protection of Stratospheric Ozone: Determination 27 for Significant New Alternatives Policy Program,'' Docket ID No. EPA–HQ–OAR–2012–0934.

[25] Andersen, M.P.S., E.J.K. Nilsson, O.J. Nielsen, M.S. Johnson, M.D. Hurley, and T.J. Wallington. 2008. Atmospheric chemistry of trans-CF3CH CHCl: Kinetics of the gas-phase reactions with Cl atoms, OH radicals, and O3. J. Photochem. Photobiol. A: Chemistry 199: 92–97.

[26] Wang D., Olsen S., Wuebbles D. 2011. ''Preliminary Report: Analyses of tCFP's Potential Impact on Atmospheric Ozone.'' Department of Atmospheric Sciences. University of Illinois, Urbana, IL. September 26, 2011.

[27] Wang, D., Wuebbles, D.J., Patten, K.O., and Olsen, S.C. In draft. Climate advantages of proposed short-lived compounds as replacements for longer-lived HCFCs and HFCs. Department of Atmospheric Sciences, University of Illinois at Urbana-Champaign, Urbana, Illinois. Draft report, undated.

[28] Ivy, D.J., M. Rigby, M. Baasandorj, J. B. Burkholder, and R. G. Prinn. 2012. Global emission estimates and radiative impact of C4F10, C5F12, C6F14, C7F16 and C8F18. Atmos. Chem. Phys., 12: 7635–7645. DOI:10.5194/acp–12–7635–2012.

code for each power generation unit. The proposed amendment would facilitate the verification of emissions information received by the EPA. The EPA is also proposing to add the following definition for ORIS code in 40 CFR 98.6 for clarity, ''ORIS Code'' means the unique identifier assigned to each power plant in the National Electric Energy Data System (NEEDS). The ORIS code is a four digit number assigned by the Energy Information Administration (EIA) at the U.S. Department of Energy to power plants owned by utilities.''

We are proposing to add a provision to 40 CFR 98.3(c)(11) to include instructions for the reporting of a United States parent company legal name and address. The proposed amendment would specify that a facility or supplier must use the reporting instructions found in e-GGRT when reporting a parent company. The proposed amendment would facilitate verification of the emissions reported by allowing the EPA to provide a common naming convention through e-GGRT that would be used to easily identify parent companies and to accurately attribute GHG emissions to the correct parent companies. Instructions regarding reporting of parent company name and address have been posted to the docket for this action (See docket ID no. EPA–HQ–OAR–2012–0934).

Additionally, we are proposing to amend 40 CFR 98.3(h)(4) to clarify the provisions for requesting an extension of the 45-day period for submission of revised reports in 40 CFR 98.3(h)(1) and (2). Specifically, we are clarifying the timing requirements for approval or denial of the automatic 30-day extension and any subsequent extensions provided in 40 CFR 98.3(h)(4). The proposed amendments would require reporters to submit a request for any additional extension beyond the 30-day automatic extension at least 5 business days prior to the expiration of the initial 30-day extension. If the request demonstrates that it is not practicable to submit the data or information needed to resolve a potential reporting error following the 30-day automatic extension, the Administrator may approve an additional extension request. The proposed amendment would provide a reasonable timeline for reporters to submit extension requests and for the EPA's collection and verification of reported data.

We are proposing to add a definition of fluidized bed combustor (FBC) to 40 CFR 98.6. The definition is necessary to be consistent with the proposed addition of FBC-specific N_2O emission factors for coal, waste anthracite (culm), and waste bituminous (gob) to Table C–2.

Finally, we are proposing revisions to the definitions of three terms in subpart A: degasification system, ventilation well or shaft, and ventilation system. These terms are used only in subpart FF, Underground Coal Mines, and are proposed to be revised to more closely align with common terminology used in the coal mining industry.

B. Subpart C—General Stationary Fuel Combustion Sources

We are proposing revisions to the requirements of 40 CFR part 98, subpart C (General Stationary Fuel Combustion Sources) to clarify the use of the Tier methodologies and to update high heat value (HHV) and emission factors. The more substantive corrections, clarifying, and other amendments to subpart C are found here. Additional minor corrections are discussed in the Table of Revisions to this rulemaking (see Docket ID No. EPA–HQ–OAR–2012–0934).

First, we are proposing to amend 40 CFR 98.33(b)(1) to expand the use of the Tier 1 methodology in one situation that currently requires the use of the Tier 3 methodology. Generally, subpart C requires the use of the Tier 3 methodology for combustion units that are greater than 250 million Btus per hour for all fuels listed in Table C–1, and, for fuels not listed in Table C–1 if the fuel provides 10 percent or more of the annual heat input to the unit. To reduce the monitoring burden of determining carbon content of Table C–1 fuels that are used in relatively small amounts annually, we are proposing a change to 40 CFR 98.33(b)(1) that will allow the Tier 1 methodology to be used for Table C–1 fuels that are combusted in a unit with a maximum rated heat input capacity greater than 250 million Btus per hour, if the fuel provides less than 10 percent of the annual heat input to the unit.

We are proposing changes to Table C–1 to update the HHV and emission factors for several fuels and to add emission factors for culm and gob. The EPA received a number of comments and questions through the GHGRP Help Desk with suggestions for improvements to these factors. We researched these factors to ensure the most scientifically valid values were reflected. An analysis of the proposed changes to Table C–1 as a result of this research can be found in the memorandum ''Review and Evaluation of 40 CFR Part 98 CO_2 Emission Factors for EPW07072 TO 45,'' available in Docket ID No. EPA–HQ–OAR–2012–0934.

In response to a Petition for Rulemaking (''Sierra Club Petition''),[29] the EPA evaluated establishing separate (from the parent coal) CO_2 emission factors for culm and gob in Table C–1. The EPA is proposing the addition of culm and gob to Table C–1. These separate entries have been added to clarify that the Table C–1 CO_2 emission factors for anthracite coal and bituminous coal should be used for culm and gob, respectively. Because the heating value of culm or gob is variable and quite different from the parent anthracite or bituminous coals, the EPA is proposing that the default heating values in Table C–1 for anthracite and bituminous may not be used for culm and gob. The changes to Table C–1 specify that the HHV for culm or gob must be measured according to the Tier 2 Methodology. Our analysis and development of emission factors can be found in the memorandum ''Emission Factor Updates for Fluidized Bed Boilers and Other Revisions to Tables C–1 and C–2 of 40 CFR Part 98—Summary'' available in Docket Id. No. EPA–HQ–OAR–2012–0934. Because the Tier 1 Methodology allows the use of default HHVs from Table C–1, we

[29] Letter from Craig Holt Segall, Sierra Club Environmental Law Program, on behalf of the Sierra Club, Center for Biological Diversity, Clean Air Task Force, Clean Wisconsin, the Kentucky Environmental Foundation, the Minnesota Center for Environmental Advocacy, and the Natural Resources Defense Council to Lisa Jackson, U.S. EPA. Petition for Rulemaking To Correct Emission Factors in the Mandatory Greenhouse Gas Reporting Rule. October 28, 2010.

propose revising 40 CFR 98.33(b)(1) to prohibit use of the Tier 1 Methodology when estimating the emissions from combustion of culm or gob. With these revisions and those proposed with respect to fluidized bed combustors in this Section II.B., *infra,* we believe that we have fully addressed the Petition for Rulemaking.

Table 4 of this preamble shows a summary of the proposed Table C–1 revisions, and major changes are explained below.

TABLE 4—PROPOSED CHANGES TO TABLE C–1 TO SUBPART C—DEFAULT CO_2 EMISSION FACTORS AND HIGH HEAT VALUES FOR VARIOUS TYPES OF FUEL

	Current values		Proposed values	
Fuel type	Default high heat value	Default CO_2 emission factor	Default high heat value	Default CO_2 emission factor
Coal and coke	mmBtu/short ton	kg CO_2/mmBtu		
Anthracite	25.09	103.54	No change	103.69
Waste Anthracite (Culm)			See footnote 1	103.69
Bituminous	24.93	93.40	No change	93.28
Waste Bituminous (Gob)			See footnote 1	93.28
Subbituminous	17.25	97.02	No change	97.17
Lignite	14.21	96.36	No change	97.72
Coal Coke [Fuel type changed from "coke"].	24.80	102.04	No change	113.67
Mixed (Commercial sector)	21.39	95.26	No change	94.27
Mixed (Industrial coking)	26.28	93.65	No change	93.90
Mixed (Industrial sector)	22.35	93.91	No change	94.67
Mixed (Electric Power sector)	19.73	94.38	No change	95.52
Natural gas	mmBtu/scf	kg CO_2/mmBtu		
(Weighted U.S. Average)	1.028×10^{-3}	53.02	1.026×10^{-3}	53.06
Petroleum products	mmBtu/gallon	kg CO_2/mmBtu		
Used Oil	0.135	74.00	0.138	No change
Liquefied petroleum gases (LPG)	0.092	62.98	No change	61.71
Propane	0.091	61.46	No change	62.87
Propylene	0.091	65.95	No change	67.77
Ethane	0.069	62.64	0.068	59.60
Ethylene	0.100	67.43	0.058	65.96
Isobutane	0.097	64.91	0.099	64.94
Isobutylene	0.103	67.74	No change	68.86
Butane	0.101	65.15	0.103	64.77
Butylene	0.103	67.73	0.105	68.72
Natural Gasoline	0.110	66.83	No change	66.88
Petrochemical Feedstocks	0.129	70.97	0.125	71.02
Unfinished Oils	0.139	74.49	No change	74.54
Heavy Gas Oils	0.148	74.92	No change	No change
Crude Oil	0.138	74.49	No change	74.54
Other fuels-solid	mmBtu/short ton	kg CO_2/mmBtu		
Tires	26.87	85.97	28.00	No change
Biomass fuels—solid	mmBtu/short ton	kg CO_2/mmBtu		
Wood and Wood Residuals(dry basis) [Fuel Type description changed from Wood and Wood Residuals].	15.38	93.80	17.48	No change
Solid Byproducts	25.83	105.51	10.39	No change
Biomass fuels—gaseous	mmBtu/scf	kg CO_2/mmBtu	.	
Landfill Gas [Fuel type description changed from Biogas (captured methane).	0.841×10^{-3}	52.07	0.485×10^{-3}	No change
Other Biomass Gases [New Fuel type added].			$0.655 \times {}^{10-3}$	52.07
Biomass Fuels—Liquid	mmBtu/gallon	kg CO_2/mmBtu		
Biodiesel	0.128	73.84	Deleted Duplicate.	

Note: "No change" indicates no changes to the current value. Additional footnotes have been added to the table.

The changes include a change to the HHV for wood and wood residuals. The HHV in Table C–1 for Wood and Wood Residuals is a wet basis value that assumes a moisture content of 12 percent. GHGRP reporters have indicated that they use wood fuel with highly variable moisture content, and so the existing factor results in calculation inaccuracies of CO_2 emissions from burning this fuel. These reporters have requested that the EPA provide HHVs for a range of moisture contents for wood fuel. In order to address this issue, we are proposing an addition to Table C–1 for ''Wood and Wood Residuals on a dry basis,'' with a footnote containing an equation that can be used to adjust the value for any moisture content. Reporters can then calculate a HHV for use in Equation C–1 using the moisture content of their facility specific fuel. We are also proposing a change to Table C–1 that replaces the one HHV for ''Biogas (captured methane)'' with values for two types of biogas: ''Landfill Gas'' and ''Other Biomass Gases.'' The CH_4 content of landfill gas (approximately 50 percent) is typically lower than the CH_4 concentration in digester gas (approximately 65 percent), and the proposed emission factors reflect these concentration values.

Revisions are proposed to the HHV and emission factors for the individual components of liquid petroleum gases (LPG) including propane, propylene, ethane, ethylene, isobutane, isobutylene, butane, and butylene. Since the HHV for these LPGs are presented on the basis of million Btu per gallon, and these compounds are gases under standard conditions, the heating value must be presented using a stated temperature and pressure. For all LPG except ethylene, we are proposing estimates of HHV at 60 degrees Fahrenheit (°F) and saturation pressure. For ethylene, since it cannot be liquefied above 48.6°F, we have selected a value for HHV that is determined at 41°F (slightly under the critical temperature) and the corresponding saturation pressure. The emission factors for these compounds have also been updated using the proposed HHV and the fraction of carbon contained in the compound.

We are proposing a correction to the emission factor for coke because it appears that the emission factor currently in Table C–1 was inadvertently listed as the emission factor for petroleum coke. We have also changed the name in Table C–1 to ''coal coke'' to differentiate this substance from ''petroleum coke,'' which has a different HHV and EF. We are also proposing updated emission factors for the four types of coal and the four listed factors for mixed coals based on the most recent version of the factors used in the Inventory.

The HHV for the biomass fuel ''solid byproducts'' would be revised to reflect the average of the solid byproducts consumed by the facilities that reported HHV in the 1999 survey conducted by the Energy Information Administration. The proposed value is presented on a wet basis, and is more consistent with other biomass fuels. Based on our research, we are also proposing minor changes to the HHV and/or emission factors for the following substances: natural gas, used oil, petrochemical feedstocks, and tires. Other proposed changes to Table C–1 include updates to emission factors and HHV based on our latest research and to standardize conversion factors. These corrections are discussed in the memorandum ''Review and Evaluation of 40 CFR Part 98 CO_2 Emission Factors for EPW07072 TO 45'' (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are also proposing to revise 40 CFR 98.33(e)(3)(iv). The method in 40 CFR 98.33(e)(3)(iv) for calculating biogenic CO_2 emissions from municipal solid waste (MSW) combustion requires the use of a default factor for the biogenic share of CO_2. We are proposing a change to the default factor used to determine the annual biogenic CO_2 emissions from MSW from 0.6 to 0.55 to reflect trends in waste composition. The complete analysis of this change can be found in the memorandum ''Review and Evaluation of 40 CFR Part 98 CO_2 Emission Factors for EPW07072 TO 45,'' available in Docket ID No. EPA–HQ–OAR–2012–0934.

The EPA received a Petition for Reconsideration and Rulemaking from the American Forest & Paper Association (AF&PA) and the American Wood Council (AWC) on November 16, 2012 (hereafter referred to as ''AF&PA Petition'').[30] The AF&PA Petition included a recent study containing new methane (CH_4) and nitrous oxide (N_2O) emissions test data in support of a request that EPA revise the CH_4 and N_2O emission factors in Subparts AA and C for combustion of spent pulping liquor and wood residuals. The EPA reviewed the basis for the current emission factors, integrated the emissions test data provided by Petitioners with previously available data, and is proposing to update the spent pulping liquor and wood residual combustion emission factors in subparts AA and C, respectively.

Table 5 of this preamble summarizes the proposed Table C–2 revisions, and major changes are explained below.

TABLE 5—PROPOSED CHANGES TO TABLE C–2 TO SUBPART C–DEFAULT CH_4 AND N_2O EMISSION FACTORS FOR VARIOUS TYPES OF FUEL

Fuel type	Current values		Proposed values	
	Default CH_4 emission factor	Default N_2O emission factor	Default CH_4 emission factor	Default N_2O emission factor
Coal and Coke (All fuel types in Table C–1) [1] (Footnote Added).	1.1×10^{-02}	1.6×10^{-03}	1.1×10^{-02}	1.6×10^{-03}
Anthracite for FBCs only [2]	N/A	N/A	1.1×10^{-02}	1.6×10^{-01}
Waste Anthracite (Culm) for FBCs only [2]	N/A	N/A	1.1×10^{-02}	4.0×10^{-01}
Bituminous for FBCs only [2]	N/A	N/A	1.1×10^{-02}	1.3×10^{-01}
Waste Bituminous (Gob) for FBCs only [2]	N/A	N/A	1.1×10^{-02}	2.9×10^{-01}
Subbituminous for FBCs only [2]	N/A	N/A	1.1×10^{-02}	6.5×10^{-02}
Lignite for FBCs only [2]	N/A	N/A	1.1×10^{-02}	1.1×10^{-01}
Fuel Gas	N/A	N/A	3.0×10^{-03}	6.0×10^{-04}

[30] Letter from Paul Noe, American Forest & Paper Association, and Robert Glowinski, American Wood Council, to Lisa Jackson, U.S. EPA. Petition for Reconsideration of 40 CFR Part 98 Subparts C and AA; Petition for Rulemaking To Revise 40 CFR Part 98 Subparts C and AA; Request for Correction Under Information Quality Act. November 16, 2012.

TABLE 5—PROPOSED CHANGES TO TABLE C–2 TO SUBPART C–DEFAULT CH_4 AND N_2O EMISSION FACTORS FOR VARIOUS TYPES OF FUEL—Continued

Fuel type	Current values		Proposed values	
	Default CH_4 emission factor	Default N_2O emission factor	Default CH_4 emission factor	Default N_2O emission factor
Biomass Fuels—Solid (All fuel types in Table C–1, except wood and wood residuals) (Added to parenthetical: "except wood and wood residuals").	3.2×10^{-02}	4.2×10^{-03}	3.2×10^{-02}	4.2×10^{-03}
Wood and wood residuals			7.2×10^{-3}	3.6×10^{-3}
Biomass Fuels-Gaseous (All fuel types in Table C–1) Changed category from "Biomass".	3.2×10^{-03}	6.3×10^{-04}	3.2×10^{-03}	6.3×10^{-04}

N/A = No current emission factor available.

[1] Use of the default emission factors for the coal and coke category may not be used to estimate emissions from combusting anthracite, waste anthracite, bituminous, waste bituminous, subbituminous, or lignite coal burned in an FBC.

[2] Use of these default emission factors is required for FBCs burning the specified coal type.

Note: Those employing this table are assumed to fall under the IPCC definitions of the "Energy Industry" or "Manufacturing Industries and Construction". In all fuels except for coal the values for these two categories are identical. For coal combustion, those who fall within the IPCC "Energy Industry" category may employ a value of 1g of CH_4/mmBtu.

Specifically, based on our analysis of this emissions test data, we are proposing to add a row for wood and wood residuals in Table C–2 that contains CH_4 and N_2O emission factors addressing those submitted to EPA with the AF&PA Petition. We integrated that data with previously available emissions test data in order to consider all of the information available to us in developing the new default emission factors for wood and wood residuals. Our analysis of the test data can be found in the memorandum "Kraft Pulping Liquor and Woody Biomass Methane (CH_4) and Nitrous Oxide (N_2O) Emission Factor Literature Review" available in Docket Id. No. EPA–HQ–OAR–2012–0934.

We are also proposing to add coal, culm, and gob N_2O emission factors to Table C–2 specific to fluidized bed combustors. As referenced above in response to the Sierra Club Petition, the EPA reviewed multiple studies that indicate that N_2O emissions from fluidized bed combustors burning coal, culm, and gob are significantly higher than from conventional combustion technologies. The EPA agrees our analysis and development of emission factors (including a discussion of emission factors for culm and gob) can be found in the memorandum "Emission Factor Updates for Fluidized Bed Boilers and Other Revisions to Tables C–1 and C–2 of 40 CFR Part 98—Summary" available in Docket Id. No. EPA–HQ–OAR–2012–0934.

We are proposing to add "fuel gas" to Table C–2 of subpart C to address a program gap discovered through the verification process. Because fuel gas is not currently included in Table C–2, instructions are included in subparts X and Y to use the default CH_4 and N_2O emission factors for "Petroleum (All fuel types in Table C–1)" to calculate CH_4 and N_2O emissions from fuel gas combustion. However, for facilities that do not report under subpart X or Y, there is currently no requirement to calculate CH_4 and N_2O emissions from fuel gas combustion. The proposed revision addresses this unintentional gap. As a result, subpart C reporters would be required to report CH_4 and N_2O emissions from fuel gas combustion. Fuel gas is defined at 40 CFR 98.6 as "gas generated at a petroleum refinery or petrochemical plant and that is combusted separately or in any combination with any type of gas."

C. Subpart H—Cement Production

We are proposing one revision to the reporting requirements of 40 CFR part 98, subpart H (Cement Production). The current Part 98, published on October 30, 2009, provides that facilities subject to subpart H report the monthly cement production from each kiln at the facility for verification of reported emissions. In the preamble to the Technical Corrections, Clarifying, and Other Amendments to Certain Provisions of the Mandatory Greenhouse Gas Reporting Rule (75 FR 66434, October 28, 2010), the EPA stated its intent to change the cement production reporting requirements under 40 CFR 98.86 to require annual, facility-wide cement production instead of monthly, kiln-specific cement production (75 FR 66440). Reporting cement production on a kiln-specific basis is inconsistent with cement plant manufacturing practices, because kilns produce clinker (an intermediate product in cement manufacturing) and do not make cement. Although it was obviously the EPA's intention to revise the rule accordingly, inadvertently, this change was not reflected in the rule. This change is also consistent with the requirement in 40 CFR 98.86(b)(3), which requires facilities without continuous emissions monitoring systems (CEMS) to report annual cement production at the facility. Therefore, we are proposing to amend 40 CFR 98.96(a)(2) to require reporting of facility-wide cement production.

D. Subpart K—Ferroalloy Production

We are proposing two corrections to subpart K of Part 98 (Ferroalloy Production). First, we are proposing to revise Equation K–3 of subpart K to correct the equation. The equation in the current Part 98 does not include a conversion factor from kilograms to metric tons. Therefore, we are proposing to correct Equation K–3 to revise the numerical term "2000/2205" to "2/2205" to account for this conversion.

Next, we are proposing to amend 40 CFR 98.116(e) to require the reporting of the annual process CH_4 emissions (in metric tons) from each electric arc furnace (EAF) used for the production of any ferroalloy listed in Table K–1 of subpart K of Part 98. Per 40 CFR 98.113(d), ferroalloy production facilities are currently required to calculate CH_4 emissions from each EAF used for the production of ferroalloys listed in Table K–1. Facilities are currently required to report CH_4 emissions for EAFs where a CEMS is used to measure emissions. However, the requirement to report emissions of CH_4 from EAFs where the carbon mass balance procedure is used to measure emissions was erroneously omitted from the current Part 98. The proposed amendments are necessary for

consistent reporting of CH_4 emissions from all ferroalloy production facilities. Because facilities must already monitor and calculate emissions of CH_4 from each EAF, the proposed amendment would not impose any additional burden on reporters. The proposed data reporting element reflects aggregated annual information that is currently gathered by reporters.

E. Subpart L—Fluorinated Gas Production

Under subpart L of Part 98 (Fluorinated Gas Production), the EPA is proposing to extend temporary, less detailed reporting requirements for fluorinated gas producers for an additional year. In a final rule published on August 24, 2012, the EPA promulgated temporary, less detailed reporting requirements for reporting years 2011 and 2012 (77 FR 51477). As discussed in that final rule, this was intended to allow the EPA time to evaluate concerns raised by the producers that EPA release of the more detailed reporting required by the 2010 final rule would reveal trade secrets, and to consider how the rule might be changed to balance these concerns with the need to obtain the data necessary to inform the development of future GHG policies and programs. The proposed extension would require the same less detailed reporting for reporting year 2013 as for reporting years 2011 and 2012. The extension would allow the EPA, as well as stakeholders, to consider the various options for reporting emissions under subpart L in conjunction with EPA's on-going evaluations regarding reporting inputs to emission equations for subpart L, whose reporting deadline was deferred until 2015. Fluorinated gas producers and other commenters have often noted that whether or not disclosure of a particular data element poses confidentiality concerns depends on the other data that would be required to be reported and/or disclosed. The extension would allow the various potential reporting requirements and confidentiality determinations to be considered simultaneously.

F. Subpart N—Glass Production

We are proposing several clarifying revisions to subpart N of Part 98 (Glass Production). The more substantive corrections, clarifying, and other amendments to subpart N are found here. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to revise the monitoring methods used to measure carbonate-based mineral mass-fractions to allow for more accurate measurement methods and to add flexibility for reporters. The current Part 98 requires that such measurements are based on sampling using ASTM D3682–01 (Reapproved 2006) Standard Test Method for Major and Minor Elements in Combustion Residues from Coal Utilization Processes or ASTM D6349–09 Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry. However, we have determined that industry consensus standards that specify analysis by X-ray fluorescence (e.g., ASTM C25–11 Standard Test Methods for Chemical Analysis of Limestone, Quicklime, and Hydrated Lime and ASTM C1271–99 Standard Test Method for X ray Spectrometric Analysis of Lime and Limestone) are more accurate than ASTM D6349–09, which uses inductively coupled plasma or ASTM D3682–01, which uses atomic absorption. Therefore, we are proposing to revise 40 CFR 98.144(b) to specify that reporters determining the carbonate-based mineral mass fraction must use sampling methods that specify X-ray fluorescence. We are proposing to remove ASTM D6349–09 and ASTM D3682–01 from the requirements in 98.144(b). The proposed amendment would allow reporters flexibility in choosing a sampling method (since multiple X-ray fluorescence methods are available) while ensuring that more accurate available measurement methods are applied. For measurements made in the emission reporting year 2013 or prior years, reporters would continue to have the option to use ASTM D6349–09 and ASTM D3682–01. The EPA is not proposing to have reporters revise previously submitted annual reports. These facilities would have the option, but not be required, to use the newly proposed option for the reports submitted to EPA in 2013.

G. Subpart O—HFC–22 Production and HFC–23 Destruction

The EPA is proposing clarifying amendments and other corrections to Subpart O (HFC–22 Production and HFC–23 Destruction); the more substantive corrections, clarifying, and other amendments to Subpart O are found in this section. Additional minor corrections to Subpart O are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to add a sentence to 40 CFR 98.156(c) to clarify how to report the HFC–23 concentration at the outlet of the destruction device in the event that the concentration falls below the detection limit of the measuring device. The provisions of 40 CFR 98.156(c) require facilities that destroy HFC–23 to report the concentration of HFC–23 measured at the outlet of the destruction device during the facility's annual HFC–23 concentration measurements at the outlet of the destruction device. However, if the concentration during the measurements falls below the detection limit of the measuring device, the facility will not be able to report a specific concentration. The proposed sentence clarifies that in this situation, facilities are required to report the detection limit of the measuring device and that the concentration was below that detection limit.

H. Subpart P—Hydrogen Production

We are proposing several clarifying revisions to subpart P of Part 98 (Hydrogen Production). The more substantive corrections, clarifying, and other amendments to subpart P are found here. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to revise 40 CFR 98.163(b) to clarify that when the fuel and feedstock material balance approach is followed, the average carbon content and molecular weight for each month used in Equations P–1, P–2, or P–3 may be based on analyses performed annually or analyses performed more frequently than monthly (based on the requirements of 40 CFR 98.164(b)). If the carbon content or molecular weight measurements are performed annually, reporters would use the annual value as the monthly average. If the analyses are performed more often than monthly, then the reporter would use the arithmetic average of these values as the monthly average. The term definitions in Equations P–1, P–2, and P–3 currently refer to the ''results of one or more analyses for month n''; however, the monitoring frequencies specified at 40 CFR 98.163(b)(2), (b)(3) and (b)(4) range from weekly to annually, so this clarification is necessary to align these requirements. Further, we are proposing to revise the term definitions in Equations P–1, P–2, and P–3 to remove references to ''one or more analyses'' since multiple analyses in a month are not always required, as described above.

We are also proposing to modify 40 CFR 98.164(b)(5) to reduce burden by adding flexibility to the fuel and feedstock analysis requirements, consistent with EPA's original intent

and subpart C (40 CFR 98.34(a)(6), 40 CFR 98.34(b)(4)), and subpart X (40 CFR 98.244(b)(4)(xiii)). The proposed change allows a facility to analyze fuels and feedstocks using chromatographic analysis, whether continuous or non-continuous.

We are proposing to move recordkeeping requirements currently included in 40 CFR 98.164 (Monitoring and QA/QC requirements) to 40 CFR 98.167 (Records that must be retained). Specifically, 40 CFR 98.164(c) and (d) will be moved to new paragraphs 40 CFR 98.167(c) and (d). Finally, we are proposing to revise 40 CFR 98.166(a)(2) and (a)(3) to remove the requirement to report hydrogen and ammonia production for all units combined. The individual unit production is already reported and can be summed to obtain the production for all units combined.

I. Subpart Q—Iron and Steel Production

We are proposing multiple amendments to subpart Q of Part 98 (Iron and Steel Production) to provide clarification for certain provisions and calculation methods. The more substantive corrections, clarifying, and other amendments to subpart Q are found here. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to amend the definition of the iron and steel production source category in subpart Q, 40 CFR 98.170, to include direct reduction furnaces not co-located with an integrated iron and steel manufacturing process. Reporters are required to report CO_2 emissions from direct reduction furnaces under 40 CFR 98.172(c), and it was the EPA's intent for this reporting requirement to cover all direct reduction furnaces; however, the inclusion of direct reduction furnaces not co-located with an integrated iron and steel manufacturing process was inadvertently excluded from 40 CFR 98.170. The proposed change corrects that omission. This change impacts only one facility currently operating in the United States and that facility is already reporting under Part 98. We do not anticipate this change will impose a burden on additional existing reporters.

The EPA is proposing to amend Equation Q–5 in subpart Q to account for the use of gaseous fuels in EAFs. Many EAF operators use supplemental natural gas for melting scrap in the furnace. One facility that provided input to the EPA on this issue meets approximately 20 percent of its energy requirement with natural gas. Because natural gas combustion products can constitute a significant portion of CO_2 emissions from EAFs, we are proposing to modify Equation Q–5 by adding terms to account for the amount of gaseous fuel combusted and the carbon content of the gaseous fuel. We are also proposing to amend Equation Q–5 by correcting the term ''C_f'' to ''C_{flux}'' and the term ''C_c'' to ''C_{carbon}'' to match those presented in the definitions, and to add a closing bracket at the end of the equation.

Additionally, we are proposing to revise 40 CFR 98.173(d) to clarify when the Tier 4 calculation methodology must be used to calculate and report combined stack emissions. The proposed amendment would clarify that the Tier 4 calculation methodology would be used (and emissions would be reported under subpart C of Part 98) if the GHG emissions from a taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, EAF, decarburization vessel, or direct reduction furnace are vented through a stack equipped with a CEMS that complies with the Tier 4 methodology in subpart C of this part, or through the same stack as any combustion unit or process equipment that reports CO_2 emissions using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C. The amendment is necessary to clarify that facilities using either shared or dedicated CEMS must use the appropriate subpart C calculation methodology for determining emissions.

We are also proposing to amend 40 CFR 98.174(c)(2) by removing the term ''furnace'' from the statement ''For the furnace exhaust,'' because decarburization vessels are not furnaces. We are also proposing to amend 40 CFR 98.174(c)(2) by dividing (c)(2) into two separate sub paragraphs to separately specify the sampling time for continuously charged EAFs. Newer and more efficient EAFs use the ''Consteel®'' process, which involves continuous, rather than batch, scrap feed. Thus, ''production cycles'' may be an ambiguous term for reporters who operate a continuous EAF, and could be interpreted to require lengthy test periods as a single production cycle could extend for several days during which steel was continuously tapped. Therefore, we are proposing to remove the term ''production cycles'' for continuous EAFs and provide owners or operators with the option of sampling for a period spanning at least three hours.

We are proposing to amend 40 CFR 98.175(a) to clarify that 100 percent data availability is not required for process inputs and outputs that contribute less than one percent of the total mass of carbon into or out of the process. In accordance with 40 CFR 98.174(b)(4), reporters do not collect the monthly mass or annual carbon content of inputs or outputs that contribute less than one percent of the total mass of carbon into or out of the process. Therefore, reporters are not required to estimate missing data for these inputs. Similarly, we are proposing to amend 40 CFR 98.176(e) by clarifying that the reporting requirements of 40 CFR 98.176(e) do not apply to process inputs and outputs that contribute less than one percent of the total mass of carbon into or out of the process.

J. Subpart X—Petrochemical Production

We are proposing changes to subpart X of Part 98 (Petrochemical Production). In addition, we are providing flexibility for reporters and clarifying the calculation methodology, monitoring and reporting requirements, missing data procedures and other provisions under the rule. The more substantive corrections, clarifying, and other amendments to subpart X are found here. Additional minor corrections are discussed in the Table of Revisions to this rulemaking (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to revise 40 CFR 98.242(b)(2) to clarify that reporters using the mass balance option for a petrochemical process are not to report emissions from the combustion of petrochemical off-gas in any combustion unit, regardless of whether or not the combustion unit is part of the petrochemical process unit. Subpart X currently states that emissions of CO_2, CH_4, and N_2O from only supplemental fuels (i.e., not from the combustion of process off-gas) burned in a combustion unit are reported under subpart C of Part 98 (General Stationary Fuel Combustion Sources). However, this requirement applies only to combustion units that are within the petrochemical process unit because the definition of supplemental fuel applies only to combustion within the process unit. Reporters may interpret this to mean that combustion units not within the petrochemical process unit should report emissions from combustion of petrochemical off-gas. This would lead to double counting since these emissions are already accounted for in the mass balance calculation. The proposed amendment would avoid possible double counting by specifying that emissions from the combustion of petrochemical process off-gas in combustion units outside the process unit also are not to be reported under subpart C.

We are proposing a change to the calculation methodology in 40 CFR 98.243(b) for CH_4 and N_2O emissions from burning process off-gas for reporters using the CEMS method to determine CO_2 emissions. The proposed calculation method is consistent with the calculation approach for CEMS-monitored sources in subpart C but should not increase burden because Tier 4 units can use the best available information to estimate cumulative annual heat input (see 40 CFR 98.33(c)(4)(i), 40 CFR 98.33(c)(4)(ii)(C)). The proposed calculation method would require reporters to use Equation C–10 of subpart C of Part 98. Reporters would use the cumulative annual heat input from combustion of the off-gas (mmBtu) and proposed fuel gas emission factors from Table C–2 to calculate emissions of CH_4 and N_2O. The proposed fuel gas emission factors in Table C–2 are the same as the ''Petroleum'' factors previously referenced by subpart X, but we determined that a separate entry for fuel gas is needed for other reasons, as described in Section II.B of this preamble.

We are proposing to modify both 40 CFR 98.243(c)(3) and 40 CFR 98.244(b)(4) to allow subpart X reporters that use the mass balance calculation method to obtain carbon content measurements from a customer of the product. Subpart X currently requires petrochemical manufacturers to determine product carbon contents from their own analyses. This change would provide additional flexibility for sources to obtain the carbon content measurement, and it is consistent with the current option that allows petrochemical manufacturers to obtain the carbon content of feedstocks from feedstock suppliers.

We are proposing a change to 40 CFR 98.243(c)(4) for the alternative sampling requirements for feedstocks and products when the composition is greater than 99.5 percent of a single compound for reporters using the mass balance calculation method. Currently, the alternative can only be used during periods of normal operation and when the product meets specifications. We are proposing changes that will allow the alternative method to be used during all times that the average monthly concentration is above 99.5 percent. The proposed changes would allow greater flexibility for reporters.

For reporters using the mass balance calculation method in 40 CFR 98.243(c)(5), we are proposing to revise definitions for five of the terms in Equation X–1. First, we are proposing to clarify that the term ''C_g'' includes streams containing CO_2 recovered for sale or use in another process, which is consistent with the current definition of the term ''$(CC_{gp})_{i,n}$''. Second, proposed changes to the terms ''$(F_{gf})_{i,n}$'' and ''$(P_{gp})_{i,n}$'' would clarify that the inputs for gaseous feedstock and products may be measured on either a mass basis or a volume basis. Finally, we are proposing clarifications to the terms for molecular weight of gaseous feedstocks and products (''$(MW_f)_i$'' and ''$(MW_p)_i$'') to specify that molecular weight is to be determined monthly, which is consistent with the monitoring frequency specified in 40 CFR 98.243(c)(1).

We are proposing to modify the test method description for chromatographic analysis in 40 CFR 98.244(b)(4)(xiii) to remove the word ''gas.'' The proposed change would clarify that a chromatograph other than a gas chromatograph may be used. We are also proposing to modify 40 CFR 98.244(b)(4)(xv) to allow additional methods for the analysis of carbon black feedstock oils and carbon black products. This section of subpart X currently specifies that a reporter may use an industry standard practice for such feedstocks and products. The proposed changes would provide additional flexibility by also allowing the use of a method published by a consensus-based standards organization (i.e., a published method that is not already specifically listed in 98.244(b)(4)). For clarity, the proposed amendments also would list known consensus-based standards organizations and add a requirement for facilities to document the standard method that they use in the facility monitoring plan required under 40 CFR 98.3(g)(5).

We are proposing to add a requirement under 40 CFR 98.244(c) to clarify the monitoring and quality assurance requirements for flares. Following implementation of Part 98, the EPA received questions concerning the monitoring and quality assurances requirements for flares because while the rule refers to subpart Y for flare emission calculation methods, it does not specify monitoring and quality assurance requirements. As a result, we are clarifying the requirements for flares to specify that facilities must conduct monitoring and quality assurance in accordance with 40 CFR 98.254. The proposed monitoring requirements for flares harmonize subpart X with other subparts under Part 98.

We are proposing to clarify the missing data procedures in 40 CFR 98.245 for missing feedstock and product flow rates and missing feedstock and product carbon contents. This section of subpart X currently specifies that reporters are to develop substitute values for these parameters using the same procedures as for missing fuel carbon contents as specified in 40 CFR 98.35. The proposed amendment clarifies that the procedures for missing fuel carbon contents in 40 CFR 98.35(b)(1) are to be used only for missing feedstock and product carbon contents, and the procedures for missing fuel usage in 40 CFR 98.35(b)(2) are to be used to develop substitute values for missing feedstock and product flow rates. We are also proposing to add missing data requirements for missing flare data and for missing molecular weights for gaseous feedstocks and products. The amendment would require reporters to develop substitute values for missing molecular weights using the procedures for missing fuel carbon contents as specified in 40 CFR 98.35(b)(1), and substitute values for missing flare data would be developed using the procedures in 40 CFR 98.255(b) and (c). We are proposing these additional missing data procedures so that reporters do not have to contact the EPA individually for guidance on how to proceed in the absence of instructions in the rule. We also expect that these changes will promote consistency both among subpart X reporters and between subpart X reporters and other reporters (e.g., subpart Y reporters).

We are proposing two amendments to clarify the reporting requirements of 40 CFR 98.246(a)(6) for reporters using the mass balance method. This section of subpart X currently requires a reporter to report the name of each method listed in 40 CFR 98.244 that is used to determine a measured parameter. In addition, when a method is not listed in 40 CFR 98.244 (i.e., for flow or mass measurements), the reporter is required to provide a description of the manufacturer's recommended method. The only methods listed in 40 CFR 98.244 are methods for determining carbon content or molecular weight, and they are all in paragraph (b)(4) of 40 CFR 98.244. Thus, one proposed amendment to clarify 40 CFR 98.246(a)(6) would require reporters to report the name of each method that is used to determine carbon content or molecular weight in accordance with 40 CFR 98.244(b)(4). The current requirement to provide a description of manufacturer's recommended method has been interpreted in various ways, and a wide variety of information has been provided in reports to date. To simplify this reporting requirement,

reduce burden, and promote consistency among reporters, the second proposed change would require reporters to describe each type of device used to determine flow or mass (e.g., flow meter or weighing device) and identify the method used to determine flow or mass for each device in accordance with 40 CFR 98.244(b)(1) through (b)(3). Methods could be identified by method number, title, or other descriptor.

We are proposing to revise 40 CFR 98.246(a)(8) to specify that reporters using the mass balance calculation method must identify combustion units outside of the petrochemical process unit that burned process off-gas. This section of subpart X currently requires identification of each combustion unit that burned both process off-gas and supplemental fuel. Supplemental fuel is defined as fuel burned in a petrochemical process that is not produced within the process itself. Thus, the current language in 40 CFR 98.246(a)(8) requires identification of only those combustion units within a petrochemical process unit that burn off-gas from the process. The purpose of the proposed change is to extend this requirement to combustion units that combust fuel gas generated by the petrochemical process but are not part of the petrochemical process. This additional information is needed to allow us to verify correct reporting of fuel gas in subpart C.

We are proposing to revise 40 CFR 98.246(a)(9) for reporters using the alternative to sampling and analysis for carbon content as specified in 40 CFR 98.243(c)(4) of the mass balance calculation method. One of the proposed changes would clarify the units of time to report in (days) for periods during which off-specification product was produced. A second proposed revision would eliminate reporting of the volume or mass of off-specification products produced. If a facility is complying with 40 CFR 98.243(c)(4) for a product and produces off-specification products so that the average monthly purity does not fall below 99.5 percent, then the facility need not report the amount of off-specification product. However, if the average monthly purity does fall below 99.5 percent, the facility must use the carbon content procedures in 40 CFR 98.243(c)(3) for the off-specification product, and must report the amount and carbon content of the off-specification product under 40 CFR 98.246(a)(4). The proposed revision would reduce the burden on reporters.

We are proposing several changes to the CEMS reporting requirements in 40 CFR 98.246(b)(4), (b)(5), and (b)(6) to improve the accuracy of emissions attributed to subpart X sources, clarify requirements, and reduce burden. We would revise 40 CFR 98.246(b)(4) to specify that for each CEMS monitoring location where CO_2 emissions from either the process or combustion of off-gas from the process are measured, the facility must provide an estimate of the fraction of the total CO_2 emissions that are attributable to the petrochemical process unit, based on engineering judgment. Subpart X currently requires this reporting for process off-gas combustion emissions but not for process emissions. We need both to correctly determine the quantity of CEMS location emissions attributable to the petrochemical process unit. We would remove the requirements in 40 CFR 98.246(b)(4) and (b)(5) to report CO_2, CH_4, and N_2O emissions from each CEMS location because this requirement is also specified in 40 CFR 98.36(c)(2), which is referenced from 40 CFR 98.246(b)(2). Similarly, we would remove the requirement to report the aggregated total emissions from all CEMS locations because the EPA will calculate sums from the reported values for individual CEMS locations, as necessary. In 40 CFR 98.246(b)(5) we would also remove the requirements to report inputs to Equation C–8 because we are proposing to replace the requirement to use Equation C–8 with a requirement to use Equation C–10, as noted previously in this section. Instead of the Equation C–8 inputs, reporters would report the total annual heat input for Equation C–10, as required in 40 CFR 98.35(c)(2). Finally, we are proposing to remove the requirement to identify each stationary combustion unit that burns petrochemical process off-gas. We use combustion unit identifications to help verify the distribution of emissions reported under subparts C and X for reporters that use the mass balance method. The identifications are not needed for reporters that use CEMS because all emissions from each combustion unit that burns process off-gas are reported under subpart X. On balance, we expect that these changes will reduce the reporting burden.

K. Subpart Y—Petroleum Refineries

We are proposing changes, technical corrections and clarifying amendments for subpart Y of Part 98 (Petroleum Refineries). The more substantive corrections, clarifying, and other amendments to subpart Y are found here. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

In conjunction with the addition of fuel gas to Table C–2 as discussed in Section II.B of this preamble, we are proposing revisions to subpart Y to change the reference to Table C–2 at 40 CFR 98.253(b)(2) and (b)(3) from ''Petroleum Products'' to ''Fuel Gas'' for calculation of CH_4 and N_2O from combustion of fuel gas. We are also proposing to revise 40 CFR 98.252(a) to remove the reference to the default emission factors for ''Petroleum (All fuel types in Table C–1)'' in Table C–2. Because the emission factors for Petroleum Products and Fuel Gas are identical, this will not change the result of any emission calculation.

We are proposing to revise 40 CFR 98.253(f)(4) and the terms ''F_{SG}'' and ''MF_c'' in Equation Y–12 to clarify the calculation methods for sulfur recovery plants to address both on-site and off-site sulfur recovery plants. We are also proposing changes to the reporting requirements in 40 CFR 98.256(h) to clarify the reporting requirements for on-site and off-site units. The proposed revisions would clarify the requirements that should apply to on-site versus off-site sulfur recovery plants.

We are proposing to clarify 40 CFR 98.253(j) regarding when Equation Y–19 must be used for calculation of CH_4 and CO_2 emissions. The proposed change clarifies that Equation Y–19 must be used to calculate CH_4 emissions if the reporter elected to use the method in 40 CFR 98.253(i)(1), and may be used to calculate CO_2 and/or CH_4 emissions, as applicable, if the reporter elects this method as an alternative to the methods in paragraphs (f), (h), or (k) of 40 CFR 98.253. We are also proposing to clarify reporting requirements to 40 CFR 98.256(j) and (k) to specify that when Equation Y–19 is used for asphalt blowing operations or delayed coking units, the facility must report the relevant information required under 40 CFR 98.256(l)(5) rather than all of the reporting elements in 40 CFR 98.256(l).

L. Subpart Z—Phosphoric Acid Production

We are proposing an additional requirement, minor corrections, and clarifications to subpart Z of Part 98 (Phosphoric Acid Production). The more substantive corrections, clarifying, and other amendments to subpart Z of Part 98 are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

The terminology used in the introductory text of 40 CFR

98.263(b)(1)(ii) and definition of the term ''$CO_{2n,}$'' could be interpreted as meaning that the method for sampling carbon content of rock represented direct CO_2 emissions from the process, which was not the EPA's intention. While the equation calculates CO_2 emissions from a process line, the input values obtained from the measurements of grab samples are CO_2 content of the rock. Therefore, we are proposing to amend 40 CFR 98.263(b)(1)(ii) and the description of ''$CO_{2n,i}$'' to indicate that the sampling method provides CO_2 content, and not emissions.

We are also proposing to revise 40 CFR 98.266(b) to require that the annual report must include the annual phosphoric acid production capacity (tons), rather than the annual permitted phosphoric acid production capacity. Through implementation of the rule, the EPA has learned that not all facilities have a ''permitted'' production capacity. The EPA is proposing to revise this requirement to report annual production capacity, as opposed to permitted production capacity, in the current Part 98.[31] The proposed change acknowledges that not all phosphoric acid production facilities have a permitted production capacity. Additionally, not all facilities produce to the permitted capacity. This change is necessary to ensure that the EPA collects consistent annual production capacity data and will provide a better characterization of the relationship between industry production and emissions.

We are also proposing to amend 40 CFR 98.266 to add a requirement to report the number of times missing data procedures were used to estimate the CO_2 content of the phosphate rock. The proposed requirement is consistent with 40 CFR 98.264(b), which allows for determination of either inorganic carbon content or CO_2 content.

M. Subpart AA—Pulp and Paper Manufacturing

We are proposing changes to subpart AA of Part 98 (Pulp and Paper Manufacturing) to revise default emission factors and clarify the information that must be reported. The more substantive corrections, clarifying, and other amendments to subpart AA of Part 98 are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to amend 40 CFR 98.273(a)(3), 40 CFR 98.276(e) and Equation AA–1 to remove the references to site-specific emissions factors because there are no methods or requirements in subpart AA for deriving the site-specific GHG emission factors for biomass combustion.

We are proposing revisions to the emission factors shown in Tables AA–1 and AA–2 to correct format errors that occurred in the printing of the rule in the CFR. Specifically, in Table AA–1, the CH_4 and N_2O emission factors were intended to apply to each fuel. However, when printed in the **Federal Register**, lines were added to separate each row/fuel, and this format change created the appearance that the factors apply only to the first fuel listed in the table. To correct this error, we are proposing to insert the CH_4 and N_2O emission factors for each individual fuel. Today's proposed changes will make the rule conform to Tables AA–1 and AA–2 as they originally were proposed in the April 10, 2009 **Federal Register** (74 FR 16692). A similar error occurred with Table AA–2. In addition, the Kraft Lime Kiln N_2O factors were inadvertently omitted in the printing of Table AA–2; it was intended to be zero (0) for all fuels in Table AA–2 (as proposed to be amended in the August 11, 2010 **Federal Register** (75 FR 48811)).

In addition to correcting formatting errors, we are proposing revisions to the CH_4 and N_2O emission factors for pulping liquor in Table AA–1 based on emissions test data made available to us for eight U.S. recovery furnaces in the AF&PA Petition as discussed above. Our analysis of that data confirms that the information contained in the AF&PA Petition is more robust and relevant for U.S. recovery furnaces than the original Table AA–1 emission factors which were previously adopted from a literature review.[32]

We are also proposing additional changes to Table AA–2 to (1) Amend the title to remove the reference to fossil fuel since the table contains a biogenic fuel as well (biogas); (2) specify that the emission factors for residual and distillate oil apply for any type of residual (no. 5 or 6) or distillate (no. 1, 2 or 4) fuel oil to clarify our intent that the emissions factors apply to all grades of these fuel types; and (3) add a row to specify that the Table C–2 emission factor for CH_4 and the Table C–2 emission factors for CH_4 and N_2O may be used, respectively, for ancillary lime kilns and calciners combusting fuels (e.g., propane, used oil, and lubricants) that were not previously listed in Table AA–2. The Technical Support Document for Subpart AA from the final Part 98 [33] explains that the operating temperatures in rotary lime kilns appear to be too high for appreciable formation of N_2O, so an emission factor of zero is proposed for N_2O from ancillary fuel combustion in pulp mill lime kilns.

We are proposing to amend 40 CFR 98.276(k) to clarify the EPA's intent regarding the annual pulp and/or paper production information that must be reported. Since publication of the rule, we have received questions from the industry about what this requirement means and the units of measure to use for reporting pulp production. Hence, we are proposing to amend the rule to clarify that the annual production information must consist of the production of air-dried, unbleached virgin pulp produced onsite during the reporting year and the production of paper products exiting the paper machine(s) during the reporting year, prior to application of any off-machine coatings.[34] Greenhouse gas emissions from pulp and paper operations reported under subpart AA are dependent on the amount of pulp produced. Reporting the total annual production of air-dried unbleached virgin pulp provides a common reporting basis for all types of pulp mills regardless of production processes (e.g., bleaching, secondary fiber pulping, and paper making) that happen downstream of the virgin pulping process where the GHG emissions are generated.

N. Subpart BB—Silicon Carbide Production

We are proposing several revisions to subpart BB of Part 98 (Silicon Carbide Production). The more substantive corrections, clarifying, and other amendments to subpart BB of Part 98 are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

[31] See Table 9 of this preamble for the EPA's proposed data category assignment and confidentiality determination for this data element.

[32] See the memorandum in the docket titled, *''Kraft Pulping Liquor and Woody Biomass Methane (CH_4) and Nitrous Oxide (N_2O) Emission Factor Literature Review.''*

[33] Available at: *http://www.epa.gov/ghgreporting/documents/pdf/archived/tsd/TSD Pulp_and_Paper 2_11_09.pdf.*

[34] See the memorandum ''Proposed data category assignments and confidentiality determinations for new and substantially revised data elements in the proposed '2013 Revisions to the Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements'" (hereafter referred to as ''Confidentiality Determinations Memorandum'') (Docket Id. No. EPA–HQ–OAR–2012–0934) for the proposed category assignments and confidentiality determinations for new and revised data elements.

We are proposing to revise 40 CFR 98.282(a) to remove the requirement for silicon carbide production facilities to report CH_4 emissions from silicon carbide process units or furnaces. We are proposing to revise 40 CFR 98.283(d) to remove the CH_4 calculation methodology. The current CH_4 calculation methodologies in subpart BB overestimate the emissions of CH_4 from silicon carbide facilities because the equations do not take into consideration the destruction of CH_4 emissions. Because these emissions are typically controlled, emissions from these facilities are minimal, and the EPA has determined that the requirement to report CH_4 emissions is not necessary to understand the emissions profile of the industry.

Reporters must continue to monitor and report CO_2 emissions from silicon carbide process units and production furnaces. We are proposing to revise 40 CFR 98.283 so that CO_2 emissions are to be calculated and reported for all process units and furnaces combined. The EPA intended in the final Part 98 (October 30, 2009) to require reporting from all silicon carbide process units and production furnaces, as specified in 40 CFR 98.282. However, 40 CFR 98.283 states that ''You must calculate and report the annual process CO_2 emissions from each silicon carbide process unit or production furnace using the procedures in either paragraph (a) or (b) of this section.'' The proposed correction would revise 40 CFR 98.283 for consistency with the reporting requirements of 40 CFR 98.286 and reduce burden by combining all emissions.

O. Subpart DD—Electrical Transmission and Distribution Equipment Use

We are proposing two substantive corrections to subpart DD (Electrical Transmission and Distribution Equipment Use) in this section. We are proposing to revise 40 CFR 98.304(c)(1) and (c)(2) to correct the accuracy and precision requirements for weighing cylinders. In the current Part 98, the subpart DD regulatory text for 40 CFR 98.304(c)(1) and (c)(2) presents the required scale accuracies as ''2 pounds of the scale's capacity.'' The scale accuracy requirement for subpart DD was intended to be ''2 pounds of true weight,'' as expressed in the ''Technical Support Document: Emissions from Electric Power Equipment Use'' and ''EPA's Response to Public Comments: Subpart DD: Electric Transmission and Distribution Equipment Use'' [35], and the preamble to the final Part 98 (74 FR 56260, October 30, 2009). The proposed amendments would make 40 CFR 98.304(c)(1) and (c)(2) consistent with the EPA's intent.

P. Subpart FF—Underground Coal Mines

We are proposing multiple amendments to subpart FF of Part 98 (Underground Coal Mines) to clarify certain provisions and equation terms, harmonize reporting requirements, and improve verification of annual GHG reports. The more substantive corrections, clarifying, and other amendments to subpart FF of Part 98 are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to revise the terminology in subpart FF in response to questions submitted by reporters. Reporters have noted that ventilation does not take place through wells, but rather mine ventilation system shafts or vent holes, and degasification systems do not use shafts, but rather wells or gob gas vent holes. Reporters have also stated that mine ventilation air is not flared, rather it is destroyed using a ventilation air methane (VAM) oxidizer. Therefore we are proposing to revise provisions in 40 CFR 98.320(b), 40 CFR 98.322(b) and (d), 40 CFR 98.323(c), and 40 CFR 98.324(b) and (c) to adopt terminology that more accurately reflects industry operations.

We are also proposing to revise the reporting requirements of subpart FF to include additional data elements that will allow the EPA to verify the data submitted, perform a year to year comparison of the data, and assess the reasonableness of the data reported.[36] The data elements are readily available to the reporter and would not require additional data collection or monitoring or significantly increase the reporting burden. The additional data elements are included in the proposed revised 40 CFR 98.326(h), (i), (j), (o), (r), and new requirements (t) and (u) and include: The moisture correction factor used in the emissions equations, units of measure for the volumetric flow rates reported, method of determining the gas composition, the start date and close date of each well or shaft, the number of days the well or shaft was in operation during the reporting year, and the amount of CH_4 routed to each destruction device. We are also proposing to add a reporting requirement (40 CFR 98.326(u)) for the reporting mines to provide the Mine Safety and Health Administration (MSHA) identification. This identification number will allow the EPA to easily identify the facility for verification and comparison of the Inventory data with GHGRP data. The reporting requirements have also been updated to harmonize with changes to the calculation methods as itemized in the Table of Revisions (see Docket ID No. EPA–HQ–2–12–0934).

Q. Subpart HH—Municipal Solid Waste Landfills

We are proposing multiple revisions to 40 CFR part 98, subpart HH (Municipal Solid Waste Landfills) to clarify equations and amend monitoring requirements to reduce burden for reporters. The more substantive corrections, clarifying, and other amendments to subpart HH are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to amend the definition of the degradable organic carbon (DOC) term for Equation HH–1 to indicate that the DOC values for a waste type must be selected from Table HH–1. When we originally proposed subpart HH in April of 2009, Equation HH–1 applied to both MSW and industrial waste landfills. When we finalized Subpart HH for MSW landfills only, the definition of the DOC term allowed for the default value from Table HH–1 or measurement data, if available. Although we included measurement methods for determining site-specific DOC values for industrial waste streams within Subpart TT, we do not consider that these laboratory methods are suitable for determining the DOC for MSW landfills in subpart HH because of the variability and heterogeneity of MSW.

The EPA may take into consideration the usage of site-specific DOC values for MSW landfills in Equation HH–1 if suitable measurement methods are available. We specifically request comment from reporters who have used measurement methods for determining DOC. We request that the commenter provide information on the type of waste streams for which measurement methods were used, the analytical method used to determine DOC, and procedures used to ensure that the samples tested were representative of the waste stream tested for different years. We also note that, if measurements of DOC are made for different years, the DOC variable in Equation HH–1 should be a function of

[35] See *http://www.epa.gov/ghgreporting/reporters/subpart/dd.html.*

[36] See Table 9 of this preamble for the proposed category assignments and confidentiality determinations for each proposed data element.

the year the waste is placed in the landfill. As currently written, the DOC term in Equation HH–1 is a constant for a given waste type and is not a function of the disposal year. We therefore also request comment on the need to revise Equation HH–1 and the definition of DOC to allow DOC to be a different value for different years that a waste is placed in the landfill.

We are proposing to amend the definition of the term ''F'' in Equation HH–1 (fraction by volume of CH_4 in the landfill gas) to further clarify that this term should be corrected to zero percent (0%) oxygen. Unlike the concentration of CH_4 in the landfill gas as measured for use in Equation HH–4, the term F is more accurately defined as the fraction of the dissimilated carbon that is metabolized to CH_4. Some landfill gas collection systems may draw ambient air into the collected landfill gas, thereby diluting the concentration of CH_4 in the landfill gas. The proposed amendment is needed to correct measurements of CH_4 concentrations made in gas collection systems (or elsewhere) for ambient air dilution so that the resultant value of F more closely matches the fraction of degraded carbon that is generated as CH_4.

We are also proposing to revise the definition of parameter ''N'' in Equation HH–4 and the provisions of 40 CFR 98.343(b)(2)(i), (ii), (iii)(A), and (iii)(B). We received comments from landfill owners and operators that the requirement to sample CH_4 concentrations weekly was burdensome, particularly for closed landfills, and unnecessary because the CH_4 concentrations did not vary appreciably over the year. Some landfill owners and operators provided EPA with their weekly flow and CH_4 concentration data for the 2011 reporting year for 395 unique landfills. We reviewed and analyzed the data and determined that reducing the CH_4 concentration monitoring frequency from weekly to monthly would increase the overall uncertainty of a landfill's CH_4 recovery from ±8 percent to ±10.5 percent. (See ''Review of Weekly Landfill Gas Volumetric Flow and Methane Concentrations,'' October 18, 2012, in Docket ID No. EPA–HQ–OAR–2012–0934.) It is reasonable to conclude that the on-going annual costs associated with monitoring CH_4 concentrations monthly would be approximately one-fourth the cost of monitoring weekly. Thus, landfill owners can realize a significant savings in their monitoring costs while not significantly increasing the uncertainty in the calculated CH_4 recovery. Based on the data provided by the landfill owners and operators and our analysis of that data, we are proposing to revise the minimum monitoring frequency from weekly to monthly.

We are proposing to amend the oxidation fraction default value used in Equations HH–5, HH–6, HH–7, and HH–8 of subpart HH. We received comments from landfill owners and operators that the oxidation fraction default value of 10 percent that is required to be used in these equations is too low and that many landfills exhibit much higher oxidation fractions. Over the past several years, numerous U.S. landfills have been tested to estimate the oxidation fraction; the newly tested landfills have been predominately landfills with gas collection systems and clay soil or ''other soil mixture'' covers. We reviewed the oxidation study data and analyzed Subpart HH data to evaluate various options for revising the default oxidation fraction. Based on our review, we agree that the 10 percent soil oxidation fraction likely underestimates the amount of methane oxidized in the surface soil layer when the landfill gas flow through the soil surface is reduced, as is the case for landfills with gas collection systems. We considered a revised single default oxidation fraction or a default oxidation fraction based on the type of cover soil used at the landfill, but these defaults do not take in account the key variable, which is the methane flux rate entering the surface soil layer. Based on our analysis, we are proposing three different default oxidation fractions depending on the methane flux ''bin,'' found in new proposed Table HH–4. For cases where the methane flux is projected to be high (greater than 70 grams/m^2/day), the default oxidation fraction remains as 10 percent. For cases where the methane flux is projected to be low (less than 10 grams/m^2/day), the default proposed oxidation fraction is 35 percent. For cases with moderate methane flux rates (10 to 70 grams/m^2/day), the proposed default oxidation fraction is 25 percent. We are also proposing to add requirements in paragraph 98.346(h) and paragraphs 98.346(i)(8), (10), and (11) for facilities to report the oxidation fraction used in each of Equations HH–5, HH–6, HH–7, and HH–8.[37] We have concluded that this binned approach provides a more realistic estimate of the role of methane oxidation in the surface soil on the methane emissions than the single default oxidation fraction. We are including Table HH–4 to reference these values. Table HH–4 also provides a calculation method to determine the methane flux rate to be used for determining the oxidation fraction when Equations HH–5, HH–6, HH–7, or HH–8 are used. Reporters under subpart TT will also use Table HH–4 when Equation TT–6 is used to determine the methane generation adjusted for oxidation. For further information regarding our analysis of methane oxidation fractions, see ''Review of Methane Flux and Soil Oxidation Data'', December 7, 2012, in Docket ID No. EPA–HQ–OAR–2012–0934.

We are also proposing to amend Equations HH–6, HH–7, and HH–8 and surrounding text to generalize these equations in the event that the landfill contains multiple landfill gas collection system measurement locations and/or multiple destruction devices. When there is a single landfill gas measurement location, these equations are identical to the existing equations. However, the existing equations were inadequate to calculate CH_4 emissions at landfills with gas collection systems that have multiple measurement locations and/or multiple destruction devices. In addition to the revisions proposed to clarify equation term definitions when multiple measurement locations or destruction devices are used, we are also proposing to revise the definition of the f_{Dest} term for Equation HH–6 and HH–8 to clarify that the fraction of hours the destruction device was operating should be calculated as the number of operating hours for the device divided by the hours that gas flow as sent to the device.

We are also proposing to amend the first sentence in 40 CFR 98.345(c) to revise ''in reporting years'' to ''in the reporting year'' to clarify that the missing data procedures are for a reporting year and that reporters do not need to report substitute data information for years prior to the current reporting year, thereby reducing the burden on reporters.

Finally, we are proposing to revise 40 CFR 98.346(d)(1) and (e) to move the reporting elements pertaining to the methane correction factor (MCF) from paragraph (d)(1) to paragraph (e) because MCF is not a function of the waste type. This amendment eliminates the duplicative reporting requirements for MCF and its related reporting elements (i.e., reporters would no longer be required to report this information for each waste type).

[37] The EPA is proposing category assignments and confidentiality determinations for these new and revised data elements in the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

R. Subpart LL—Suppliers of Coal-based Liquid Fuels

We are proposing multiple revisions to 40 CFR part 98, subpart LL (Suppliers of Coal-based Liquid Fuels) to clarify requirements and amend data reporting requirements to reduce burden for reporters. This section includes the more substantive corrections, clarifying, and other amendments to subpart LL. Additional minor corrections are discussed in EPA's Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

To reduce burden, we are proposing to remove the requirements at 40 CFR 98.386(a)(1), (a)(5), (a)(13), (b)(1), and (c)(1) for each facility, importer, and exporter to report the annual quantity of each product or natural gas liquid on the basis of the measurement method used. Reporters would continue to report the annual quantities of each product or natural gas liquid in metric tons or barrels at 40 CFR 98.386(a)(2), (a)(6), (a)(14), (b)(2), and (c)(2). We are also retaining the requirement to report a complete list of methods used to measure the annual quantities reported for each product or natural gas liquid.

S. Subpart MM—Suppliers of Petroleum Products

We are proposing several revisions to 40 CFR part 98, subpart MM (Suppliers of Petroleum Products) to clarify requirements and amend data reporting requirements to reduce burden for reporters. This section includes the more substantive corrections, clarifying, and other amendments to subpart MM. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to clarify the equation term for ''$Product_i$'' at 40 CFR 98.393(a)(2) to exclude those products that entered the refinery but are not reported under 40 CFR 98.396(a)(2). We are proposing harmonizing changes to 40 CFR 98.394(b) to make the equipment calibration requirements for petroleum products suppliers consistent with other Part 98 calibration requirements. The requirements for equipment calibration in 40 CFR part 98, subpart A (General Provisions) allow for postponement of calibrations for units and processes that operate continuously with infrequent outages. We are proposing similar provisions be incorporated into the subpart MM equipment calibration requirements. The proposed changes would also provide flexibility for reporters meeting the equipment calibration requirements.

As with the proposed changes to subpart LL, in order to reduce burden for reporters, we are proposing to remove the requirements of 40 CFR 98.396(a)(1), (a)(5), (a)(13), (b)(1), and (c)(1) for each facility, importer, and exporter to report the annual quantity of each petroleum product or natural gas liquid on the basis of the measurement method used. Reporters would continue to report the annual quantities of each petroleum product or natural gas liquid in metric tons or barrels at 40 CFR 98.396(a)(2), (a)(6), (a)(14), (b)(2), and (c)(2). We are also retaining the requirement to report a complete list of methods used to measure the annual quantities reported for each product or natural gas liquid.

In order to reduce the recordkeeping and reporting burden, the EPA is proposing to eliminate the reporting requirement for individual batches of crude oil feedstocks. The reporting requirements for crude oil at 40 CFR 98.396(a)(20) are proposed to be changed to require only the annual quantity of crude oil. We are also proposing to eliminate the requirement to measure the API gravity and the sulfur content of each batch of crude oil at 40 CFR 98.394(d). We are also proposing to remove the requirement at 40 CFR 98.394(a)(1) that a standard method by a consensus-based standards organization be used to measure crude oil on site at a refinery, if such a method exists. Other associated changes to the rule to harmonize with this change include removing the definition of ''batch,'' removing the procedures for estimating missing data for determination of API gravity and sulfur content at 40 CFR 98.395(c), and the recordkeeping requirement for crude oil quantities at 40 CFR 98.397(b). Reporters would still be required to maintain all the records required to support information contained in the reports as specified at 40 CFR 98.397(a).

We are proposing to include the definitions of natural gas liquids (NGL) and bulk NGLs in the subpart MM definitions at 40 CFR 98.397 to clarify the distinction between NGL and bulk NGL for reporting purposes under subpart MM. ''Natural gas liquids (NGLs)'' for purposes of reporting under subpart MM means hydrocarbons that are separated from natural gas as liquids through the process of absorption, condensation, adsorption, or other methods, and are sold or delivered as differentiated product. Generally, such liquids consist of ethane, propane, butanes, or pentanes plus. Those subject to subpart MM are required to report NGLs as the individual differentiated product and are not required to conduct testing to determine additional components (i.e., impurities) that are contained within the differentiated product. For a mixture, the individual components should be reported. For example, if a refinery receives a known mixture of propane and ethane, the refiner must report the quantities of propane and ethane individually. Undifferentiated NGLs would be reported as bulk NGLs for subpart MM. We are also proposing to clarify the reporting requirements for bulk NGLs and NGLs. NGLs should be reported either as differentiated NGLs or as bulk NGLs. The requirement at 40 CFR 98.396(a)(22) is proposed to be modified to specify that NGLs reported in 40 CFR 98.396(a)(2) should not be reported again in 40 CFR 98.396(a)(22).

Finally, we are proposing to revise the default density and emission factors in Table MM–1 for propane, propylene, ethane, ethylene, isobutane, isobutylene, butane, and butylene. Because these compounds are gases under standard conditions, the default density metric must be presented using a stated temperature and pressure. For all compounds except ethylene, we are proposing estimates of density and calculated emission factors at 60 degrees F and saturation pressure, the standard temperature and pressure conditions used by industry. For ethylene, because it cannot be liquefied above 48.6°F, we have selected as a basis for the values of density and emission factor conditions at 41°F (slightly under the critical temperature) and the corresponding saturation pressure. The current and proposed values for default density and emission factors are included in Table 6 of this preamble.

TABLE 6—PROPOSED CHANGES TO TABLE MM–1 TO SUBPART MM OF PART 98–DEFAULT FACTORS FOR PETROLEUM PRODUCTS AND NATURAL GAS LIQUIDS

Products	Column A: density (metric tons/bbl)	Column C: emission factor (metric tons CO_2/bbl)	Proposed Column A: density (metric tons/bbl)	Proposed Column C: emission factor (metric tons CO_2/bbl)
Ethane [3]	0.0866	0.2537	0.0579	0.170
Ethylene [4]	0.0903	0.2835	0.0492	0.154
Propane [3]	0.0784	0.2349	0.0806	0.241
Propylene [3]	0.0803	0.2521	0.0827	0.260
Butane [3]	0.0911	0.2761	0.0928	0.281
Butylene [3]	0.0935	0.2936	0.0972	0.305
Isobutane [3]	0.0876	0.2655	0.0892	0.270
Isobutylene [3]	0.0936	0.2939	0.0949	0.298

[3] The density and emission factors for components of LPG determined at 60°F and saturation pressure (LPGs other than ethylene).
[4] The density and emission factor for ethylene determined at 41°F and saturation pressure.

T. Subpart NN—Suppliers of Natural Gas and Natural Gas Liquids

The EPA is proposing multiple corrections and clarifying amendments to the provisions of subpart NN (Suppliers of Natural Gas and Natural Gas Liquids). The more substantive corrections, clarifying, and other amendments to subpart NN are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

First, we are proposing to amend the definition of Local Distribution Companies (LDCs) in 40 CFR 98.400(b) to coincide with the definition of LDCs in 40 CFR 98.230(a)(8) (40 CFR part 98, subpart W). For LDCs that operate in multiple states, we are proposing to clarify that the operations in each state are considered a separate LDC. For example, if an LDC owns and operates pipelines in two adjacent states, the LDC is considered two separate entities both for the purpose of determining applicability and for registering and reporting under subpart NN. We are also proposing a revision to clarify that interstate and intrastate pipelines delivering natural gas either directly to major industrial users or to farm taps upstream of the local distribution company inlet are not included in the definition of an LDC. The proposed changes are harmonizing changes that improve the consistency of provisions across Part 98.

We are also proposing to revise 40 CFR 98.406(b)(7).[38] The current subpart NN rule requires that LDCs report annual volume of natural gas delivered to each meter registering supply equal to or greater than 460,000 thousand standard cubic feet (Mscf) during the calendar year. The EPA is proposing a change in the calculation and reporting requirements that would require that if the LDC knows that a series of meters serves one particular customer receiving a total of greater than 460,000 Mscf during the year, the LDC would be required to report these deliveries per customer rather than per meter. If the LDC does not know if the series of meters serve a single customer or multiple customers, the LDC may continue to report deliveries to individual meters. Customers that receive over 460,000 Mscf (approximately 25,000 Mtons CO_2) for use in combustion are required to report emissions under subpart C or subpart D. We are proposing the change to 40 CFR 98.407(b)(7) in order to greatly minimize double counting emissions reported under subparts C or D and emissions that would result from natural gas supplied reported under subpart NN from facilities that may receive a total of over 460,000 Mscf of natural gas through several meters.

The EPA received comments that the multiple streams of natural gas included in Equation NN–5 may have different characteristics (e.g., HHV). Subpart NN currently requires the use of a single emission factor for all types of gas streams accounted for in Equation NN–5 (e.g., gas stored, liquefied natural gas removed from storage, natural gas received from local production). Because the characteristics of these streams may differ, the EPA agrees that emissions associated with the supply of natural gas would be more accurately calculated using emission factors specific to each stream. To allow reporters the flexibility to use different emission factors for different natural gas streams, the EPA is proposing Equation NN–5 be replaced with two equations, Equations NN–5a and NN–5b. The greenhouse gas quantity associated with the net amount of natural gas that is placed into or removed from storage during the year is proposed to be calculated using Equation NN–5a. Emissions that would result from the combustion or oxidation of natural gas supplied that bypassed the city gate are proposed to be calculated using Equation NN–5b. Separating Equation NN–5 into two equations does not impose additional burden on reporters. LDCs already monitor the volume of gas placed into or removed from storage separately from natural gas that bypassed the city gate. Further, LDCs may use different emission factors in Equations NN–5a and NN–5b, though they are not required to. The default value may be used. Additionally, we are proposing a change to Equation NN–6 that incorporates the two proposed NN–5 equations. With this change, all the equation terms resulting in net additions to the CO_2 quantity are added, and terms resulting in decreases to the CO_2 quantity are subtracted from the LDC's subpart NN total. This change will make Equation NN–6 easier to understand.[39] Finally, the EPA has learned that o-grade as well as y-grade bulk NGLs are fractionated by facilities subject to subpart NN. Additionally, the EPA has learned that some fractionators strip out only a portion of the bulk NGL stream and supply the remaining bulk NGL downstream to other fractionators, where it is separated into its constituent products. Therefore, the EPA is

[38] The EPA has proposed a data category and confidentiality determination for this revised data element. See the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

[39] We are also proposing to revise the reporting requirements in 40 CFR 98.406(b) in order to harmonize the reported data with the change to the equations in subpart NN. See the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934) for the proposed category assignments and confidentiality determinations for new and revised data elements.

proposing revisions to 40 CFR 98.406(a)(4) to add new reporting elements that require reporting of the quantity of o-grade, y-grade, and other types of bulk NGLs received, and the quantity not fractionated, but supplied downstream.[40]

We are also proposing changes to the HHV and emission factors in Table NN–1 and NN–2. As discussed in this preamble for subpart C and subpart MM, we are proposing to revise the default HHV and emission factors for the individual components of liquid petroleum gases (LPG) including propane, ethane, isobutane, and butane. These values for Table NN–1 and NN–2 are based on the same HHV, density and carbon share used for the HHV and emission factors in Table C–1 and MM–1. Since these compounds are gases under standard conditions, the default emission factors in Table NN–1 and NN–2 (kg CO_2 per MMBtu or MT CO_2 per barrel) and HHV in Table NN–1 (MMBtu per barrel) must be presented using a density at a stated temperature and pressure. For all these LPGs, we are proposing calculated values of HHV and emission factors using the density of the liquid at 60°F and saturation pressure, standard temperature and pressure conditions used by industry. The current and proposed default HHV and emission factors are shown in Tables 7 and 8 of this preamble.

TABLE 7—PROPOSED CHANGES TO TABLE NN–1 TO SUBPART NN OF PART 98–DEFAULT FACTORS FOR CALCULATION METHODOLOGY 1 OF THIS SUBPART

Fuel	Default high heating value factor	Default CO_2 emission factor (kg CO_2/MMBtu)	Proposed Default higher heating value [1]	Proposed Default CO_2 emission factor (kg CO_2/MMBtu)
Natural Gas	1.028 MMBtu/Mscf	53.02	1.026 MMBtu/Mscf	53.06
Propane	3.822 MMBtu/bbl	61.46	3.84 MMBtu/bbl	62.87
Normal butane	4.242 MMBtu/bbl	65.15	4.34 MMBtu/bbl	64.77
Ethane	4.032 MMBtu/bbl	62.64	2.85 MMBtu/bbl	59.60
Isobutane	4.074 MMBtu/bbl	64.91	4.16 MMBtu/bbl	64.94
Pentanes plus	4.620 MMBtu/bbl	70.02	4.62 MMBtu/bbl	70.02

[1] Conditions for higher heating values presented in MMBtu/bbl are 60°F and saturation pressure.

TABLE 8—PROPOSED CHANGES TABLE NN–2 TO SUBPART NN OF PART 98–DEFAULT VALUES FOR CALCULATION METHODOLOGY 2 OF THIS SUBPART

Fuel	Unit	Default CO_2 emission value (MT CO_2/Unit)	Proposed Default CO_2 emission value (MT CO_2/Unit) [1]
Natural Gas	Mscf	0.055	0.0544
Propane	Barrel	0.235	0.241
Normal butane	Barrel	0.276	0.281
Ethane	Barrel	0.253	0.170
Isobutane	Barrel	0.266	0.270

[1] Conditions for emission value presented in MT CO_2/bbl are 60°F and saturation pressure.

U. Subpart PP—Suppliers of Carbon Dioxide

We are proposing three substantive amendments to subpart PP of Part 98 (Suppliers of Carbon Dioxide) that are described in this section. One additional minor correction is discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to amend 40 CFR 98.423(a)(3)(i) to clarify that both capture and extraction facilities may use Equation PP–3a to aggregate annual data from multiple flow meters. In the December 17, 2010 Technical Corrections, Clarifying, and Other Amendments to the GHG Reporting Rule (75 FR 79092), we modified the provisions of 40 CFR 98.423(a)(3) to add Equation PP–3b to account for situations where a CO_2 stream is segregated such that only a portion is captured for commercial application or for injection and where a flow meter is used prior to the point of segregation; we also introduced the two-meter approach for facilities with production process units that capture a CO_2 stream. At that time, we made a harmonizing change and re-designated Equation PP–3 to Equation PP–3a. However, we inadvertently limited the application of equation PP–3a to facilities with production processes, whereas in the original promulgation, Equation PP–3 could be used by all facilities (including those with production wells) that have multiple streams and multiple flow meters. In this rulemaking we are proposing to amend 40 CFR 98.423(a)(3)(i) to clarify that facilities with CO_2 production wells that extract or produce a CO_2 stream may use Equation PP–3a to aggregate the total annual mass of CO_2 from multiple extracted streams. This clarifying change increases the reporting flexibility for facilities with CO_2 production wells by allowing them to aggregate CO_2 emissions from multiple CO_2 streams, without sacrificing the quality of data reported.

Finally, we are proposing to amend the reporting requirements of 40 CFR 98.426(f)(10) and (f)(11), which require reporting the aggregated annual CO_2 quantities transferred to enhanced oil and natural gas recovery or geologic sequestration. The proposed changes would clarify that these end use application options reflect injection of CO_2 to geologic sequestration or enhanced oil recovery as covered by 40 CFR part 98, subparts RR and UU, respectively.

[40] See the Confidentiality determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934) for the proposed category assignments and confidentiality determinations for new and revised data elements.

V. Subpart QQ—Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams

We are proposing multiple revisions to 40 CFR part 98, subpart QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams). The more substantive corrections, clarifying, and other amendments to subpart QQ are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934). We are proposing to correct the equation term ''S_t'' in Equations QQ–1 and QQ–2 to clarify that the input may be mass (charge per piece of equipment) or density (charge per cubic foot of foam, kg per cubic foot). The proposed revision is necessary to ensure that the input for each equation is in the correct units when the density of F–GHG in the foam is used.

We are proposing to amend an example within the definition of ''closed-cell foam'' at 40 CFR 98.438. The revised text would read ''*Closed-cell foams* include but are not limited to polyurethane (PU) foam contained in equipment, * * *'' The EPA is proposing this change to clarify that the reporting requirements apply to devices that contain F–GHGs in closed-cell foams even if the device is not an ''appliance'' as defined in this section. Appliances are defined as devices that contain a fluorinated greenhouse gas refrigerant. This change clarifies that the reporting requirements apply to equipment such as water heaters which have closed-cell foam but no refrigerant charge. Similarly the reporting requirements apply to refrigeration and air conditioning equipment that contain closed-cell foam but not refrigerants that are covered by this reporting program. As part of this change, we are also proposing to replace the term ''appliance'' with the term ''equipment'' at 40 CFR 98.436(a)(3), (a)(4), (a)(6)(ii), (a)(6)(iii), (b)(3), (b)(4), (b)(6)(ii), and (b)(6)(iii). This clarification does not subject any new foams to the reporting requirements as subpart QQ currently requires the reporting of all fluorinated GHG closed-cell foams excluding packaging foam.

We are proposing to revise the reporting requirements for 40 CFR 98.436(a)(6)(iii) and (b)(6)(iii) to match the reported data element to the units required to be reported. The proposed revision is a change from ''mass in CO_2e'' to ''density in CO_2e.'' The units specified for the data elements in the current subpart QQ are kg CO_2e/cubic foot, and are unchanged in this proposal.[41]

We are proposing to amend the definition of ''pre-charged electrical equipment component'' at 40 CFR 98.438. The EPA is revising the definition to include components charged with any fluorinated greenhouse gas. The current definition is limited to components charged with SF_6 or PFCs. The purpose of this revision is to align the definition of a component with that of ''pre-charged electrical equipment'' which is defined as containing a fluorinated greenhouse gas.

We are also proposing to remove the following reporting requirements to alleviate burden on reporters: 40 CFR 98.436(a)(5), (a)(6)(iv), (b)(5), and (b)(6)(iv). These provisions require reporters to supply the dates on which pre-charged equipment or closed-cell foams were imported or exported. The EPA established these reporting requirements to allow the agency to compare these data with shipment manifest data from Customs and Border Protection (CBP). The EPA has since learned that the data required under this subpart is more specific than the data found in the manifests, and has determined that the remaining information provided by the facilities is sufficient for verification purposes. The EPA can compare total annual imports and exports of appliances with reported data without needing date-specific information. In addition, the EPA has been made aware of the burden created by tracking and reporting each shipment by date. Many importers and exporters do not maintain data that include the appliance charge and foam type by date of import or export. Some of those that do indicated to the EPA that this would result in tens of thousands of reports. We do not believe that this level of specificity is necessary to understand the net import and export of fluorinated greenhouse gases within appliances and closed-cell foams. Given the burden and low utility of this data, the EPA is proposing to remove these requirements. The EPA is also not proposing any changes to the recordkeeping requirements of 40 CFR 98.437 as the current requirements do not require the records to be organized by date in this manner. We have determined that the current recordkeeping requirements are sufficient because they would contain a complete record of imports and exports without requiring an aggregation of this data by date.

W. Subpart RR—Geologic Sequestration of Carbon Dioxide

We are proposing several corrections to subpart RR of Part 98 (Geologic Sequestration of Carbon dioxide). The more substantive corrections, clarifying, and other amendments to subpart RR are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to add a requirement for facilities to report the standard or method used to calculate the mass or volume of contents in containers that is redelivered to another facility without being injected into the well.[42] The addition of this requirement improves consistency within subpart RR, as it was previously only required for facilities using flow meters but not containers. This new reporting element would be used for verification purposes. The proposed data element does not require additional data collection or monitoring by reporters, and as it is not a significant change, would not add burden to reporting entities.

X. Subpart SS—Electrical Equipment Manufacture or Refurbishment

We are proposing clarifying amendments and other corrections to subpart SS of Part 98 (Electrical Equipment Manufacture or Refurbishment); the more substantive corrections, clarifying, and other amendments to subpart SS are discussed in this section. Additional minor corrections to subpart SS are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to harmonize 40 CFR 98.453(d) and 40 CFR 98.453(h), clarifying the options available to estimate the mass of SF_6 and PFCs disbursed to customers in new equipment. The proposed revision does not add a new option, but clarifies the existing estimation methods for reporters under subpart SS.

The EPA intended to provide four options for the calculation of SF_6 or PFCs charged into equipment or containers that are sent to customers; these options are based on how the reporter determines the mass of SF_6 or PFCs in equipment or containers. The

[41] The EPA has proposed a data category and confidentiality determination for these revised data elements. See the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

[42] The EPA has proposed a data category and confidentiality determination for this revised data element. See the Confidentiality Determinations Memorandum ''Proposed data category assignments and confidentiality determinations for (Docket Id. No. EPA–HQ–OAR–2012–0934).

four options are monitoring the mass flow of the SF_6 or PFCs into the new equipment or cylinders using a flowmeter; weighing containers before and after gas from containers is used to fill equipment or cylinders; and using the nameplate capacity of the equipment either by itself or together with a calculation of the partial shipping charge.

The proposed changes are designed to correct inconsistencies between paragraphs so that all options are clearly identified as available. We are proposing to add text to 40 CFR 98.453(d) to include the options to use the nameplate capacity of the equipment by itself and to use the nameplate capacity along with a calculation of the partial shipping charge; these options were inadvertently omitted from that paragraph. The provisions of 40 CFR 98.453(h) currently state that reporters ''must'' use the nameplate capacity of the equipment, or calculate the partial shipping charge, to determine the mass of SF_6 or PFCs disbursed to customers in new equipment. This is inconsistent with the language and intent of 40 CFR 98.453(d), which was to provide facilities multiple options for determining the mass disbursed. Therefore, we are proposing to revise 40 CFR 98.453(h) to clarify that these calculation requirements only apply where reporters choose to estimate the mass of SF_6 or PFCs disbursed to customers in new equipment using the nameplate capacity of the equipment, either by itself or together with a calculation of the partial shipping charge.

Y. Subpart TT—Industrial Waste Landfills

We are proposing several amendments to 40 CFR part 98, subpart TT to clarify and correct calculation methods, provide additional flexibility for certain monitoring requirements, and clarify reporting requirements. The more substantive corrections, clarifying, and other amendments to subpart TT are discussed in this section. Additional minor corrections are discussed in the Table of Revisions (see Docket ID No. EPA–HQ–OAR–2012–0934).

We are proposing to revise the definition of the term ''DOC_F'' in Equation TT–1 when a 60-day anaerobic biodegradation test is used. In Equation TT–1, ''DOC_F'' is defined as the fraction of degradable organic carbon (DOC) that is dissimilated to landfill gas. The typical assumption is that half of the DOC will be anaerobically dissimilated and therefore, the default value for ''DOC_F'' currently used in Equation TT–1 is 0.5. However, the 60-day anaerobic biodegradation test effectively determines the organic carbon content that is anaerobically dissimilated, and as such, represents the product of the terms ''DOC_X'' and ''DOC_F'' within Equation TT–1. Therefore, for facilities using the 60-day anaerobic biodegradation test, it can be assumed that all of the measured DOC will be dissimilated (as it was during the test), so that ''DOC_F'' is 1. We are therefore proposing that the DOC_F have a default value of 1.0 for facilities using the 60-day anaerobic biodegradation test.

We are also proposing similar revisions to Equation TT–7, which is used to determine a waste stream-specific DOC value when a facility performs a 60-day anaerobic biodegradation test. The DOC value from Equation TT–7 is then used as an input to Equation TT–1 for that waste stream. Consistent with our proposed revision of the ''DOC_F'' term in Equation TT–1, ''DOC_F'' equals 1 when DOC is determined using the 60-day anaerobic biodegradation test. As such the ''1/DOC_F'' term in Equation TT–7 must equal to 1, so there is no need to include this term in the Equation TT–7.

We are also proposing to delete the term ''$1/(MCD_{control}/MC_{control})$'' from Equation TT–7. This term was erroneously included to correct the measured value of the DOC (i.e., MCD_{sample}/M_{sample}) for the recovery of the control substrate. However, after further review, the EPA determined that the recovery of the control substrate is only used to ensure quality control of the anaerobic biodegradation test (i.e., to verify that the inoculum or sludge from an anaerobic sludge digester used in the test is in fact biologically active) and is therefore not appropriate to include as a correction term in this equation.

We are proposing to revise 40 CFR 98.464(b) and (c) to broaden the provisions to determine volatile solids concentration for historically managed waste streams for the purposes of 40 CFR 98.460(c)(2)(xii) (exemption as an inert waste) so that they may also be used for determining a site-specific DOC value for historically managed waste streams. When we added the 60-day anaerobic biodegradation test in the 2011 Technical Corrections, Clarifying, and Other Amendments (76 FR, 73886; November 2011), we had not considered the impact of those amendments to this section. We did not intend to prevent facilities from using the 60-day anaerobic biodegradation test for similar waste streams for determining if a waste stream is inert. Furthermore, if a facility tests a similar waste stream and the waste stream is not inert, we did not intend to prevent the facility from using that result as the DOC value for their waste stream for purposes of calculating CH_4 generation and ultimately reporting GHG emissions. The proposed amendments expand the provisions of this section to determining a site-specific DOC value for historically managed waste streams both to assess whether the waste stream qualifies as an inert waste and to use in Equation TT–1 (even when the waste stream does not qualify as inert).

We are proposing to amend 40 CFR 98.466(b)(1) to clarify that the number of waste streams for which Equation TT–1 is used includes the number of ''Inert'' waste streams disposed of in the landfill.[43] Although ''Inert'' waste streams have a DOC of 0 and therefore do not contribute to the facility's CH_4 generation, 40 CFR 98.463(a) clearly requires the owner or operator to ''Apply Equation TT–1 of this section for each waste stream disposed of in the landfill * * *'' Therefore, an owner or operator of an industrial waste landfill that is required to report the emissions must apply Equation TT–1 to their inert waste streams and include these inert waste streams in the number reported in 40 CFR 98.466(b)(1).

As part of the 2011 Technical Corrections, Clarifying, and Other Amendments (76 FR, 73886), we amended Equation TT–4 to become Equation TT–4a and added Equation TT–4b for the calculation of historical waste disposal quantities. However, we neglected to amend the reporting requirements specific to Equations TT–4a and TT–4b in 40 CFR 98.466(c)(4). We also noted that the reporting elements associated with Equations TT–4a or TT–4b were not waste-stream specific and therefore did not need to be reported for each waste stream as indicated by the introduction in 40 CFR 98.466(c). In order to eliminate duplicative reporting requirements and to clarify the reporting requirements when using Equations TT–4a or TT–4b, we are proposing several amendments to 40 CFR 98.466(c). First, we are proposing to revise the introductory text in 40 CFR 98.466(c) to read ''Report the following historical waste information'' rather than ''For each waste stream identified in paragraph (b) of this section, report the following information.'' Second, we are proposing to move the reporting of the decay rate (k) from paragraph (c)(1) to a new paragraph (b)(5) as this reporting

[43] The EPA has proposed a data category and confidentiality determination for this revised data element. See the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

element is more correctly categorized under ''waste characterization and modeling information''; we are specifically indicating that the reporting of the decay rate (k) must be made for each waste stream (as it was previously). Third, we are proposing to clarify that the reporting elements for paragraphs (c)(2) and (c)(3) are for each waste stream (as they were under previously). Fourth, we are proposing to clarify that the reporting elements for Equation TT–4 are specific to reporters using Equation TT–4a; these reporting elements would be reported once for the facility's landfill rather than for each waste stream. Fifth, we are proposing to add a new paragraph (c)(5) to this section to delineate the reporting requirements for reporters using Equation TT–4b; these reporting elements would also be reported once for the facility's landfill rather than for each waste stream. We are also proposing to amend 40 CFR 98.466(d)(3) to read ''For each waste stream, the degradable organic carbon * * *'' rather than ''The waste stream's degradable organic carbon * * *'' to clarify that these reporting elements must be reported for each waste stream. [44]

To harmonize with the proposed changes to subpart HH, and in order to more accurately reflect the amount of methane oxidized in the surface soil layer of industrial waste landfills, we are proposing to amend the oxidation fraction default value (''OX'') in Equation TT–6. Reporters would be referred to newly proposed Table HH–4 to determine the value for ''OX'' to be used in Equation TT–6. Please see Section II.Q of this preamble for more detailed explanation.

In addition to adding reporting of the oxidation factor used, we are also proposing clarification of the reporting requirements for CH_4 generation adjusted for oxidation for industrial waste landfills with gas collection systems. Under 40 CFR 98.463(b)(1), we require all industrial waste landfills reporting under Subpart TT to calculate their CH_4 generation, adjusted for oxidation, from the modeled CH_4 (GCH_4 from Equation TT–1) using Equation TT–6. For landfills without gas collection systems, we then require the reporting of the result of this equation in 40 CFR 98.466(g)(1), which is also the annual CH_4 emissions from these landfills. For landfills with gas collection systems, we require the reporting of the requirements in paragraphs 40 CFR 98.466(a) through (f) in addition to 40 CFR 98.346(i). In the cross-reference to 40 CFR 98.346(i) we inadvertently required facilities to report, under 40 CFR 98.346(i)(8), their CH_4 generation adjusted for oxidation based using Equation HH–5 rather than Equation TT–6. While these equations appear identical, the modeled CH_4 generation term is defined as the result of the Equation HH–1 in Equation HH–5 rather than the result of Equation TT–1 as in Equation TT–6. We never intended to have industrial waste landfills that have gas collection systems to calculate their modeled CH_4 generation using Equation HH–1 (with its default DOC and k parameter values associated with MSW) rather than using Equation TT–1 (with default DOC and k parameter values for industrial wastes). To provide improved clarity in the reporting of CH_4 generation adjusted for oxidation for industrial waste landfills with gas collection systems, we are therefore proposing to amend 40 CFR 98.466(h) to read ''For landfills with gas collection systems, in addition to the reporting requirements in paragraphs (a) through (f) of this section, provide: (1) The annual methane generation, adjusted for oxidation, calculated using Equation TT–6 of this subpart, reported in metric tons CH_4; (2) The oxidation factor used in Equation TT–6 of this subpart; and (3) All information required under 40 CFR 98.346(i)(1) through (7) and 40 CFR 98.346(i)(9) through (12).'' [45]

Finally, we are proposing changes to Table TT–1 of subpart TT of Part 98. During implementation of Part 98, a question arose regarding the default value for pulp and paper wastes questioning whether the 2006 IPCC Guidelines recommended value of 0.09 instead should be used for wastewater sludges. We reviewed the 2006 IPCC Guidelines as well as laboratory test data results for pulp and paper wastewater sludges provided by NCASI (see memorandum ''Calculations documenting the greenhouse gas emissions from the pulp and paper industry'' from R.A. Miner, NCASI, to B. Nicholson, RTI International, dated May 21,2008, in Docket ID No. EPA–HQ–OAR–2012–0934). Based on the available data, we agree that the industrial sludge default value for DOC of 0.09 appears to provide a more accurate estimate of the DOC than the generic industry defaults currently provided in the rule. Consequently, we are proposing to revise Table TT–1 to include the DOC default value of 0.09 for ''Industrial Sludge.''

We are also proposing to revise the titles of the industry specific categories in Table TT–1 to note that these industry specific parameters apply to the industry waste streams ''(other than sludge).'' The addition of the new default DOC value for industrial sludge in Table TT–1 also requires the addition of corresponding k-values. The 2006 IPCC Guidelines do not provide default k-values for industrial wastes (sludge or otherwise); the IPCC Waste Model (a spreadsheet tool to help implement the 2006 IPCC Guidelines for landfills) uses the same k-values for industrial wastes as for bulk MSW. While it is anticipated that sludge generated by different industries will have different decay rates (and therefore different k-values), we have very little data by which to determine industry-specific k-values for the new default ''Industrial Sludge'' waste type. The k-values for ''Other Industrial Solid Waste'' waste type in Table TT–1 were selected based on country-specific default k-values for bulk MSW in U.S. landfills following the general default assumptions used in the IPCC Waste Model. These same k-values (0.02, 0.04, and 0.06 for dry, moderate, and wet climates, respectively) are being proposed as the default k-values for the new ''Industrial Sludge'' waste type for the same reasons (i.e., based on country-specific default k-values for bulk MSW in U.S. landfill following general default assumptions used in the IPCC Waste model). We specifically request comment from reporters on these proposed k-values and we further request that the commenters provide any applicable data to support comments.

Z. Subpart UU—Injection of Carbon Dioxide

We are proposing technical amendments to 40 CFR part 98, subpart UU (Injection of Carbon Dioxide) to clarify provisions and improve verification of reported GHG data. The more substantive corrections, clarifying, and other amendments to subpart UU are discussed in this section. Additional minor corrections are discussed in the Table of Revisions for this rulemaking (see Docket ID No. EPA–HQ–OAR–2012–0934).

The EPA is proposing to add a requirement to subpart UU for a facility to report the purpose of CO_2 injection (i.e., Research and Development (R&D) project exemption from subpart RR, enhanced oil or gas recovery, acid gas disposal, or some other reason) to aid

[44] The EPA is proposing data category assignments and confidentiality determinations for the new and substantially revised data elements in the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

[45] The EPA has proposed a data category and confidentiality determination for the revised data elements of 40 CFR 98.466(h). See the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

the agency in verification of data reported under subpart UU and to allow the EPA to understand the nature of the CO_2 injection operations for the purposes of data analysis to inform policy development.[46] We do not anticipate that this change would significantly increase burden for reporters.

We are also proposing to add a requirement for facilities to report the standard or method used to calculate the parameters for CO_2 received in containers. This new reporting element will be used for verification purposes.[47] The proposed data element does not require additional data collection or monitoring from reporters, and as it is not a significant change, will not add burden to reporting entities.

AA. Other Technical Corrections

In addition to the corrections, clarifying, and other amendments proposed in Sections II.A through II.Z of this preamble, we are proposing minor corrections to subparts E, G, O, S, V, and II of Part 98. The proposed changes to these subparts are provided in the Table of Revisions for this rulemaking, available in Docket ID No. EPA–HQ–OAR–2012–0934, and include clarifying requirements to better reflect the EPA's intent, corrections to calculation terms or cross-references that do not revise the output of calculations, harmonizing changes within a subpart (such as changes to terminology), simple typo or error corrections, and removal of redundant text.

III. Schedule for the Proposed Amendments

A. When would the proposed amendments become effective?

The EPA is planning to address the comments on these proposed changes and publish any final amendments before the end of 2013. This section describes when the proposed amendments would become effective for existing reporters and new facilities that could be required to report as a result of the proposed amendments to Table A–1 of subpart A. This section also discusses proposed amendments to subpart A for the use of best available monitoring methods (BAMM) by new reporters and for options considered for revising emissions estimates due to the change in GWPs for 2010, 2011, and 2012 reports previously submitted by existing reporters.

1. Existing Reporters

We have determined that it would be feasible for existing reporters to implement the proposed changes for the 2013 reporting year because these changes are consistent with the data collection and calculation methodologies in the current rule. The proposed revisions primarily provide additional clarifications or flexibility regarding the existing regulatory requirements, would not add new monitoring requirements, and would not substantially affect the information that must be collected. Where calculation equations are proposed to be modified, the changes clarify equation terms or simplify the calculations and do not require any additional data monitoring. The owners or operators are not required to actually submit reporting year 2013 reports until March 31, 2014, which is several months after we expect a final rule based on this proposal to be finalized, thus providing an opportunity for reporters to adjust to any finalized amendments.

We are proposing that existing GHGRP reporters begin using the updated GWPs in Tables A–1 for their reporting year 2013 annual reports, which must be submitted by March 31, 2014. In keeping with the March 15, 2012 UNFCCC decision, the Inventory submitted to the UNFCCC in 2015 must use AR4 GWP values (see Section II.A.1.a of this preamble). Development of the 2015 Inventory will rely in part on data from the GHGRP reports submitted in 2014 to supplement the top-down national estimate. Existing GHGRP reporters would also begin calculating facility GHG emissions or supply using the proposed GWPs for the additional F–GHGs discussed in Section II.A.1.c of this preamble for their reporting year 2013 annual reports. The proposed amendments would pose a minimal burden to existing reporters. Part 98 already requires that existing reporters report these F–GHGs in metric tons of chemical emitted or supplied.[48] Therefore, facilities are already collecting information on emissions and supply for these substances, and in some cases have provided GWP estimates for these compounds. Furthermore, the proposed amendments only provide a factor to convert emissions to CO_2e, and do not change the type of data collected. The EPA also does not anticipate that the proposed GWPs would require any existing reporters to report under new subparts; such a reporter, if one exists, would not be required to report for any past years under any subparts for which the reporter's emissions newly exceed a reporting threshold. Therefore, we anticipate that there is no significant burden for existing reporters to use the proposed GWP values for reporting year 2013.

In some cases we are proposing revisions to reporting requirements to clarify requirements or to make harmonizing changes within a subpart or between subparts under Part 98. The EPA anticipates that the proposed reporting requirements are either already being collected by reporters or would be readily available to reporters. For example, we are revising reporting requirements to 40 CFR part 98, subpart A to include additional data for identification purposes, such as the latitude and longitude for facilities without a physical address, or the ORIS code for power generation units (an identifier assigned by the Energy Information Administration). In the case of 40 CFR part 98, subpart K (Ferroalloy Production), we are proposing to add a requirement to report the annual process CH_4 emissions (in metric tons) from each EAF where the carbon mass balance procedure is used to measure emissions. This reporting requirement is an aggregate of data that is currently being monitored from each EAF. Similarly, under 40 CFR part 98, subpart Y (Petroleum Refineries), we are clarifying the reporting requirements by adding a provision to specify that when the process vent calculation method using Equation Y–19 is used to calculate emissions for asphalt blowing operations or delayed coking units, the facility must report the information required under 40 CFR 98.256(l)(5), which are the reporting requirements for process vents. This is a clarification of the reporting parameters required when an alternate calculation methodology is used. In the case of 40 CFR part 98, subpart Z (Phosphoric Acid Production), we are proposing to require reporting of the number of times missing data procedures were used to estimate CO_2 content. Because the proposed changes to these subparts would not require new monitoring or data collection but could be determined from existing monitoring and recordkeeping, the EPA has determined that it would be feasible to include these

[46] The EPA has proposed category assignments and confidentiality determinations for new and revised data elements in the Confidentiality Determinations Memorandum (Docket Id. No. EPA–HQ–OAR–2012–0934).

[47] *Id.*

[48] The sole exception is Subpart L, under which the requirement to report these F–GHGs on a mass basis is deferred for reporting years 2011 and 2012 (and 2013, under this proposal), but reporters are required to keep records of the data and calculations used to estimate aggregate emissions in CO_2e for the entire facility (77 FR 51477, August 24, 2012).

new reporting requirements in 2013 reports.

In the case of subpart N (Glass Production), we are proposing to revise the monitoring methods used to measure carbonate-based mineral mass-fractions to allow for more accurate measurement methods and to add flexibility for reporters. The proposed amendments would specify that reporters determining the carbonate-based mineral mass fraction must use sampling methods that specify X-ray fluorescence, instead of the current methods that use inductively coupled plasma or atomic absorption. For measurements made in the emission reporting year 2013 or prior years, reporters would continue to have the option to use the current monitoring methods in Part 98. This change would allow reporters flexibility in choosing a sampling method (since multiple X-ray fluorescence methods are available) while ensuring that more accurate available measurement methods are applied in future reporting years. These facilities would have the option, but not be required, to use the newly proposed option for the reporting year 2013 reports submitted to the EPA in 2014.

In some cases, we are proposing to require reporting of additional data elements to improve verification of the reported GHGs emitted or supplied. For example, for 40 CFR part 98, subpart FF (Underground Coal Mines), we are proposing to substantiate the data collected for identification of each well and shaft by adding a requirement to report the start date and close date of each well or shaft and the number of days the well or shaft was in operation during the reporting year. In the case of subpart UU (Injection of Carbon Dioxide), we are proposing to require reporting of the purpose of CO_2 injection, whether the facility received a Research and Development project exemption from reporting under subpart RR of Part 98 for the reporting year, and the start and end dates of the exemption, if applicable. The proposed changes would not significantly burden reporters or affect reporting year 2013 reports because this information is expected to be readily available to reporters as part of their standard recordkeeping and would not require additional monitoring or recordkeeping for 2013 reports.

In the case of 40 CFR part 98, subpart NN (Suppliers of Natural Gas and Natural Gas Liquids), we are proposing a change to Equation NN–5 to better reflect actual operating conditions. We are proposing to replace Equation NN–5 with two equations, NN–5a and NN–5b, with harmonizing changes to Equation NN–6. The proposed equations would allow for the use of different emission factors for natural gas that is stored and for natural gas that bypasses the city gate, such as natural gas received from local production. We are proposing harmonizing changes to the reporting requirements to specify the quantity of gas that bypasses the city gate and the net quantity of gas that is placed into or withdrawn from on-system storage during the reporting year. The proposed changes do not substantially revise the calculation methodology, but are changes that would provide more accurate GHG estimates in situations where the LDC receives several different streams of natural gas with different characteristics. Furthermore, the proposed changes do not revise the information that must be collected for recordkeeping or reporting. Therefore, we have concluded that under the proposed amendments, existing sources could use the same information that they have been collecting under the current Part 98 and readily available information for each subpart to determine applicability and to calculate and report GHG emissions for reporting year 2013.

The EPA specifically seeks comment on the conclusion that it is appropriate to implement these amendments and incorporate the requirements in the data reported to the EPA by March 31, 2014. Further, we specifically seek comment on whether there are specific subparts or amendments for which this timeline may not be feasible or appropriate due to the nature of the proposed changes or the way in which data have been collected thus far. We request that commenters provide specific examples of how and why the proposed implementation schedule would not be feasible.

2. New Reporters

As a result of the proposed amendments to the GWPs in Table A–1 of subpart A, some facilities that were never previously required to report under Part 98 may be required to report (see Section V.A of this preamble). Given that a final rule based on this proposed rule would not be finalized until the second half of 2013, we have determined that it would not be feasible for these new facilities to acquire, install, and calibrate monitoring equipment, collect data, and implement these changes for reporting year 2013. Therefore, we are proposing that new reporters who would be required to report under Part 98 as a result of the proposed changes to Table A–1 would begin collecting data on January 1, 2014 for the 2014 reporting year. New reporters would be required to submit their first reports, covering the 2014 reporting year, on March 31, 2015. The intended schedule (including publication of any final rule by the end of 2013) would allow time for new reporters to acquire, install, and calibrate monitoring equipment for the 2014 reporting year.

We are also proposing to add provision 40 CFR 98.3(l) to subpart A to allow new reporters who would be required to report as a result of the proposed new or revised GWPs to have the option of using BAMM from January 1, 2014 to March 31, 2014 for any parameter that cannot reasonably be measured according to the monitoring and QA/QC requirements of a relevant subpart. The EPA understands that because any final rule based on this proposal likely would not be promulgated until the fall of 2013, facilities that do not already have the monitoring systems required by the rule in place might not have time to install and begin operating them by January 1, 2014. Therefore, we are proposing that reporters be allowed to use BAMM during the January 1, 2014 to March 31, 2014 time period without formal request to the EPA. Reporters would also have the opportunity to request an extension for the use of BAMM beyond March 31, 2014; those owners or operators must submit a request to the Administrator by 60 days after the effective date of the final rule. The EPA anticipates granting approval for BAMM no later than December 31, 2014. The EPA has concluded that the time period allowed under this schedule (including the provision for facility-specific requests) is reasonable and will allow facilities that do not currently have the required monitoring systems sufficient time to begin implementing the monitoring methods required by the rule. The proposed schedule would allow approximately six months to prepare for data collection, which is consistent with existing BAMM provisions provided under subpart A of Part 98. By allowing the additional time, many facilities may also be able to install any necessary equipment during other planned (or unplanned) process unit downtime, thus avoiding process interruptions.

B. Options Considered for Revision and Republication of Emissions Estimates for Prior Year Reports

The EPA is proposing to independently recalculate revised CO_2e emissions from the 2010, 2011, and 2012 reporting year emissions or supply for each facility using the revised GWPs in Table A–1. We considered two

options for revising the CO_2e emission estimates from annual reports for reporting years 2010, 2011, and 2012 using the proposed GWP values in Table A–1. Revision of CO_2e emission estimates in reports for years 2010, 2011, and 2012, either by reporters or by the EPA, would allow for the comparison of emission data submitted for those reporting years with data submitted in 2013 and future reporting years and ensure that published annual GHG reports are based on a common metric. This would allow the EPA and the public to more efficiently analyze changes in GHG emissions and industry trends in a time series.

Option 1: Under this option, which is not preferred by EPA, reporters who have submitted annual reports for the reporting years 2010, 2011, and 2012 would be required to resubmit their prior year reports using the revised GWPs. Under this option, reporters would use the built-in calculation methods in the EPA's Electronic Greenhouse Gas Reporting Tool (e-GGRT) to convert reported quantities of GHGs to CO_2e per the requirements of 40 CFR 98.2(b)(4).[49] To adjust prior year reports, the system would recalculate facility GHG emissions using the revised GWP values in Table A–1, yielding a new CO_2e for each GHG in the annual report.[50] Reporters would then recertify and sign the reports as required by 40 CFR 98.4(e) and resubmit the reports through e-GGRT.

The proposed revised GWP values in Table A–1 will likely result in changes to the CO_2e estimates of GHGs emitted or supplied in previous reporting years. In most cases, this will result in higher estimates of CO_2e emitted or supplied, rather than lower estimates. Reporters may desire to review and certify the revised emission estimates prior to data publication by the EPA. So we have included this option for comment. This option would give reporters greater control over the republication of their data, and emission or supply totals would be certified by reporters. However, this option would present an additional burden on reporters. The EPA calculates that existing reporters would incur a total one-time cost of $3.5 million for resubmittal and recertification of 2010, 2011, and 2012 reports. This represents a one-time cost for 2010 reporters of $347 per facility for the resubmittal of 2010, 2011, and 2012 reports, and a cost of $231 per facility for 2011 reporters for the resubmittal of 2011 and 2012 reports. In addition, the EPA recognizes that some facilities may no longer be required to report under Part 98 or may have ceased operations. Obtaining revised emissions estimates from these facilities could be difficult; therefore, the EPA may not be able to revise the complete data set for prior reporting years. For these reasons, the EPA does not prefer this option.

Option 2: The EPA would independently recalculate revised CO_2e emissions from the 2010, 2011, and 2012 reporting year emissions or supply for each facility using the revised GWPs in Table A–1. Under this scenario, through e-GGRT, each reporter would be able to see the EPA's revision of its emission or supply totals in previously submitted 2010, 2011, and 2012 reports before that information is publically available. However, although the reporter would be able to view the estimate, the reporter would not be able to comment on or change the revised estimate. The EPA would publish the revised estimates with a caveat explaining how the estimates were obtained and explaining that the emission values are not those submitted and certified by reporters. While the calculation is very straightforward for most reporters, because subpart L reporters have not reported the specific compounds that make up their emissions, there could be some uncertainty associated with the revisions to subpart L emission data if option 2 is selected.

This option would allow the EPA to publish revised emission and supply totals without increasing burden on reporters. This option would remove the need for reporters to resubmit and recertify revised reports. However, Option 2 would not give reporters the opportunity to provide feedback on their individual revised emissions or supply totals, or allow them to certify the amended totals at any point before or after republication. As reporters would be unable to submit revised emission estimates or comment on the estimation methods used to calculate the updated CO_2e totals, they would have less control over the revised data. Although Option 1 would give reporters more input in the revised emission or supply totals provided to the public, we do not anticipate that the benefits of requiring data resubmission and certification would justify the increased burden on reporters discussed above. Option 2 would not present any additional burden for reporters. Option 2 would allow the EPA to publish revised emission and supply totals for all facilities which submitted a report for 2010, 2011, and 2012, including facilities which have ceased operations or which are no longer required to report. This approach would allow the EPA to reconstruct the complete data set for prior year reports for comparison to data reported for 2013 and future years. In light of these considerations, the EPA prefers Option 2. The EPA seeks comment on the two options. Specifically, we request comment on the need for review and certification of revised emission estimates by reporters and whether revised calculations prepared by the EPA, as proposed in Option 2, would be sufficient for publication.

IV. Confidentiality Determinations

A. Overview and Background

In this notice we are proposing confidentiality determinations for the new or substantially revised reporting data elements (i.e., the data required to be reported would change under the proposed revision) in the proposed subpart rule amendments, except for inputs to equations.[51] For information on the history of confidentiality determinations for Part 98 data elements, see the following notices:

- 75 FR 39094, July 7, 2010; hereafter referred to as the ''July 7, 2010 CBI proposal.'' Describes the data categories EPA developed for the Part 98 data elements.
- 76 FR 30782, May 26, 2011; hereafter referred to as the ''2011 Final CBI Rule.'' Assigned data elements to data categories and published the final CBI determinations for the data elements in 34 Part 98 subparts, except for those data elements that were assigned to the ''Inputs to Emission Equations'' data category.
- 77 FR 48072, August 13, 2012, hereafter referred to as ''2012 Final CBI Determinations Rule.'' Finalized confidentiality determinations for data elements to be reported under nine subparts I, W, DD, QQ, RR, SS, UU; except for those data elements that are inputs to emission equations, and finalized confidentiality determinations for new data elements added to subparts

[49] For reporters using the e-GGRT web forms, the system currently automatically applies the GWP values in Table A–1 of subpart A to reported facility emissions (metric tons) to convert emissions to CO_2e, according to the requirements of Subpart A (General Provisions).

[50] For reporters using the XML schema to submit annual GHG reports, reporters would apply the revised GWP values in Table A–1 of subpart A in their submitted XML reports to recalculate emission or supply estimates, following the XML reporting instructions provided through e-GGRT. For these reporters, the system would validate the CO_2e estimates provided in the XML report against automatically calculated e-GGRT values, using the revised GWPs in Table A–1.

[51] As discussed later in the preamble, we propose to assign certain new or substantially revised data elements to the ''inputs to emission equations'' category but do not propose confidentiality determinations for these data elements.

II and TT in the November 29, 2011 Technical Corrections Notice (76 FR 73886).

• 77 FR 51477, August 24, 2012; hereafter referred to as the ''2012 Technical Corrections and Subpart L Confidentiality Determinations.'' Finalized confidentiality determinations for new data elements added to subpart L.

In this action, the EPA is proposing confidentiality determinations for new or substantially revised data elements. The new and substantially revised data elements result from the proposed corrections, clarifying, and other amendments that are described in Section II of this preamble. These proposed confidentiality determinations would be finalized based on public comment. The EPA currently plans to finalize these determinations at the same time the proposed rule amendments described in Sections II and III of this preamble are finalized. We are not proposing new confidentially determinations for data reporting elements that may be minimally revised for clarification or to correct insignificant errors, where the change does not require an additional or different data element to be reported. The final confidentiality determinations the EPA has previously made for these data elements are unaffected by this proposed amendment and continue to apply.

B. Approach to Proposed Confidentiality Determinations for New or Substantially Revised Data Elements

In this action, we are proposing to add or substantially revise data reporting requirements in subparts A, H, K, X, Y, Z, AA, FF, HH, NN, QQ, RR, TT, and UU. We propose to assign each of the newly proposed or substantially revised data elements in these subparts to one of the direct emitter or supplier data categories created in the 2011 Final CBI Rule (76 FR 30782, May 26, 2011). In the 2011 Final CBI Rule, the EPA made categorical confidentiality determinations for data elements assigned to eight direct emitter data categories and eight supplier data categories. For two direct emitter data categories, ''Unit/Process 'Static' Characteristics that Are Not Inputs to Emission Equations'' and ''Unit/Process Operating Characteristics that Are Not Inputs to Emission Equations,'' the EPA determined in the 2011 Final CBI Rule that the data elements assigned to those categories are not emission data but did not make categorical CBI determinations. Rather, the EPA made CBI determinations for individual data elements assigned to these two data categories. Similarly, for three supplier data categories, ''GHGs Reported,'' ''Production/Throughput Quantities and Composition,'' and ''Unit/Process Operating Characteristics,'' the EPA determined in the 2011 Final CBI Rule that the data elements assigned to those categories are not emission data but did not make categorical CBI determinations; instead the EPA made CBI determinations for individual data elements assigned to these two data categories. In subsequent amendments to Part 98,[52] the EPA assigned each new or substantially revised data element to an appropriate data category created in the 2011 Final CBI Rule and applied the categorical confidentiality determination if one was established in the 2011 Final CBI Rule. If a data element was assigned to one of the two direct emitter or three supplier data categories identified above that do not have categorical determinations, the EPA made individual CBI determinations. With respect to data elements for which the revisions did not change the type of data to be reported, their categorical assignments and confidentiality determinations (whether categorical or individual determinations) are not affected by this proposed amendment and therefore remain unchanged. The EPA did not make final confidentiality determinations for data elements assigned to the inputs to emission equations category either in the 2011 Final CBI rule or any subsequent Part 98 rulemaking. We are following the same approach in this proposed rule. Specifically, we are proposing to assign new or substantially revised data elements in the proposed amendments to the appropriate direct emitter or supplier data category.[53] For new or substantially revised data elements being assigned to categories with categorical confidentiality determinations, we propose to apply the categorical determinations made in the 2011 Final CBI Rule to the assigned data elements. For new or substantially revised reporting elements assigned to the ''Unit/Process 'Static' Characteristics that Are Not Inputs to Emission Equations'' and the ''Unit/Process Operating Characteristics that Are Not Inputs to Emission Equations'' direct emitter data categories or the ''Unit/Process Operating Characteristics'' supplier data categories, consistent with our approach toward data elements previously assigned to these data categories, we propose that these data elements are not emission data, and are making individual CBI determinations for the data elements in these categories.

Please see the memorandum titled ''Proposed data category assignments and confidentiality determinations for new and substantially revised data elements in the proposed '2013 Revisions to the Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements' '' (''Confidentiality Determinations Memorandum'') in Docket EPA–HQ–OAR–2012–0934 for a list of the proposed new or substantially revised data elements, their proposed category assignments, and their proposed confidentiality determinations (whether categorical or individual) except for those assigned to the inputs to equations category. Section IV.C of this preamble discusses the proposed CBI determinations and supporting rationale for individual data elements.

C. Proposed Confidentiality Determinations for Individual Data Elements in Two Direct Emitter Data Categories and Two Supplier Data Categories

The EPA is proposing individual CBI determinations for 16 data elements assigned to the ''Unit/Process 'Static' Characteristics that Are Not Inputs to Emission Equations'', ''Unit/Process Operating Characteristics that Are Not Inputs to Emission Equations'' direct emitter data categories and the ''Production/Throughput Quantities and Composition'' and ''Unit/Process Operating Characteristics'' supplier data categories. (There are no new data elements proposed to be assigned to the ''GHGs Reported'' supplier data category.) These data elements consist of three new data elements in the direct emitter subpart FF and eight in the supplier subpart UU. We are also proposing individual CBI determinations for five substantially revised data elements in the subparts Z, NN, TT, and QQ. Table 9 of this preamble provides the category assignment and proposed rationale for the proposed determinations.

[52] See, e.g., 77 FR 48072 (August 13, 2012) and 77 FR 51477 (August 24, 2012).

[53] Proposed determination is not needed for two data elements proposed for subpart Y (40 CFR 98.256(j)(10) and 40 CFR 98.256(k)(6)), because they refer to an existing data element (40 CFR 98.256(l)(5)) for which a CBI determination has already been finalized.

TABLE 9—DATA ELEMENTS PROPOSED TO BE ASSIGNED TO DATA CATEGORIES WITHOUT CATEGORICAL DETERMINATIONS AND PROPOSED CBI DETERMINATIONS (SUBPARTS Z, NN, FF, QQ, TT, AND UU)

Citation	New or revised data element	Data element	Rationale for the proposed CBI determination
Data Elements Proposed To Be Assigned to the ''Unit/process Static Characteristics That Are Not Inputs to Emission Equations'' Direct Emitter Data Category			
98.266(b)	Revised	Annual phosphoric acid production capacity.	We are not proposing a determination for this data element at this time. This data element is being revised from ''permitted production capacity'' to ''production capacity''. As discussed in the 2011 Final CBI Rule (76 FR 30782), the EPA reviewed available capacity information in the ''Unit/process Static Characteristics that Are Not Inputs to Emission Equations'' data category and determined that these data elements may not be publically available for all facilities and may be competitively sensitive. Revising the current data element to ''production capacity'' would require reporting of actual production capacity in lieu of permitted production capacity. Although this information in some cases is publicly available (e.g., Title V permits, NEI), this data may still be competitively sensitive for other facilities. No determination is being proposed at this time; case-by-case determinations will be made when necessary.
Data Elements Proposed To Be Assigned to the ''Unit/process Operating Characteristics That Are Not Inputs to Emission Equations'' Direct Emitter Data Category			
98.326(r)(2)	New	Start date of each well and shaft	We are proposing that these data elements are not emission data and not CBI. These proposed data elements would provide additional identification and descriptive information for each well or shaft.
98.326(r)(2)	New	Close date of each well and shaft..	
98.326(r)(3)	New	Number of days each well or shaft was in operation during the reporting year.	These data elements reveal general information about the operating characteristics of the reporting facility and would be assigned to the ''Unit/process Operating Characteristics that Are Not Inputs to Emission Equations'' data category. We are proposing that these data elements not be considered CBI because they characterize the total operation period of each well or shaft. None of these data elements reveal information regarding the production characteristics or production rates of any individual well or shaft. Furthermore, these data elements are generally publicly available. For example, facilities currently report shaft operating periods to the Mine and Safety Health Administration (MSHA). Additionally, facilities are often required to report well operation periods to state agencies for other regulatory purposes. Therefore, these data elements are not anticipated to be sensitive information and public disclosure of these data elements is not likely to cause substantial competitive harm to the reporting facility.
98.466(b)(1)	Revised	The number of waste streams for which Equation TT–1 is used.	We are proposing that this data element is not emission data and not CBI. This data element is being revised to include ''inert'' waste streams. The addition of ''inerts'' to the reporting requirement clarifies that inert waste streams must be reported in the total number of waste streams used to calculate modeled CH4 generation, which may change the value reported. This data element does not disclose any information about the design or operating characteristics of production processes, historical production volumes, or any other production related information about the landfill that competitors could use to discern sensitive information. Therefore we are proposing a determination of ''not emission data and not CBI''.
Data Elements Proposed To Be Assigned to the ''Production/Throughput Quantities and Composition'' Supplier Data Category			
98.406(b)(2)	Revised	LDCs: Annual volume of natural gas placed into storage.	We are proposing that this data element is not CBI. The change to this data element is proposed in order to harmonize the reported data with the change to the equations in subpart NN. The change clarifies that the volume to be reported is the volume referenced as $Fuel_1$ in the Equation NN–5a. The volume reported is not expected to change as a result of the proposed revision. As discussed in the 2011 Final CBI Rule, the EPA does not consider LDC-level production/throughput data as CBI because many of the same data elements are already collected and released annually by the Energy Information Administration (EIA). Therefore, we are proposing that the data element is not CBI.

TABLE 9—DATA ELEMENTS PROPOSED TO BE ASSIGNED TO DATA CATEGORIES WITHOUT CATEGORICAL DETERMINATIONS AND PROPOSED CBI DETERMINATIONS (SUBPARTS Z, NN, FF, QQ, TT, AND UU)—Continued

Citation	New or revised data element	Data element	Rationale for the proposed CBI determination
98.436(a)(6)(iii)	Revised	If the reporter does not know the identity and the mass of the F–GHGs within the closed cell foam: For closed cell foams that are not imported inside of equipment, the density in CO_2e of the F–GHGs in the foam.	We are proposing that these data elements are CBI. These data elements were previously assigned to the ''Production/Throughput Quantities and Composition'' data category and assigned a ''CBI'' determination in the 2012 Final CBI Determinations Rule. The proposed change to these data elements is a correction to match the reported data element to the units required to be reported. The change proposed is a change from ''mass in CO_2e'' to ''density in CO_2e''. The units specified for the data element are kg CO_2e/cubic foot, and are unchanged in this proposal. These data elements reveal importer- and exporter-level production information (density of the fluorinated gas within the foam) and the disclosure of these data elements would likely cause substantial harm to the competitive positions of businesses reporting these data. Therefore, we are proposing to assign these elements to the ''Production/Throughput Quantities and Composition'' data category and a determination that the data element is CBI.
98.436(a)(6)(iii)	Revised	If the reporter does not know the identity and the mass of the F–GHGs within the closed cell foam: For closed cell foams that are not exported inside of equipment, the density in CO_2e of the F–GHGs in the foam.	
Data Elements Proposed To Be Assigned to the ''Unit/Process Operating Characteristics'' Supplier Data Category			
98.476(e)(1)	New	Whether the facility received a Research and Development project exemption from reporting under 40 CFR part 98, subpart RR for the reporting year.	These data elements reveal general information about the operating characteristics of the reporting facility and are proposed to the ''Unit/Process Operating Characteristics'' supplier data category. We are proposing that these data elements are not CBI. These proposed data elements are based on the compliance requirements for R&D facilities under subpart RR that are not considered sensitive information by the EPA. We are proposing that these data elements are non-CBI because they would not reveal any information about production quantities, process, or specific R&D projects that could cause competitive harm, but only provide information about whether the facility received an approved exemption from other subpart-specific requirements under Part 98 and the duration of the exemption.
98.476(e)(1)	New	If you received a Research and Development project exemption from reporting under 40 CFR part 98, subpart RR for the reporting year, the start date of the exemption.	
98.476(e)(1)	New	If you received a Research and Development project exemption from reporting under 40 CFR part 98, subpart RR for the reporting year, the end date of the exemption.	
98.476(e)(2)	New	Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations to enhance the recovery of oil during the reporting year.	The proposed data elements would reveal general information about the operating characteristics of the reporting facility and would be assigned to the ''Unit/Process Operating Characteristics'' supplier data category, which contain similar data elements. We are proposing that these data elements are not CBI. The proposed data elements would provide additional information on the purpose of the CO_2 injection on a facility-wide basis. The proposed data elements would not reveal any specific information about the quantities of CO_2 received or injected at specific wells or information about the production that could cause competitive disadvantage. We are proposing that these data elements are not considered CBI because they do not reveal any detailed information that is likely to cause competitive harm if publicly released.

TABLE 9—DATA ELEMENTS PROPOSED TO BE ASSIGNED TO DATA CATEGORIES WITHOUT CATEGORICAL DETERMINATIONS AND PROPOSED CBI DETERMINATIONS (SUBPARTS Z, NN, FF, QQ, TT, AND UU)—Continued

Citation	New or revised data element	Data element	Rationale for the proposed CBI determination
98.476(e)(3)	New	Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations to enhance the recovery of natural gas during the reporting year.	
98.476(e)(4)	New	Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations for acid gas disposal during the reporting year.	
98.476(e)(5)	New	Whether the facility includes a well or group of wells where a CO_2 stream was injected for a purpose other than those listed in (e)(1)through (4) of 40 CFR 98.476.	
98.476(e)(5)	New	The purpose of the injection, if you injected CO_2 for a purpose of than those listed in paragraph (e)(1) through (4) of 40 CFR 98.476.	

D. Proposed New Inputs to Emission Equations

As discussed in Section IV.C of this preamble, the EPA is proposing category assignment for the new and substantially revised data elements. As shown in the Confidentiality Determinations Memorandum (see Docket Id. No. EPA–HQ–OAR–2012–0934), the EPA is proposing to assign 13 new data elements to the ''inputs to emission equations category'': Two in subpart FF, five in subpart HH, and six in subpart TT. The EPA had previously deferred the reporting deadlines for inputs to emissions equations until March 2013 for some data elements and March 2015 for others to allow EPA sufficient time to conduct an ''in-depth evaluation of the potential impact from the release of inputs to equations'' (76 FR 53057 and 53060, August 25, 2011); (77 FR 48072, August 13, 2012). We are not proposing to defer the reporting of these 13 data elements. The EPA has conducted an evaluation of these inputs following the process outline in the memorandum ''Process for Evaluating and Potentially Amending Part 98 Inputs to Emission Equations'' (Docket ID EPA–HQ–OAR–2010–0929), which accompanied the Final Deferral Rule (76 FR 53057). This evaluation is summarized in the memorandum ''Summary of Evaluation of 'Inputs to Emission Equations' Data Elements Proposed to be Added with the 2013 Revisions to the Greenhouse Gas Reporting Rule.'' (See Docket ID No. EPA–HQ–OAR–2012–0934.) Because the EPA has completed the above mentioned evaluation for these 13 data elements, EPA does not see a need to defer their reporting. Accordingly, under this proposed amendment, these data elements would be reported in 2014 along with the rest of the proposed changes.

E. Request for Comments on Proposed Category Assignments and Confidentiality Determinations

For the CBI component of this rulemaking, we are soliciting comment on the following specific issues. First, we specifically seek comment on the proposed data category assignment for each of the new or substantially revised data elements in the proposed amendments to subparts A, H, K, X, Y, Z, AA, FF, HH, NN, QQ, RR, TT, and UU.

If you believe that the EPA has improperly assigned certain new or substantially revised data elements in these subparts to any of the data categories established in the 2011 Final CBI Rule, please provide specific comments identifying which of the new data elements may be mis-assigned along with a detailed explanation of why you believe them to be incorrectly assigned and in which data category you believe they belong. In addition, if you believe that a data element should be assigned to one of the five categories that do not have a categorical confidentiality determination, please also provide specific comment along with detailed rationale and supporting information on whether such data element does or does not qualify as CBI.

We seek comment on the proposed confidentiality status of the new or substantially revised data elements in the direct emitter data categories ''Unit/Process 'Operating' Characteristics that Are Not Inputs to Emission Equations'' and ''Unit/Process 'Static' Characteristics that Are Not Inputs to Emission Equations'' and the supplier data categories ''Production/Throughput Quantities and Composition'' and ''Unit/Process Operating Characteristics.'' By proposing confidentiality determinations prior to data reporting through this proposal and rulemaking process, we provide potential reporters an opportunity to submit comments, in particular comments identifying data they consider sensitive and their rationales and supporting documentation; this opportunity is the same opportunity that is afforded to submitters of information in case-by-case confidentiality determinations. In addition, it provides an opportunity to rebut the Agency's proposed determinations prior to finalization. We will evaluate the comments on our proposed determinations, including claims of confidentiality and

information substantiating such claims, before finalizing the confidentiality determinations. Please note that this will be reporters' only opportunity to substantiate a confidentiality claim. Upon finalizing the confidentiality determinations of the data elements identified in this rule, the EPA will release or withhold these data in accordance with 40 CFR 2.301, which contains special provisions governing the treatment of Part 98 data for which confidentiality determinations have been made through rulemaking.

When submitting comments regarding the confidentiality determinations we are proposing in this action, please identify each individual proposed new or revised data element you do or do not consider to be CBI or emission data in your comments. Please explain specifically how the public release of that particular data element would or would not cause a competitive disadvantage to a facility. Discuss how this data element may be different from or similar to data that are already publicly available. Please submit information identifying any publicly available sources of information containing the specific data elements in question. Data that are already available through other sources would likely be found not to qualify for CBI protection. In your comments, please identify the manner and location in which each specific data element you identify is publicly available, including a citation. If the data are physically published, such as in a book, industry trade publication, or federal agency publication, provide the title, volume number (if applicable), author(s), publisher, publication date, and International Standard Book Number (ISBN) or other identifier. For data published on a Web site, provide the address of the Web site and the date you last visited the Web site and identify the Web site publisher and content author.

If your concern is that competitors could use a particular data element to discern sensitive information, specifically describe the pathway by which this could occur and explain how the discerned information would negatively affect your competitive position. Describe any unique process or aspect of your facility that would be revealed if the particular proposed new or revised data element you consider sensitive were made publicly available. If the data element you identify would cause harm only when used in combination with other publicly available data, then describe the other data, identify the public source(s) of these data, and explain how the combination of data could be used to cause competitive harm. Describe the measures currently taken to keep the data confidential. Avoid conclusory and unsubstantiated statements, or general assertions regarding potential harm. Please be as specific as possible in your comments and include all information necessary for the EPA to evaluate your comments.

V. Impacts of the Proposed Rule

This section of the preamble examines the costs and economic impacts of the proposed rulemaking and the estimated economic impacts of the rule on affected entities, including estimated impacts on small entities.

A. Impacts of the Proposed Amendments to Global Warming Potentials

There are two primary reasons that Part 98 requires direct emitters and suppliers of GHGs to use the GWP values in Table A–1 to subpart A to calculate emissions (or supply) of GHGs in CO_2e. The first is to help determine whether the facility meets a CO_2e-based threshold and is required to report under Part 98. The second is to help calculate total facility emissions for submittal in the annual report. A change to the GWP for a GHG will change the calculated emissions (in CO_2e) of that gas. Therefore, the proposed amendments could affect both the number of facilities required to report under Part 98 and the quantities of GHGs reported.

For most GHGs whose GWPs we are proposing to amend, the proposed AR4 GWP values are greater than the GWP values in the current Table A–1. Therefore, the proposed amendments would likely result in higher reported emissions of CO_2e for facilities that emit these gases. Although the proposed amendments would result in an increase in reported emissions for many facilities that currently submit a report, using the proposed GWPs would have no effect on the cost of monitoring and recordkeeping and, therefore, no significant impact for reporters.

For the additional F–GHGs and associated GWPs we are proposing to include in Table A–1, we do not anticipate significant impacts for existing reporters. Per 40 CFR 98.3(c), facilities are required to report annual CO_2e emissions or supply, using Equation A–1, for each GHG with a GWP in Table A–1. The proposed amendments to subpart A would require Part 98 reporters to include emissions of the new F–GHGs in Table A–1 (in CO_2e) in their facility totals in their annual reports. With the addition of the new F–GHGs, we expect the quantities of CO_2e reported to increase for reporters that previously emitted, produced, imported, or exported the proposed compounds and reported the annual quantities (metric tons) of these gases in their 2010, 2011, or 2012 reports, but who were not required to include the calculated CO_2e emissions for these gases in determining annual emissions of CO_2e for their annual report. Because these reporters are already required to meet monitoring, recordkeeping, and reporting requirements for calculating the quantity of the proposed F–GHGs in metric tons, additional costs to report CO_2e using the GWPs are expected to be insignificant.

Equation A–1 is also used to determine whether the rule applies to direct emitters and suppliers in certain source categories where the applicability of the GHG reporting rule is based on a threshold quantity of GHGs that is either generated, emitted, imported, or exported over a calendar year, expressed in CO_2e. For some direct emitters or suppliers in these source categories, calculating CO_2e using the proposed GWP values would result in higher emissions or supply that might newly exceed the reporting threshold. These facilities would then be required to begin reporting under Part 98 in 2014 (see Section III.A.2 of this preamble), with the associated monitoring, recordkeeping, and reporting costs.

If finalized, the proposed amendments to Table A–1 would result in a collective increase in annual reported emissions from all subparts of more than 104 million metric tons CO_2e (a 1.4 percent increase in current emissions), which the EPA has concluded more accurately reflects the estimated radiative forcing from the emissions reported under Part 98. The increase would include 4.8 million metric tons CO_2e from an estimated 184 additional facilities that would be newly required to report under Part 98 based on the new and revised GWPs. The number of new reporters estimated, the estimated increase in emissions or supply from existing reporters (reporters who submitted 2010 and 2011 reports) and new reporters, and the estimated total change in source category emissions or supply for each subpart are summarized in Table 10 of this preamble.

TABLE 10—SUMMARY OF ESTIMATED IMPACTS ON REPORTED EMISSIONS DUE TO PROPOSED REVISIONS TO TABLE A–1 FOR PART 98 SUBPARTS

Subpart	Number of existing reporters	Total reported emissions or supply for existing reporters prior to proposed amendments (non-biogenic) (metric tons CO_2e/year)	Number of estimated new reporters	Estimated incremental reported emissions or supply for new reporters (metric tons CO_2e/year)	Estimated change in reported source category emissions or supply due to proposed amendments (metric tons CO_2e/year)
2010 Reporters					
C	4,211	619,572,472	0	0	112,339
D	1,263	2,231,408,653	0	0	293,276
E	2	4,397,310	0	0	(170,218)
F	9	4,298,897	0	0	283,040
G	22	13,596,985	0	0	0
H	97	42,734,686	0	0	2,657
K	10	2,240,907	0	0	1,743
N	103	2,061,679	0	0	0
O	5	6,351,797	0	0	1,682,955
P	101	31,261,120	0	0	10
Q	123	27,094,226	0	0	(21)
R	12	588,209	0	0	0
S	70	15,566,816	0	0	174
U	19	122,663	0	0	0
V	36	11,990,739	0	0	(464,158)
X	63	9,445,122	0	0	11,973
Y	145	55,751,060	0	0	100,695
Z	13	1,080,913	0	0	0
AA	110	7,562,923	0	0	50,408
BB	1	122,466	0	0	2,141
CC	4	1,221,863	0	0	0
EE	7	1,447,634	0	0	0
GG	6	730,209	0	0	0
HH	1,202	107,000,000	57	1,560,000	2,787,153
MM	155	2,493,881,410	0	0	0
NN	476	909,000,000	0	0	0
OO	167	254,554,000	3	75,000	44,060,000
2011 Reporters					
I	94	5,622,570	4	18,076	1,052,905
L	14	10,600,000	0	0	1,060,000
T	11	1,067,000	0	0	(37,213)
W	2,786	337,000,000	99	2,572,881	41,136,821
DD	141	10,320,000	0	0	(474,979)
FF	114	33,823,404	0	0	6,442,553
II	244	5,845,000	2	59,500	1,172,833
JJ[a]	0	0	0	0	0
LL	0	0	0	0	0
PP	99	33,500,000	0	0	0
QQ	108	21,907,182	0	0	1,915,000
RR	10	7,162,885	0	0	0
SS	10	814,128	0	0	(37,470)
TT	200	13,700,000	19	520,000	3,129,524
UU	92	48,735,442	0	0	0
Total	12,355	7,385,182,369	184	4,805,457	104,114,139

[a] There are no reporters for subpart JJ of Part 98 because the EPA will not be implementing subpart JJ due to a Congressional restriction prohibiting the expenditure of funds for this purpose.

Additional reporters would be expected to report under subparts I, W, HH, II, OO, and TT due to an increase in the number of facilities exceeding the CO_2e threshold. The majority of these additional reporters would be expected from subpart W, Petroleum and Natural Gas Systems, and subpart HH, Municipal Solid Waste Landfills. There are no expected additional reporters from the other 36 subparts. We do not anticipate that the proposed revisions would reduce the number of reporters that meet CO_2e thresholds for any subpart. The change in reported emissions or supply from each subpart are summarized in Sections V.A.1 of this preamble. A detailed analysis of the impacts for each subpart, including the number of additional reporters expected, the quantities of annual GHGs reported, and the compliance costs for expected additional reporters, is included in the Impacts Analysis (see Docket ID No. EPA–HQ–OAR–2012–0934).

The total cost of compliance for the additional expected reporters is $3.9 million for the first year and $1.2 million per year for subsequent years. The annual costs for the additional reporters is an approximate increase of 1.2 percent above the current reporters

cost of compliance with Part 98. The expected costs of the proposed amendments and the associated methodology are summarized in Section V.A.2 of this preamble.

1. How were the number of reporters and the change in annual emissions or supply estimated?

The EPA evaluated the number of reporters affected by the proposed amendments by examining the 2010 and 2011 reporters that are already affected under Part 98. For the number of affected facilities, the EPA examined available e-GGRT data from the 2010 reporting year and summary data that were developed to support the current Part 98 to determine the number of existing affected facilities. We then evaluated the number of additional facilities that could be required to report under each subpart by determining what additional facilities could exceed Part 98 source category thresholds. Affected subparts that might have additional reporters due to the proposed new or revised GWPs are those that meet all of the following criteria: (1) The subpart has a reporting threshold that is based on CO_2e; (2) the subpart requires reporting of emissions or supply of F–GHG, CH_4, or N_2O, (other than combustion related emissions, which are a small percentage of total combustion emissions); and (3) the EPA estimates that there are some facilities in the source category that did not previously exceed the threshold. The EPA analyzed the applicability of these criteria to each subpart; the subparts that met these three criteria and could have new reporters as a result of the proposed changes to Table A–1 were subparts I, T, W, HH, II, OO, and TT.

In order to determine the number of additional reporters expected under these subparts, we used data from industry surveys and publicly available data sources to compile a list of facilities that could be affected in each subpart. Combined with source-specific data, we used these facility lists to estimate the change in facility emissions or supply using the proposed new and revised GWPs and to identify the additional facilities in each subpart that could meet a CO_2e-based threshold. Following this review, the EPA determined that there would likely be no new reporters from the magnesium production source category (subpart T).

The EPA determined the estimated increases in reported emissions for each subpart by examining the available data for 2010 and 2011 reporters. For existing facilities submitting an initial annual report for reporting year 2010, the increase in calculated emissions from each facility was estimated by adjusting the reported GHG mass emissions to CO_2e using the proposed AR4 GWP values. For existing facilities required to submit an initial annual report for reporting year 2011, we estimated CO_2e emissions and supply using data that was developed to support the original rule, such as the subpart-specific technical support documents. We also estimated the increase in emissions that would result from additional reporters in each subpart expected to exceed the source category threshold. For those facilities, the available source-specific emissions data for the expected new reporters was calculated in terms of CO_2e, and the estimated emissions were included in the total source category emissions.

Additional information on the EPA's analysis of the estimated number of reporters and the increase in reported CO_2e for each subpart is in the Impacts Analysis (see Docket ID No. EPA–HQ–OAR–2012–0934).

2. How were the costs of this proposed rule estimated?

The compliance costs associated with the proposed amendments were determined for those additional reporters who would be required to submit an annual report under Part 98 if the proposed amendments to Table A–1 were finalized. The total compliance costs for additional reporters are estimated to be $3.9 million for the first year and $1.2 million for subsequent years (2011 dollars).

Costs for additional reporters are summarized in Table 11 of this preamble, which presents the first-year and subsequent-year costs for each source category.

TABLE 11—COST IMPACTS OF PROPOSED AMENDMENTS FOR ADDITIONAL REPORTERS

Subpart	Number of additional reporters due to revised GWP	Incremental cost impact for additional reporters ($/yr for first year)	Incremental cost impact for additional reporters ($/yr for subsequent years)
I—Electronics Manufacturing	4	88,900	88,900
W—Petroleum & Natural Gas Systems	99	3,400,000	860,000
HH—Municipal Solid Waste Landfills	57	309,700	137,500
II—Industrial Wastewater	2	10,300	10,300
OO—Industrial GHG Suppliers	3	10,500	10,500
TT—Industrial Waste Landfills	19	118,600	87,300
Total	184	3,938,000	1,194,500

To estimate the cost impacts for additional reporters, the EPA used the methodologies from the subpart-specific regulatory impacts analyses from the original GHG reporting rule and updated the cost information to 2011 dollars. In general, we determined total reporting costs for each subpart by assigning model facility costs to individual affected facilities in each industry sector. Labor costs were determined for monitoring, recordkeeping, and reporting according to the rule requirements. Capital costs for monitoring equipment were also estimated for each model facility. The total cost for each subpart was determined by multiplying the model facility cost by the number of affected facilities.

For existing reporters that have submitted an annual report for reporting year 2010 or 2011, there would be no significant cost impacts resulting from the proposed amendments to Table A–1; using the proposed GWPs would not affect the cost of monitoring and recordkeeping and would not materially affect the cost for calculating emissions for these facilities. See the Impacts Analysis (Docket ID No. EPA–HQ–OAR–2012–0934) for more details.

B. Additional Impacts of the Proposed Technical Corrections and Other Amendments

The proposed corrections also include clarifications to terms and definitions for certain emission equations, simplifications to calculation methods and data reporting requirements, or corrections for consistency between provisions within a subpart or between subparts in Part 98. In general, these clarifications and corrections do not fundamentally affect the applicability, monitoring requirements, or data collected and reported or increase the recordkeeping and reporting burden associated with Part 98. Although we have added a few new reporting provisions to select source categories, the data we are proposing to collect is expected to be readily available to reporters; in most cases, it would already have been recorded and would not require additional monitoring or monitoring equipment for existing reporters. Additionally, the proposed confidentiality determinations for new or revised data elements would not affect whether and how data are reported and therefore, would not impose any additional burden on sources. See the EPA's full analysis of the additional impacts of the corrections, clarifying, and other amendments in the Impacts Analysis in Docket ID No. EPA–HQ–OAR–2012–0934).

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011). This action (1) proposes to clarify or change specific provisions in the Greenhouse Gas Reporting Rule, including amending Table A–1 of Subpart A to incorporate new and revised GWPs, and (2) proposes confidentiality determinations for the reporting of new or substantially revised (i.e., requiring additional or different data to be reported) data elements contained in the proposed amendments. The EPA prepared an analysis of the potential compliance costs associated with the proposed amendments and amendments to revise global warming potentials in subpart A. This analysis is contained in the Impacts Analysis (see Docket ID No. EPA–HQ–OAR–2012–0934). A copy of the analysis is available in the docket for this action and the analysis is briefly summarized here. The total compliance costs for additional reporters are $1,195,000 ($2011). The highest costs are anticipated for 99 facilities affected by subpart W, Petroleum and Natural Gas Systems, ($860,000), and 57 facilities affected by subpart HH, Municipal Solid Waste Landfills ($137,500). New facilities required to report under subparts I, II, OO, and TT would incur a combined cost of $197,000. The proposed confidentiality determinations for new and substantially revised data elements do not increase the existing compliance costs. The compliance costs associated with the proposed amendments are less than the significance threshold of $100 million per year. The compliance costs for individual facilities are not expected to impose a significant economic burden.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. This action proposes amended GWP values in subpart A and other corrections and harmonizing revisions, and proposes confidentiality determinations for the reporting of new or substantially revised (i.e., requiring additional or different data to be reported) data elements contained in the proposed amendments. These proposed amendments and confidentiality determinations do not make any substantive changes to the reporting requirements in any of the subparts for which amendments are being proposed. The proposed amendments to subpart A include revision of GWPs in Table A–1 of subpart A. As discussed in Section V of this preamble, the proposed amendments could affect the total number of facilities reporting under Part 98 and increase the collective annual emissions or supply reported. The EPA prepared an analysis of the potential compliance costs associated with the proposed amendments to Table A–1 in the Impacts Analysis (see Docket ID No. EPA–HQ–OAR–2012–0934).

Other proposed amendments to subpart A include adding requirements that provide reporters instruction regarding reporting of location, ownership, and facility identification (i.e., reporting of ORIS codes). The remaining proposed changes also include revising and adding definitions. The proposed revisions are clarifications or require reporting of information that facilities are expected to have readily available (e.g., latitude and longitude of the facility, ORIS code for each power generating unit), and are not expected to result in significant burden for reporters.

The proposed amendments to the reporting requirements in the source category-specific subparts generally do not change the nature of the data reported and are not anticipated to result in significant burden for reporters. For example, several of the proposed amendments are clarifications or corrections to existing reporting requirements. For example, for subpart H, the EPA is proposing to require reporting of annual, facility-wide cement production instead of monthly, kiln-specific cement production for facilities that use a CEMS to measure CO_2 emissions. Because facilities are already expected to track facility-wide cement production for budgeting purposes, we do not expect this revision to result in any additional burden for cement production facilities. In some cases we are proposing to include reporting requirements for data that are already collected by reporters. For instance, for subpart RR, the EPA is proposing to add a reporting requirement for facilities to report the standard or method used to calculate the mass or volume of contents in containers that is redelivered to another facility without being injected into the well. The proposed data element does not require additional data collection or monitoring from reporters, and is not a significant change.

The EPA is also proposing changes that would reduce the reporting burden. For example, for subpart BB (Silicon Carbide Production), the EPA is proposing to remove the requirement for facilities to report CH_4 emissions from silicon carbide process units or furnaces. Additionally, the EPA is proposing to amend subpart BB such that facilities would calculate and report CO_2 emissions for all process units and furnaces combined, instead of each process unit or production furnace. We expect that both of these major changes will reduce the reporting burden for facilities subject to subpart BB.

Additional changes to the reporting requirements in each subpart are detailed in the Impacts Analysis (see Docket ID No. EPA–HQ–OAR–2012–0934). The Office of Management and Budget (OMB) has previously approved the information collection requirements for 40 CFR part 98 under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0629, ICR 2300.10. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act (RFA)

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 this proposed rule on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration's 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 today's proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this proposed rule are small businesses. We have determined that up to 37 small municipal solid waste landfills, representing up to a .03% increase in regulated businesses in this industry, will experience an impact of .02 to .60% of revenues; up to 3 suppliers of industrial GHGs, representing up to a .02% increase in regulated businesses in this industry, will experience an impact of .02 to .14% of revenues; and that up to 19 industrial waste landfills (primarily co-located with food processing facilities), representing up to a .19% increase in regulated businesses in this industry, will experience an impact of .01 to .48% of revenues.

Although this proposed rule will not have a significant economic impact on a substantial number of small entities, the EPA nonetheless has tried to reduce the impact of this rule on small entities. For example, the EPA conducted several meetings with industry associations to discuss regulatory options and the corresponding burden on industry, such as recordkeeping and reporting. The EPA continues to conduct significant outreach on the mandatory GHG reporting rule and maintains an ''open door'' policy for stakeholders to help inform the EPA's understanding of key issues for the industries.

We continue to be interested in the potential impacts of the proposed rule amendments on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act (UMRA)

The proposed rule amendments and confidentiality determinations do 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. Thus, the proposed rule amendments and confidentiality determinations are not subject to the requirements of section 202 and 205 of the 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. The proposed rule amends specific provisions in subpart A, General Provisions, to reflect global warming potentials that have been published by the IPCC and to propose global warming potentials for certain fluorinated greenhouse gases. Also in this action, the EPA is revising specific provisions to provide clarity on what is to be reported. In some cases, the EPA has increased flexibility in the selection of methods used for calculating and monitoring GHGs. Therefore, this action is not subject to the requirements of section 203 of the UMRA.

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.

These proposed amendments and confidentiality determinations apply directly to facilities that directly emit greenhouses gases or that are suppliers of greenhouse gases. They do not apply to governmental entities unless the government entity owns a facility that directly emits greenhouse gases above threshold levels (such as a landfill or large combustion device), so relatively few government facilities would be affected. Moreover, for government facilities that are subject to the rule, the proposed revisions will not have a significant cost impact. This regulation also does not limit the power of States or localities to collect GHG data and/or regulate GHG emissions. Thus, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between the EPA and state and local governments, we specifically solicit comment on this proposed action from state and local officials.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). The proposed amendments and confidentiality determinations apply directly to facilities that directly emit greenhouses gases or that are suppliers of greenhouse gases. They would not have tribal implications unless the tribal entity owns a facility that directly emits greenhouse gases above threshold levels (such as a landfill or large combustion device). Relatively few tribal facilities would be affected. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

The 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 does not establish an environmental standard intended to mitigate health or safety risks.

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 (15 U.S.C. 272 note) directs the 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 the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This proposed rulemaking does not involve the use of any new technical standards, but allows for greater flexibility for reporters to use consensus standards where they are available. Therefore, the EPA is not considering the use of specific 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.

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment because it is a rule addressing information collection and reporting procedures.

List of Subjects 40 CFR Part 98

Environmental protection, Administrative practice and procedure, Greenhouse gases, Suppliers, Reporting and recordkeeping requirements.

Dated: March 8, 2013.

Bob Perciasepe,

Acting Administrator.

For the reasons stated in the preamble, title 40, chapter I, of the Code of Federal Regulations is proposed to be amended as follows:

PART 98—[AMENDED]

■ 1. The authority citation for part 98 continues to read as follows:

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

Subpart A—[AMENDED]

■ 2. Section 98.3 is amended by:

■ a. Revising paragraph (c)(1).

■ b. Adding paragraphs (c)(11)(viii) and (c)(13).

■ c. Revising paragraphs (h)(4), and (j)(3)(ii).

■ d. Adding paragraphs (k) and (l).

§ 98.3 What are the general monitoring, reporting, recordkeeping and verification requirements of this part?

* * * * *

(c) * * *

(1) Facility name or supplier name (as appropriate), and physical street address of the facility or supplier, including the city, State, and zip code. If the facility does not have a physical street address, then the facility must provide the latitude and longitude representing the location of facility operations in decimal degree format. This must be provided in a comma-delimited ''latitude, longitude'' coordinate pair reported in decimal degrees to at least four digits to the right of the decimal.

* * * * *

(11) * * *

(viii) The facility or supplier must refer to the reporting instructions of the electronic GHG reporting tool regarding standardized conventions for the naming of a parent company.

* * * * *

(13) ORIS code for each power generation unit that has been assigned an ORIS code by the Energy Information Administration.

* * * * *

(h) * * *

(4) Notwithstanding paragraphs (h)(1) and (h)(2) of this section, upon request by the owner or operator, the Administrator may provide reasonable extensions of the 45-day period for submission of the revised report or information under paragraphs (h)(1) and (h)(2) of this section. If the Administrator receives a request for extension of the 45-day period, by email to an address prescribed by the Administrator prior to the expiration of the 45-day period, the extension request is deemed to be automatically granted for 30 days. The Administrator may grant an additional extension beyond the automatic 30-day extension if the owner or operator submits a request for an additional extension and the request is received by the Administrator at least 5 business days prior to the expiration of the automatic 30-day extension, provided the request demonstrates that it is not practicable to submit a revised report or information under paragraphs (h)(1) and (h)(2) within 75 days. The Administrator will approve the extension request if the request demonstrates that it is not practicable to collect and process the data needed to resolve potential reporting errors identified pursuant to paragraphs (h)(1) or (h)(2) of this section within 75 days.

* * * * *

(j) * * *

(3) * * *

(ii) Any subsequent extensions to the original request must be submitted to the Administrator within 4 weeks of the owner or operator identifying the need to extend the request, but in any event no later than 4 weeks before the date for the planned process equipment or unit shutdown that was provided in the original or most recently approved request.

* * * * *

(k) *Revised Global Warming Potentials*—(1) *General.* Starting with reporting year 2013, facilities and suppliers must use the revised GWPs in Table A–1 of this subpart, Global Warming Potentials, for calculating CO_2e emissions for determining applicability to this part and for calculating CO_2e emissions in annual GHG reports.

(2) *Special provision for reporting year 2013.* A facility or supplier that was not subject to a subpart of part 98 for reporting year 2012, but becomes subject to a subpart of this part due to a change in the GWP for one or more compounds in Table A–1 of this subpart, Global Warming Potentials, is not required to submit an annual GHG for reporting year 2013. Such facilities or suppliers must start monitoring and collecting GHG data in compliance with this part starting on January 1, 2014, and submit an annual greenhouse gas report for reporting year 2014 by March 31, 2015.

(l) *Special provision for best available monitoring methods in 2014.* This paragraph (l) applies to owners or operators of facilities or suppliers that first become subject to any subpart of part 98 due to an amendment to Table A–1 of this subpart, Global Warming Potentials.

(1) *Best available monitoring methods.* From January 1, 2014 to March 31, 2014, owners or operators subject to this paragraph (l) may use best available monitoring methods for any parameter (e.g., fuel use, feedstock rates) that cannot reasonably be measured according to the monitoring and QA/QC requirements of a relevant subpart. The owner or operator must use the calculation methodologies and equations in the ''Calculating GHG Emissions'' sections of each relevant subpart, but may use the best available monitoring method for any parameter for which it is not reasonably feasible to acquire, install, and operate a required

piece of monitoring equipment by January 1, 2014. Starting no later than April 1, 2014, the owner or operator must discontinue using best available methods and begin following all applicable monitoring and QA/QC requirements of this part, except as provided in paragraph (l)(2) of this section. Best available monitoring methods means any of the following methods:

(i) Monitoring methods currently used by the facility that do not meet the specifications of a relevant subpart.

(ii) Supplier data.

(iii) Engineering calculations.

(iv) Other company records.

(2) *Requests for extension of the use of best available monitoring methods.* The owner or operator may submit a request to the Administrator to use one or more best available monitoring methods beyond March 31, 2014.

(i) *Timing of request.* The extension request must be submitted to EPA no later than January 31, 2014.

(ii) *Content of request.* Requests must contain the following information:

(A) A list of specific items of monitoring instrumentation for which the request is being made and the locations where each piece of monitoring instrumentation will be installed.

(B) Identification of the specific rule requirements (by rule subpart, section, and paragraph numbers) for which the instrumentation is needed.

(C) A description of the reasons that the needed equipment could not be obtained and installed before April 1, 2014.

(D) If the reason for the extension is that the equipment cannot be purchased and delivered by April 1, 2014, supporting documentation such as the date the monitoring equipment was ordered, investigation of alternative suppliers and the dates by which alternative vendors promised delivery, backorder notices or unexpected delays, descriptions of actions taken to expedite delivery, and the current expected date of delivery.

(E) If the reason for the extension is that the equipment cannot be installed without a process unit shutdown, include supporting documentation demonstrating that it is not practicable to isolate the equipment and install the monitoring instrument without a full process unit shutdown. Include the date of the most recent process unit shutdown, the frequency of shutdowns for this process unit, and the date of the next planned shutdown during which the monitoring equipment can be installed. If there has been a shutdown or if there is a planned process unit shutdown between April 2, 2013 and April 1, 2014, include a justification of why the equipment could not be obtained and installed during that shutdown.

(F) A description of the specific actions the facility will take to obtain and install the equipment as soon as reasonably feasible and the expected date by which the equipment will be installed and operating.

(iii) *Approval criteria.* To obtain approval, the owner or operator must demonstrate to the Administrator's satisfaction that it is not reasonably feasible to acquire, install, and operate a required piece of monitoring equipment by April 1, 2014. The use of best available methods under this paragraph (l) will not be approved beyond December 31, 2014.

■ 3. Section 98.6 is amended by:

■ a. Revising the definitions for ''Continuous bleed'', ''Degasification system'', and ''Intermittent bleed pneumatic devices''.

■ b. Adding the definitions of ''Fluidized Bed Combustor (FBC)'' and ''ORIS code'' in alphabetical order.

■ c. Revising the term ''Ventilation well or shaft'' to read ''Ventilation hole or shaft'' and revising the definition of the term.

■ d. Revising the definition of ''Ventilation system''.

§ 98.6 Definitions.

* * * * *

Continuous bleed means a continuous flow of pneumatic supply natural gas to the process control device (*e.g.* level control, temperature control, pressure control) where the supply gas pressure is modulated by the process condition, and then flows to the valve controller where the signal is compared with the process set-point to adjust gas pressure in the valve actuator.

* * * * *

Degasification system means the entirety of the equipment that is used to drain gas from underground coal mines. This includes all degasification wells and gob gas vent holes at the underground coal mine. Degasification systems include gob and premine surface drainage wells, gob and premine in-mine drainage wells, and in-mine gob and premine cross-measure borehole wells.

* * * * *

Fluidized Bed Combustor (FBC) means a combustion technology (e.g., a fluidized bed boiler) where the maximum steady-state temperature reached within the combustor (excluding periods of startup, shutdown, and malfunction) during the combustion of solid fuels (e.g., coal, tire derived fuel, wood and wood residuals, agricultural byproducts, coke, municipal solid waste, or mixtures of such fuels) is less than or equal to 1,900 degrees Fahrenheit.

* * * * *

Intermittent bleed pneumatic devices mean automated flow control devices powered by pressurized natural gas and used for automatically maintaining a process condition such as liquid level, pressure, delta-pressure and temperature. These are snap-acting or throttling devices that discharge all or a portion of the full volume of the actuator intermittently when control action is necessary, but does not bleed continuously.

* * * * *

ORIS code means the unique identifier assigned to each power plant in the National Electric Energy Data System (NEEDS). The ORIS code is a four-digit number assigned by the Energy Information Administration (EIA) at the US Department of Energy to power plants owned by utilities.

* * * * *

Ventilation hole or shaft means a vent hole or shaft employed at an underground coal mine to serve as the outlet or conduit to move air from the ventilation system out of the mine.

Ventilation system means a system that is used to control the concentration of methane and other gases within mine working areas through mine ventilation, rather than a mine degasification system. A ventilation system consists of fans that move air through the mine workings to dilute methane concentrations.

* * * * *

■ 4a. Table A–1 to Subpart A is revised to read as follows:

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS

[100-Year Time Horizon]

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
Carbon dioxide	124–38–9	CO_2	1
Methane	74–82–8	CH_4	[a] 25
Nitrous oxide	10024–97–2	N_2O	[a] 298
HFC–23	75–46–7	CHF_3	[a] 14,800
HFC–32	75–10–5	CH_2F_2	[a] 675
HFC–41	593–53–3	CH_3F	[a] 92
HFC–125	354–33–6	C_2HF_5	[a] 3,500
HFC–134	359–35–3	$C_2H_2F_4$	[a] 1,100
HFC–134a	811–97–2	CH_2FCF_3	[a] 1,430
HFC–143	430–66–0	$C_2H_3F_3$	[a] 353
HFC–143a	420–46–2	$C_2H_3F_3$	[a] 4,470
HFC–152	624–72–6	CH_2FCH_2F	53
HFC–152a	75–37–6	CH_3CHF_2	[a] 124
HFC–161	353–36–6	CH_3CH_2F	12
HFC–227ea	431–89–0	C_3HF_7	[a] 3,220
HFC–236cb	677–56–5	$CH_2FCF_2CF_3$	1,340
HFC–236ea	431–63–0	CHF_2CHFCF_3	1,370
HFC–236fa	690–39–1	$C_3H_2F_6$	[a] 9,810
HFC–245ca	679–86–7	$C_3H_3F_5$	[a] 693
HFC–245fa	460–73–1	$CHF_2CH_2CF_3$	1,030
HFC–365mfc	406–58–6	$CH_3CF_2CH_2CF_3$	794
HFC–43–10mee	138495–42–8	$CF_3CFHCFHCF_2CF_3$	[a] 1,640
Sulfur hexafluoride	2551–62–4	SF_6	[a] 22,800
Trifluoromethyl sulphur pentafluoride	373–80–8	SF_5CF_3	17,700
Nitrogen trifluoride	7783–54–2	NF_3	17,200
PFC–14 (Perfluoromethane)	75–73–0	CF_4	[a] 7,390
PFC–116 (Perfluoroethane)	76–16–4	C_2F_6	[a] 12,200
PFC–218 (Perfluoropropane)	76–19–7	C_3F_8	[a] 8,830
Perfluorocyclopropane	931–91–9	$C–C_3F_6$	17,340
PFC–3–1–10 (Perfluorobutane)	355–25–9	C_4F_{10}	[a] 8,860
Perfluorocyclobutane	115–25–3	$C–C_4F_8$	[a] 10,300
PFC–4–1–12 (Perfluoropentane)	678–26–2	C_5F_{12}	[a] 9,160
PFC–5–1–14 (Perfluorohexane)	355–42–0	C_6F_{14}	[a] 9,300
PFC–9–1–18	306–94–5	$C_{10}F_{18}$	7,500
HCFE–235da2 (Isoflurane)	26675–46–7	$CHF_2OCHClCF_3$	350
HFE–43–10pccc (H–Galden 1040x)	E1730133	$CHF_2OCF_2OC_2F_4OCHF_2$	1,870
HFE–125	3822–68–2	CHF_2OCF_3	14,900
HFE–134	1691–17–4	CHF_2OCHF_2	6,320
HFE–143a	421–14–7	CH_3OCF_3	756
HFE–227ea	2356–62–9	$CF_3CHFOCF_3$	1,540
HFE–236ca12 (HG–10)	78522–47–1	$CHF_2OCF_2OCHF_2$	2,800
HFE–236ea2 (Desflurane)	57041–67–5	$CHF_2OCHFCF_3$	989
HFE–236fa	20193–67–3	$CF_3CH_2OCF_3$	487
HFE–245cb2	22410–44–2	$CH_3OCF_2CF_3$	708
HFE–245fa1	84011–15–4	$CHF_2CH_2OCF_3$	286
HFE–245fa2	1885–48–9	$CHF_2OCH_2CF_3$	659
HFE–254cb2	425–88–7	$CH_3OCF_2CHF_2$	359
HFE–263fb2	460–43–5	$CF_3CH_2OCH_3$	11
HFE–329mcc2	67490–36–2	$CF_3CF_2OCF_2CHF_2$	919
HFE–338mcf2	156053–88–2	$CF_3CF_2OCH_2CF_3$	552
HFE–338pcc13 (HG–01)	188690–78–0	$CHF_2OCF_2CF_2OCHF_2$	1,500
HFE–347mcc3	28523–86–6	$CH_3OCF_2CF_2CF_3$	575
HFE–347mcf2	E1730135	$CF_3CF_2OCH_2CHF_2$	374
HFE–347pcf2	406–78–0	$CHF_2CF_2OCH_2CF_3$	580
HFE–356mec3	382–34–3	$CH_3OCF_2CHFCF_3$	101
HFE–356pcc3	160620–20–2	$CH_3OCF_2CF_2CHF_2$	110
HFE–356pcf2	E1730137	$CHF_2CH_2OCF_2CHF_2$	265
HFE–356pcf3	35042–99–0	$CHF_2OCH_2CF_2CHF_2$	502
HFE–365mcf3	378–16–5	$CF_3CF_2CH_2OCH_3$	11
HFE–374pc2	512–51–6	$CH_3CH_2OCF_2CHF_2$	557
HFE–449s1 (HFE–7100) Chemical blend	163702–07–6 163702–08–7	$C_4F_9OCH_3(CF_3)_2CFCF_2OCH_3$	297
HFE–569sf2 (HFE–7200) Chemical blend	163702–05–4 163702–06–5	$C_4F_9OC_2H_5(CF_3)_2CFCF_2OC_2H_5$	59
Sevoflurane	28523–86–6	$CH_2FOCH(CF_3)_2$	345
HFE–356mm1	13171–18–1	$(CF_3)_2CHOCH_3$	27
HFE–338mmz1	26103–08–2	$CHF_2OCH(CF_3)_2$	380
(Octafluorotetramethy-lene)hydroxymethyl group	NA	$X–(CF_2)_4CH(OH)–X$	73

TABLE A–1 TO SUBPART A OF PART 98—GLOBAL WARMING POTENTIALS—Continued

[100-Year Time Horizon]

Name	CAS No.	Chemical formula	Global warming potential (100 yr.)
HFE–347mmy1	22052–84–2	$CH_3OCF(CF_3)_2$	343
Bis(trifluoromethyl)-methanol	920–66–1	$(CF_3)_2CHOH$	195
2,2,3,3,3-pentafluoropropanol	422–05–9	$CF_3CF_2CH_2OH$	42
PFPMIE	NA	$CF_3OCF(CF_3)CF_2OCF_2OCF_3$	10,300
HFC–1234ze [b]	29118–24–9	$C_3H_2F_4$	6
hexafluoropropylene (HFP) [b]	116–15–4	C_3F_6	0.25
perfluoromethyl vinyl ether (PMVE) [b]	1187–93–5	$CF(CF_3)OCF_3$	3
tetrafluoroethylene (TFE) [b]	116–14–3	C_2F_4	0.02
trifluoro propene (TFP) [b]	677–21–4	$C_3H_3F_3$	3
vinyl fluoride (VF) [b]	75–02–5	C_2H_3F	0.7
vinylidiene fluoride (VF2) [b]	75–38–7	$C_2H_2F_2$	0.9
carbonyl fluoride [b]	353–50–4	COF_2	2
perfluoropropyl vinyl ether [b]	1623–05–8	$C_5F_{10}O$	3
perfluoroethyl vinyl ether [b]	10493–43–3	C_4F_8O	3
HFC–1234yf [b]	754–12–1	$C_3H_2F_4$	4
perfluorethyl iodide (2–I) [b]	354–64–3	C_2F_5I	3
perfluorbutyl iodide (PFBI, 42–I) [b]	423–39–2	C_4F_9I	3
perfluorhexyl iodide (6–I) [b]	355–43–1	$CF_3CF_2CF_2CF_2CF_2CF_2IC_6F_{13}I$	2
perfluoroctyl iodide (8–I) [b]	507–63–1	$C_8F_{17}I$	2
1,1,1,2,2-pentafluoro-4-iodo butane (22–I) [b]	40723–80–6	$C_4H_4F_5I$	2
1,1,1,2,2,3,3,4,4-nonafluoro-6-iodo hexane (42–I) [b]	2043–55–2	$C_6H_4F_9I$	2
perfluorobutyl ethene (42–U) [b]	19430–93–4	$C_6H_3F_9$	2
perfluorohexyl ethene (62–U) [b]	25291–17–2	$C_8H_3F_{13}$	1
perfluorooctyl ethene (82–U) [b]	21652–58–4	$C_{10}H_3F_{17}$	1
1H,1H, 2H,2H-perfluorohexan-1-ol (42–AL) [b]	2043–47–2	$C_6H_5F_9O$	5
FK–5–1–12 Perfluoroketone; FK–5–1–12myy2; n-Perfluorooctane; Octanedecafluorooctane [b].	756–13–8	$CF_3CF_2C(O)CF(CF_3)_2$	1.8
C7 Fluoroketone, Novec 774/FK–6–1–12	813–44–5 and 813–45–6	$C_7F_{14}O$ Chemical Blend	1
trans-1-chloro-3,3,3-trifluoroprop-1-ene [b]	2730–43–0	$C_3H_2ClF_3$	7
Hexadecofluoroheptane [b] (PFC–6–1–12)	335–57–9	C_7F_{16}	7930
octadecafluorooctane [b] (PFC–7–1–18)	307–34–6	C_8F_{18}	8340

[a] The GWP for this compound is different than the GWP in the version of Table A–1 to subpart A of part 98 published on October 30, 2009.
[b] The GWP for this compound was not provided in the version of Table A–1 to subpart A of part 98 published on October 30, 2009.
NA—Not available.

■ 4b. Table A–6 is amended by revising the entries for 98.346(d)(1) and 98.346(e) to read as follows:

TABLE A–6 TO SUBPART A OF PART 98—DATA ELEMENTS THAT ARE INPUTS TO EMISSION EQUATIONS AND FOR WHICH THE REPORTING DEADLINE IS MARCH 31, 2013

Subpart	Rule citation (40 CFR part 98)	Specific data elements for which reporting date is March 31, 2013 ("All" means all data elements in the cited paragraph are not required to be reported until March 31, 2013)
*	*	* * * * * *
HH	98.346(d)(1)	Only degradable organic carbon (DOC) value, and fraction of DOC dissimilated (DOCF) values.
*	*	* * * * * *
HH	98.346(e)	Only fraction of CH_4 in landfill gas and methane correction factor (MCF) values.
*	*	* * * * * *

Subpart C—[AMENDED]

■ 5. Section 98.33 is amended by:

■ a. Adding paragraphs (b)(1)(viii) and (ix).

■ b. Revising paragraphs (b)(3)(ii)(A), (e)(1)(ii), and (e)(3)(iv)(B).

§ 98.33 Calculating GHG emissions.

* * * * *

(b) * * *

(1) * * *

(viii) May be used for the combustion of a fuel listed in Table C–1 if the fuel is combusted in a unit with a maximum rated heat input capacity greater than 250 mmBtu/hr (or, pursuant to § 98.36(c)(3), in a group of units served by a common supply pipe, having at least one unit with a maximum rated heat input capacity greater than 250

mmBtu/hr), provided that both of the following conditions apply:

(A) The use of Tier 4 is not required.

(B) The fuel provides less than 10 percent of the annual heat input to the unit, or if § 98.36(c)(3) applies, to the group of units served by a common supply pipe.

(ix) May not be used for the combustion of waste coal (i.e., waste anthracite (culm) and waste bituminous (gob)).

* * * * *

(3) * * *

(ii) * * *

(A) The use of Tier 1 or 2 is permitted, as described in paragraphs (b)(1)(iii), (b)(1)(v), (b)(1)(viii), and (b)(2)(ii) of this section.

* * * * *

(e) * * *

(1) * * *

(ii) The procedures in paragraph (e)(4) of this section.

* * * * *

(3) * * *

(iv) * * *

(B) Multiply the result from paragraph (e)(3)(iv)(A) of this section by the appropriate default factor to determine the annual biogenic CO_2 emissions, in metric tons. For MSW, use a default factor of 0.55 and for tires, use a default factor of 0.20.

* * * * *

■ 6. Section 98.36 is amended by revising paragraph (b)(3) and the next to last sentence of paragraph (c)(3) introductory text to read as follows:

§ 98.36 Data reporting requirements.

* * * * *

(b) * * *

(3) Maximum rated heat input capacity of the unit, in mmBtu/hr.

* * * * *

(c) * * *

(3) * * * As a second example, in accordance with § 98.33(b)(1)(v), Tier 1 may be used regardless of unit size when natural gas is transported through the common pipe, if the annual fuel consumption is obtained from gas billing records in units of therms or mmBtu.* * *

* * * * *

■ 7. Tables C–1 and C–2 to Subpart C are revised to read as follows:

TABLE C–1 TO SUBPART C—DEFAULT CO_2 EMISSION FACTORS AND HIGH HEAT VALUES FOR VARIOUS TYPES OF FUEL

Fuel type	Default high heat value	Default CO_2 emission factor
Coal and coke	mmBtu/short ton	kg CO_2/mmBtu
Anthracite	25.09	103.69
Waste Anthracite (Culm)	See footnote 1	103.69
Bituminous	24.93	93.28
Waste Bituminous (Gob)	See footnote 1	93.28
Subbituminous	17.25	97.17
Lignite	14.21	97.72
Coal Coke	24.80	113.67
Mixed (Commercial sector)	21.39	94.27
Mixed (Industrial coking)	26.28	93.90
Mixed (Industrial sector)	22.35	94.67
Mixed (Electric Power sector)	19.73	95.52
Natural gas	mmBtu/scf	kg CO_2/mmBtu
(Weighted U.S. Average)	1.026×10^{-3}	53.06
Petroleum products	mmBtu/gallon	kg CO_2/mmBtu
Distillate Fuel Oil No. 1	0.139	73.25
Distillate Fuel Oil No. 2	0.138	73.96
Distillate Fuel Oil No. 4	0.146	75.04
Residual Fuel Oil No. 5	0.140	72.93
Residual Fuel Oil No. 6	0.150	75.10
Used Oil	0.138	74.00
Kerosene	0.135	75.20
Liquefied petroleum gases (LPG)[2]	0.092	61.71
Propane[2]	0.091	62.87
Propylene[2]	0.091	67.77
Ethane[2]	0.068	59.60
Ethanol	0.084	68.44
Ethylene[3]	0.058	65.96
Isobutane[2]	0.099	64.94
Isobutylene[2]	0.103	68.86
Butane[2]	0.103	64.77
Butylene[2]	0.105	68.72
Naphtha (<401 deg F)	0.125	68.02
Natural Gasoline	0.110	66.88
Other Oil (≤401 deg F)	0.139	76.22
Pentanes Plus	0.110	70.02
Petrochemical Feedstocks	0.125	71.02
Petroleum Coke	0.143	102.41
Special Naphtha	0.125	72.34
Unfinished Oils	0.139	74.54
Heavy Gas Oils	0.148	74.92
Lubricants	0.144	74.27
Motor Gasoline	0.125	70.22

TABLE C–1 TO SUBPART C—DEFAULT CO_2 EMISSION FACTORS AND HIGH HEAT VALUES FOR VARIOUS TYPES OF FUEL—Continued

Fuel type	Default high heat value	Default CO_2 emission factor
Aviation Gasoline	0.120	69.25
Kerosene-Type Jet Fuel	0.135	72.22
Asphalt and Road Oil	0.158	75.36
Crude Oil	0.138	74.54
Other fuels-solid	mmBtu/short ton	kg CO_2/mmBtu
Municipal Solid Waste	9.95 [4]	90.7
Tires	28.00	85.97
Plastics	38.00	75.00
Petroleum Coke	30.00	102.41
Other fuels—gaseous	mmBtu/scf	kg CO_2/mmBtu
Blast Furnace Gas	0.092×10^{-3}	274.32
Coke Oven Gas	0.599×10^{-3}	46.85
Propane Gas	2.516×10^{-3}	61.46
Fuel Gas [5]	1.388×10^{-3}	59.00
Biomass fuels—solid	mmBtu/short ton	kg CO_2/mmBtu
Wood and Wood Residuals(dry basis)[6]	17.48	93.80
Agricultural Byproducts	8.25	118.17
Peat	8.00	111.84
Solid Byproducts	10.39	105.51
Biomass fuels—gaseous	mmBtu/scf	kg CO_2/mmBtu
Landfill Gas	0.485×10^{-3}	52.07
Other Biomass Gases	0.655×10^{-3}	52.07
Biomass Fuels—liquid	mmBtu/gallon	kg CO_2/mmBtu
Ethanol	0.084	68.44
Biodiesel (100%)	0.128	73.84
Rendered Animal Fat	0.125	71.06
Vegetable Oil	0.120	81.55

[1] Provisions of the rule referencing ''default HHVs from Table C–1'' do not apply to culm and gob. The HHV for culm and gob must be determined according to the procedures specified in the Tier 2 Calculation Methodology.

[2] The HHV for components of LPG determined at 60 °F and saturation pressure with the exception of ethylene.

[3] Ethylene HHV determined at 41 °F (5 °C) and saturation pressure.

[4] Use of this default HHV is allowed only for: (a) Units that combust MSW, do not generate steam, and are allowed to use Tier 1; (b) units that derive no more than 10 percent of their annual heat input from MSW and/or tires; and (c) small batch incinerators that combust no more than 1,000 tons of MSW per year.

[5] Reporters subject to subpart X of this part that are complying with § 98.243(d) or subpart Y of this part may only use the default HHV and the default CO_2 emission factor for fuel gas combustion under the conditions prescribed in § 98.243(d)(2)(i) and (d)(2)(ii) and § 98.252(a)(1) and (a)(2), respectively. Otherwise, reporters subject to subpart X or subpart Y shall use either Tier 3 (Equation C–5) or Tier 4.

[6] Use the following formula to calculate a wet basis HHV for use in Equation C–1: $HHV_w = ((100–M)/100)*HHV_d$ where HHV_w = wet basis HHV, M = moisture content(percent) and HHV_d = dry basis HHV from Table C–1.

TABLE C–2 TO SUBPART C—DEFAULT CH_4 AND N_2O EMISSION FACTORS FOR VARIOUS TYPES OF FUEL

Fuel type	Default CH_4 emission factor (kg CH_4/mmBtu)	Default N_2O emission factor (kg N_2O/mmBtu)
Coal and Coke (All fuel types in Table C–1) [1]	1.1×10^{-02}	1.6×10^{-03}
Anthracite for FBCs only [2]	1.1×10^{-02}	1.6×10^{-01}
Waste Anthracite (Culm) for FBCs only [2]	1.1×10^{-02}	4.0×10^{-01}
Bituminous for FBCs only [2]	1.1×10^{-02}	1.3×10^{-01}
Waste Bituminous (Gob) for FBCs only [2]	1.1×10^{-02}	2.9×10^{-01}
Subbituminous for FBCs only [2]	1.1×10^{-02}	6.5×10^{-02}
Lignite for FBCs only [2]	1.1×10^{-02}	1.1×10^{-01}
Natural Gas	1.0×10^{-03}	1.0×10^{-04}
Petroleum (All fuel types in Table C–1)	3.0×10^{-03}	6.0×10^{-04}
Fuel Gas	3.0×10^{-03}	6.0×10^{-04}
Municipal Solid Waste	3.2×10^{-02}	4.2×10^{-03}
Tires	3.2×10^{-02}	4.2×10^{-03}
Blast Furnace Gas	2.2×10^{-05}	1.0×10^{-04}
Coke Oven Gas	4.8×10^{-04}	1.0×10^{-04}
Biomass Fuels—Solid (All fuel types in Table C–1, except wood and wood residuals)	3.2×10^{-02}	4.2×10^{-03}

TABLE C–2 TO SUBPART C—DEFAULT CH_4 AND N_2O EMISSION FACTORS FOR VARIOUS TYPES OF FUEL—Continued

Fuel type	Default CH_4 emission factor (kg CH_4/mmBtu)	Default N_2O emission factor (kg N_2O/mmBtu)
Wood and wood residuals	7.2×10^{-3}	3.6×10^{-3}
Biomass Fuels—Gaseous (All fuel types in Table C–1)	3.2×10^{-03}	6.3×10^{-04}
Biomass Fuels—Liquid (All fuel types in Table C–1)	1.1×10^{-03}	1.1×10^{-04}

[1] Use of the default emission factors for the coal and coke category may not be used to estimate emissions from combusting anthracite, waste anthracite, bituminous, waste bituminous, subbituminous, or lignite coal burned in an FBC.

[2] Use of these default emission factors is required for FBCs burning the specified coal type.

NOTE: Those employing this table are assumed to fall under the IPCC definitions of the "Energy Industry" or "Manufacturing Industries and Construction". In all fuels except for coal the values for these two categories are identical. For coal combustion, those who fall within the IPCC "Energy Industry" category may employ a value of 1g of CH^4/mmBtu.

* * * * *

Subpart E—[AMENDED]

■ 8. Section 98.53 is amended by:

■ a. Revising paragraph (b)(3) and paragraph (d) introductory text.

■ b. Revising paragraph (e) and Equation E–2.

■ c. Revising the parameters "DF" and "AF" of Equation E–3a.

■ d. Revising the parameters "DF_1", "AF_1", "DF_2", "AF_2", "DF_N", and "AF_N" of Equation E–3b.

■ e. Revising the parameters "DF^N", "AF_N", and "FC_N" of Equation E–3c.

§ 98.53 Calculating GHG emissions.

* * * * *

(b) * * *

(3) You must measure the adipic acid production rate during the test and calculate the production rate for the test period in tons per hour.

* * * * *

(d) If the adipic acid production unit exhausts to any N_2O abatement technology "N", you must determine the destruction efficiency according to paragraphs (d)(1), (d)(2), or (d)(3) of this section.

* * * * *

(e) If the adipic acid production unit exhausts to any N_2O abatement technology "N", you must determine the annual amount of adipic acid produced while N_2O abatement technology "N" is operating according to § 98.54(f). Then you must calculate the abatement factor for N_2O abatement technology "N" according to Equation E–2 of this section.

$$AF_N = \frac{P_z, N}{P_z} \qquad \text{(Eq. E-2)}$$

* * * * *

(g) * * *

(1) * * *

* * * * *

DF = Destruction efficiency of N_2O abatement technology "N" (decimal fraction of N_2O removed from vent stream).

AF = Abatement utilization factor of N_2O abatement technology "N" (decimal fraction of time that the abatement technology is operating).

* * * * *

(2) * * *

* * * * *

DF_1 = Destruction efficiency of N_2O abatement technology 1 (decimal fraction of N_2O removed from vent stream).

AF_1 = Abatement utilization factor of N_2O abatement technology 1 (decimal fraction of time that abatement technology 1 is operating).

DF_2 = Destruction efficiency of N_2O abatement technology 2 (decimal fraction of N_2O removed from vent stream).

AF_2 = Abatement utilization factor of N_2O abatement technology 2 (decimal fraction of time that abatement technology 2 is operating).

DF_N = Destruction efficiency of N_2O abatement technology "N" (decimal fraction of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology "N" (decimal fraction of time that abatement technology N is operating).

* * * * *

(3) * * *

* * * * *

DF_N = Destruction efficiency of N_2O abatement technology "N" (decimal fraction of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology "N" (decimal fraction of time that the abatement technology is operating).

FC_N = Fraction control factor of N_2O abatement technology "N" (decimal fraction of total emissions from unit "z" that are sent to abatement technology "N").

* * * * *

■ 9. Section 98.54 is amended by revising paragraphs (e) and (f) to read as follows:

§ 98.54 Monitoring and QA/QC requirements.

* * * * *

(e) You must determine the monthly amount of adipic acid produced. You must also determine the monthly amount of adipic acid produced during which N_2O abatement technology is operating. These monthly amounts are determined according to the methods in paragraphs (c)(1) or (c)(2) of this section.

(f) You must determine the annual amount of adipic acid produced. You must also determine the annual amount of adipic acid produced during which N_2O abatement technology is operating. These are determined by summing the respective monthly adipic acid production quantities determined in paragraph (e) of this section.

Subpart G—[AMENDED]

■ 10. Section 98.73 is amended by:

■ a. Revising paragraph (b)(4) introductory text and revising Equation G–4.

■ b. Revising Equation G–5 and by removing parameter "n" of Equation G–5 and adding in its place parameter "j".

§ 98.73 Calculating GHG emissions.

* * * * *

(b) * * *

(4) You must calculate the annual process CO_2 emissions from each ammonia processing unit k at your facility according to Equation G–4 of this section:

$$E_{CO2,k} = CO_{2,G,k} + CO_{2,L,k} + CO_{2,S,k} \qquad \text{(Eq. G-4)}$$

* * * * *

(5) * * *

$$CO_2 = \sum_{k=1}^{j} E_{CO2,k} \qquad \text{(Eq. G-5)}$$

* * * * *

j = Total number of ammonia processing units.

* * * * *

■ 11. Section 98.75 is amended by revising paragraph (b) to read as follows:

§ 98.75 Procedures for estimating missing data.

* * * * *

(b) For missing feedstock supply rates used to determine monthly feedstock consumption or monthly waste recycle stream quantity, you must determine the best available estimate(s) of the parameter(s), based on all available process data.

■ 12. Section 98.76 is amended by revising paragraphs (a) introductory text, (b) introductory text, and (b)(13) to read as follows:

§ 98.76 Data reporting requirements.

* * * * *

(a) If a CEMS is used to measure CO_2 emissions, then you must report the relevant information required under § 98.36 for the Tier 4 Calculation Methodology and the information in paragraphs (a)(1) and (a)(2) of this section:

* * * * *

(b) If a CEMS is not used to measure emissions, then you must report all of the following information in this paragraph (b):

* * * * *

(13) Annual CO_2 emissions (metric tons) from the steam reforming of a hydrocarbon or the gasification of solid and liquid raw material at the ammonia manufacturing process unit used to produce urea and the method used to determine the CO_2 consumed in urea production.

Subpart H—[AMENDED]

■ 13. Section 98.86 is amended by revising paragraph (a)(2) to read as follows:

§ 98.86 Data reporting requirements.

* * * * *

(a) * * *

(2) Annual facility cement production.

* * * * *

Subpart K—[AMENDED]

■ 14. Section 98.113 is amended by revising Equation K–3 and by removing the parameter ''2000/2205'' of Equation K–3 and adding in its place the parameter ''2/2205'' to read as follows:

§ 98.113 Calculating GHG emissions.

* * * * *

(d) * * *

(1) * * *

$$E_{CH_4} = \sum_{1}^{i} \left(M_{product_i} \times \frac{2}{2205} \times EF_{product_i} \right) \qquad \text{(Eq. K-3)}$$

* * * * *

2/2205 = Conversion factor to convert kg CH_4/ton of product to metric tons CH_4.

* * * * *

■ 15. Section 98.116 is amended by adding paragraph (e)(2) to read as follows:

§ 98.116 Data reporting requirements.

* * * * *

(e) * * *

(2) Annual process CH_4 emissions (in metric tons) from each EAF used for the production of any ferroalloy listed in Table K–1 of this subpart.

* * * * *

Subpart L—[AMENDED]

■ 16. Section 98.126 is amended by revising paragraphs (j) introductory text, (j)(1), and (j)(3)(i) to read as follows:

§ 98.126 Data reporting requirements.

* * * * *

(j) *Special provisions for reporting years 2011, 2012, and 2013 only.* For reporting years 2011, 2012, and 2013, the owner or operator of a facility must comply with paragraphs (j)(1), (j)(2), and (j)(3) of this section.

(1) *Timing.* The owner or operator of a facility is not required to report the data elements at § 98.3(c)(4)(iii) and paragraphs (a)(2), (a)(3), (a)(4), (a)(6), (b), (c), (d), (e), (f), (g), and (h) of this section until the later of March 31, 2015 or the date set forth for that data element at § 98.3(c)(4)(vii) and Table A–7 of Subpart A of this part.

* * * * *

(3) * * *

(i) If you choose to use a default GWP rather than your best estimate of the GWP for fluorinated GHGs whose GWPs are not listed in Table A–1 of Subpart A of this part, use a default GWP of 10,000 for fluorinated GHGs that are fully fluorinated GHGs and use a default GWP of 2000 for other fluorinated GHGs.

* * * * *

Subpart N—[AMENDED]

■ 17. Section 98.143 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraph (b) introductory text.

■ c. Revising the parameters ''MF_i'' and ''F_i'' of Equation N–1.

§ 98.143 Calculating GHG emissions.

You must calculate and report the annual process CO_2 emissions from each continuous glass melting furnace using the procedure in paragraphs (a) through (c) of this section.

* * * * *

(b) For each continuous glass melting furnace that is not subject to the requirements in paragraph (a) of this section, calculate and report the process and combustion CO_2 emissions from the glass melting furnace by using either the procedure in paragraph (b)(1) of this section or the procedure in paragraph (b)(2) of this section, except as specified in paragraph (c) of this section.

* * * * *

(2) * * *

(iv) * * *

* * * * *

MF_i = Annual average decimal mass fraction of carbonate-based mineral i in carbonate-based raw material i.

* * * * *

F_i = Decimal fraction of calcination achieved for carbonate-based raw material i, assumed to be equal to 1.0.

* * * * *

■ 18. Section 98.144 is amended by revising paragraph (b) to read as follows:

§ 98.144 Monitoring and QA/QC requirements.

* * * * *

(b) You must measure carbonate-based mineral mass fractions at least annually to verify the mass fraction data provided by the supplier of the raw material; such measurements shall be based on sampling and chemical analysis using consensus standards that specify X-ray fluorescence. For measurements made in years prior to the emissions reporting year 2014, you may also use ASTM D3682–01 (Reapproved 2006) Standard Test Method for Major and Minor Elements in Combustion Residues from Coal Utilization Processes (incorporated by reference, *see* § 98.7) or ASTM D6349–09 Standard Test Method for Determination of Major and Minor Elements in Coal, Coke, and Solid Residues from Combustion of Coal and Coke by Inductively Coupled Plasma—Atomic Emission Spectrometry (incorporated by reference, *see* § 98.7).

* * * * *

■ 19. Section 98.146 is amended by revising paragraphs (b)(4), (b)(6), and (b)(7) to read as follows:

§ 98.146 Data reporting requirements.

* * * * *

(b) * * *

(4) Carbonate-based mineral decimal mass fraction for each carbonate-based raw material charged to a continuous glass melting furnace.

* * * * *

(6) The decimal fraction of calcination achieved for each carbonate-based raw material, if a value other than 1.0 is used to calculate process mass emissions of CO_2.

(7) Method used to determine decimal fraction of calcination.

* * * * *

■ 20. Section 98.147 is amended by revising paragraph (b)(5) to read as follows:

§ 98.147 Records that must be retained.

* * * * *

(b) * * *

(5) The decimal fraction of calcination achieved for each carbonate-based raw material, if a value other than 1.0 is used to calculate process mass emissions of CO_2.

* * * * *

Subpart O—[AMENDED]

■ 21. Section 98.153 is amended by:

■ a. Revising paragraph (c) introductory text.

■ b, Revising paragraph (d) introductory text.

■ c. Revising the parameter ''E_D'' of Equation O–5.

§ 98.153 Calculating GHG emissions.

* * * * *

(c) For HCFC–22 production facilities that do not use a destruction device or that have a destruction device that is not directly connected to the HCFC–22 production equipment, HFC–23 emissions shall be estimated using Equation O–4 of this section:

* * * * *

(d) For HCFC–22 production facilities that use a destruction device connected to the HCFC–22 production equipment, HFC–23 emissions shall be estimated using Equation O–5 of this section:

* * * * *

E_D = Mass of HFC–23 emitted annually from destruction device (metric tons), calculated using Equation O–8 of this section.

* * * * *

■ 22. Section 98.154 is amended by revising paragraph (j) to read as follows:

§ 98.154 Monitoring and QA/QC requirements.

* * * * *

(j) The number of sources of equipment type t with screening values less than 10,000 ppmv shall be the difference between the number of leak sources of equipment type t that could emit HFC–23 and the number of sources of equipment type t with screening values greater than or equal to 10,000 ppmv as determined under paragraph (i) of this section.

* * * * *

■ 23. Section 98.156 is amended by revising paragraph (c) to read as follows:

§ 98.156 Data reporting requirements.

* * * * *

(c) Each HFC–23 destruction facility shall report the concentration (mass fraction) of HFC–23 measured at the outlet of the destruction device during the facility's annual HFC–23 concentration measurements at the outlet of the device. If the concentration of HFC–23 is below the detection limit of the measuring device, report the detection limit and that the concentration is below the detection limit.

* * * * *

Subpart P—[AMENDED]

■ 24. Section 98.163 is amended by:

■ a. Revising paragraph (b) introductory text.

■ b. Revising the parameters ''$Fdstk_n$'', ''CC_n'', and ''MW_n'' of Equation P–1.

■ c. Revising the parameters ''$Fdstk_n$'' and ''CC_n'' of Equation P–2.

■ d. Revising the parameters ''$Fdstk_n$'' and ''CC_n'' of Equation P–3.

§ 98.163 Calculating GHG emissions.

* * * * *

(b) *Fuel and feedstock material balance approach.* Calculate and report CO_2 emissions as the sum of the annual emissions associated with each fuel and feedstock used for hydrogen production by following paragraphs (b)(1) through (b)(3) of this section. The carbon content and molecular weight shall be obtained from the analyses conducted in accordance with § 98.164(b)(2), (b)(3), or (b)(4), as applicable, or from the missing data procedures in § 98.165. If the analyses are performed annually, then the annual value shall be used as the monthly average. If the analyses are performed more frequently than monthly, use the arithmetic average of values obtained during the month as the monthly average.

(1) * * *

* * * * *

$Fdstk_n$ = Volume of the gaseous fuel or feedstock used in month n (scf (at standard conditions of 68 °F and atmospheric pressure) of fuel or feedstock).

CC_n = Average carbon content of the gaseous fuel and feedstock for month n (kg carbon per kg of fuel or feedstock).

MW_n = Average molecular weight of the gaseous fuel or feedstock for month n (kg/kg-mole).

* * * * *

(2) * * *

* * * * *

$Fdstk_n$ = Volume of the liquid fuel or feedstock used in month n (gallons of fuel or feedstock).

CC_n = Average carbon content of the liquid fuel or feedstock, for month n (kg carbon per gallon of fuel or feedstock).

* * * * *

(3) * * *

* * * * *

$Fdstk_n$ = Mass of solid fuel or feedstock used in month n (kg of fuel or feedstock).

CC_n = Average carbon content of the solid fuel or feedstock, for month n (kg carbon per kg of fuel or feedstock).

* * * * *

■ 25. Section 98.164 is amended by:

■ a. Revising paragraphs (b)(3),(b)(4), and (b)(5) introductory text.

■ b. Removing paragraphs (c) and (d).

§ 98.164 Monitoring and QA/QC requirements.

* * * * *

(b) * * *

(3) Determine the carbon content of fuel oil, naphtha, and other liquid fuels and feedstocks at least monthly, except annually for standard liquid hydrocarbon fuels and feedstocks having consistent composition, or upon delivery for liquid fuels and feedstocks delivered by bulk transport (*e.g.,* by truck or rail).

(4) Determine the carbon content of coal, coke, and other solid fuels and feedstocks at least monthly, except annually for standard solid hydrocarbon fuels and feedstocks having consistent composition, or upon delivery for solid fuels and feedstocks delivered by bulk transport (*e.g.,* by truck or rail).

(5) You must use the following applicable methods to determine the carbon content for all fuels and feedstocks, and molecular weight of gaseous fuels and feedstocks. Alternatively, you may use the results of chromatographic analysis of the fuel and feedstock, provided that the chromatograph is operated, maintained, and calibrated according to the manufacturer's instructions; and the methods used for operation, maintenance, and calibration of the chromatograph are documented in the written monitoring plan for the unit under § 98.3(g)(5).

* * * * *

■ 26. Section 98.166 is amended by revising paragraphs (a)(2) and (a)(3) to read as follows:

§ 98.166 Data reporting requirements.

* * * * *

(a) * * *

(2) Annual quantity of hydrogen produced (metric tons) for each process unit.

(3) Annual quantity of ammonia produced (metric tons), if applicable, for each process unit.

* * * * *

■ 27. Section 98.167 is amended by adding paragraphs (c) and (d) to read as follows:

§ 98.167 Records that must be retained.

* * * * *

(c) For units using the calculation methodologies described 98.163(b), the records required under § 98.3(g) must include both the company records and a detailed explanation of how company records are used to estimate the following:

(1) Fuel and feedstock consumption, when solid fuel and feedstock is combusted and a CEMS is not used to measure GHG emissions.

(2) Fossil fuel consumption, when, pursuant to § 98.33(e), the owner or operator of a unit that uses CEMS to quantify CO_2 emissions and that combusts both fossil and biogenic fuels separately reports the biogenic portion of the total annual CO_2 emissions.

(3) Sorbent usage, if the methodology in § 98.33(d) is used to calculate CO_2 emissions from sorbent.

(d) The owner or operator must document the procedures used to ensure the accuracy of the estimates of fuel and feedstock usage and sorbent usage (as applicable) in § 98.163(b), including, but not limited to, calibration of weighing equipment, fuel and feedstock flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices must also be recorded, and the technical basis for these estimates must be provided.

Subpart Q—[AMENDED]

■ 28. Section 98.170 is amended by revising the first sentence to read as follows:

§ 98.170 Definition of the source category.

The iron and steel production source category includes facilities with any of the following processes: taconite iron ore processing, integrated iron and steel manufacturing, cokemaking not colocated with an integrated iron and steel manufacturing process, direct reduction furnaces not collocated with an integrated iron and steel manufacturing process, and electric arc furnace (EAF) steelmaking not colocated with an integrated iron and steel manufacturing process. * * *

■ 29. Section 98.173 is amended by:

■ a. Revising the parameters ''(F_s)'', ''(C_{sf})'', ''(F_g)'', ''(F_l)'', ''(C_0)'', ''(C_p)'', and ''(C_R)'' of Equation Q–1 in paragraph (b)(1)(i).

■ b. Revising the parameters ''(C_{Iron})'', ''(C_{Scrap})'', ''(C_{Flux})'', ''(C_{Carbon})'', ''(C_{Steel})'', ''(C_{Slag})'', and ''(C_R)'' of Equation Q–2 in paragraph (b)(1)(ii).

■ c. Revising the parameters ''(C_{Coal})'', ''(C_{Coke})'', and ''(C_R)'' of Equation Q–3 in paragraph (b)(1)(iii).

■ d. Revising the parameters ''(F_g)'', ''(C_{Feed})'', ''(C_{Sinter})'', and ''(C_R)'' of Equation Q–4 in paragraph (b)(1)(iv).

■ e. Revising paragraph (b)(1)(v).

■ f. Revising Equation Q–6 and revising the parameters ''($C_{Steelin}$)'', ''($C_{Steelout}$)'', and ''(C_R)'' of Equation Q–6 in paragraph (b)(1)(vi).

■ g. Revising the parameters ''(F_g)'', ''(C_{Ore})'', ''(C_{Carbon})'', ''(C_{Other})'', ''(C_{Iron})'', ''(C_{NM})'', and ''(C_R)'' of Equation Q–7 in paragraph (b)(1)(vii).

■ h. Revising paragraphs (c) and (d).

§ 98.173 Calculating GHG emissions.

* * * * *

(b) * * *

(1) * * *

(i) * * *

* * * * *

(F_s) = Annual mass of the solid fuel used (metric tons).

(C_{sf}) = Carbon content of the solid fuel, from the fuel analysis (expressed as a decimal fraction).

(F_g) = Annual volume of the gaseous fuel used (scf).

* * * * *

(F_l) = Annual volume of the liquid fuel used (gallons).

* * * * *

(C_0) = Carbon content of the greenball (taconite) pellets, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_p) = Carbon content of the fired pellets, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(ii) * * *

* * * * *

(C_{Iron}) = Carbon content of the molten iron, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Scrap}) = Carbon content of the ferrous scrap, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Flux}) = Carbon content of the flux materials, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Carbon}) = Carbon content of the carbonaceous materials, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Steel}) = Carbon content of the steel, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Slag}) = Carbon content of the slag, from the carbon analysis (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(iii) * * *

* * * * *

(C_{Coal}) = Carbon content of the coal, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Coke}) = Carbon content of the coke, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(iv) * * *

* * * * *

(F_g) = Annual volume of the gaseous fuel used (scf).

* * * * *

(C_{Feed}) = Carbon content of the mixed sinter feed materials that form the bed entering the sintering machine, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Sinter}) = Carbon content of the sinter pellets, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(v) For EAFs, estimate CO_2 emissions using Equation Q–5 of this section.

$$[CO]_2 = 44/12 * [(Iron) * (C_{Iron}) + (Scrap) * (C_{Scrap}) + (Flux) * (C_{Flux}) + (Electrode) * (C_{Electrode}) + (Carbon) * (C_{Carbon}) - (Steel) * (C_{Steel}) + (F_g) * (C_{gf})] \quad \text{(Eq. Q-5)}$$

Where:

CO_2 = Annual CO_2 mass emissions from the EAF (metric tons).

44/12 = Ratio of molecular weights, CO_2 to carbon.

(Iron) = Annual mass of direct reduced iron (if any) charged to the furnace (metric tons).

(C_{Iron}) = Carbon content of the direct reduced iron, from the carbon analysis results (expressed as a decimal fraction).

(Scrap) = Annual mass of ferrous scrap charged to the furnace (metric tons).

(C_{Scrap}) = Carbon content of the ferrous scrap, from the carbon analysis results (expressed as a decimal fraction).

(Flux) = Annual mass of flux materials (*e.g.,* limestone, dolomite) charged to the furnace (metric tons).

(C_{Flux}) = Carbon content of the flux materials, from the carbon analysis results (expressed as a decimal fraction).

(Electrode) = Annual mass of carbon electrode consumed (metric tons).

($C_{Electrode}$) = Carbon content of the carbon electrode, from the carbon analysis results (expressed as a decimal fraction).

(Carbon) = Annual mass of carbonaceous materials (*e.g.,* coal, coke) charged to the furnace (metric tons).

(C_{Carbon}) = Carbon content of the carbonaceous materials, from the carbon analysis results (expressed as a decimal fraction).

(Steel) = Annual mass of molten raw steel produced by the furnace (metric tons).

(C_{Steel}) = Carbon content of the steel, from the carbon analysis results (expressed as a decimal fraction).

(F_g) = Annual volume of the gaseous fuel used (scf at 60 degrees F and one atmosphere).

(C_{gf}) = Average carbon content of the gaseous fuel, from the fuel analysis results (kg C per kg of fuel).

(MW) = Molecular weight of the gaseous fuel (kg/kg-mole).

(MVC) = Molar volume conversion factor (836.6 scf per kg-mole at standard conditions of 60 degrees F and one atmosphere).

(0.001) = Conversion factor from kg to metric tons.

(Slag) = Annual mass of slag produced by the furnace (metric tons).

(C_{Slag}) = Carbon content of the slag, from the carbon analysis results (expressed as a decimal fraction).

(R) = Annual mass of air pollution control residue collected (metric tons).

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(vi) * * *

$$CO_2 = \frac{44}{12} * \{(Steel) * [(C_{Steelin}) - (C_{Steelout})] - (R) * (C_R)\} \quad \text{(Eq. Q-6)}$$

* * * * *

($C_{Steelin}$) = Carbon content of the molten steel before decarburization, from the carbon analysis results (expressed as a decimal fraction).

($C_{Steelout}$) = Carbon content of the molten steel after decarburization, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

(vii) * * *

* * * * *

(F_g) = Annual volume of the gaseous fuel used (scf).

* * * * *

(C_{Ore}) = Carbon content of the iron ore or iron ore pellets, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Carbon}) = Carbon content of the carbonaceous materials, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Other}) = Average carbon content of the other materials charged to the furnace, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{Iron}) = Carbon content of the iron, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_{NM}) = Carbon content of the non-metallic materials, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(C_R) = Carbon content of the air pollution control residue, from the carbon analysis results (expressed as a decimal fraction).

* * * * *

(c) You must determine emissions of CO_2 from the coke pushing process in $mtCO_2e$ by multiplying the metric tons of coal charged to the by-product recovery and non-recovery coke ovens during the reporting period by 0.008.

(d) If GHG emissions from a taconite indurating furnace, basic oxygen furnace, non-recovery coke oven battery, sinter process, EAF, decarburization vessel, or direct reduction furnace are vented through a stack equipped with a CEMS that complies with the Tier 4 methodology in subpart C of this part, or through the same stack as any combustion unit or process equipment that reports CO_2 emissions using a CEMS that complies with the Tier 4 Calculation Methodology in subpart C of this part (General Stationary Fuel Combustion Sources), then the calculation methodology in paragraph (b) of this section shall not be used to calculate process emissions. The owner

or operator shall report under this subpart the combined stack emissions according to the Tier 4 Calculation Methodology in § 98.33(a)(4) and comply with all associated requirements for Tier 4 in subpart C of this part (General Stationary Fuel Combustion Sources).

■ 30. Section 98.174 is amended by revising the last sentence of paragraph (b)(1), and revising paragraph (c)(2), to read as follows:

§ 98.174 Monitoring and QA/QC requirements.

* * * * *

(b) * * *

(1) * * * Determine the mass rate of fuels using the procedures for combustion units in § 98.34. No determination of the mass of steel output from decarburization vessels is required.

* * * * *

(c) * * *

(2)(i) For the exhaust from basic oxygen furnaces, EAFs, decarburization vessels, and direct reduction furnaces, sample the furnace exhaust for at least three complete production cycles that start when the furnace is being charged and end after steel or iron and slag have been tapped. For EAFs that produce both carbon steel and stainless or specialty (low carbon) steel, develop an emission factor for the production of both types of steel.

(ii) For the exhaust from continuously charged EAFs, sample the exhaust for a period spanning at least three hours. For EAFs that produce both carbon steel and stainless or specialty (low carbon) steel, develop an emission factor for the production of both types of steel.

* * * * *

■ 31. Section 98.175 is amended by revising paragraph (a) to read as follows:

§ 98.175 Procedures for estimating missing data.

* * * * *

(a) Except as provided in § 98.174(b)(4), 100 percent data availability is required for the carbon content of inputs and outputs for facilities that estimate emissions using the carbon mass balance procedure in § 98.173(b)(1) or facilities that estimate emissions using the site-specific emission factor procedure in § 98.173(b)(2).

* * * * *

■ 32. Section 98.176 is amended by revising paragraph (e) introductory text to read as follows:

§ 98.176 Data reporting requirements.

* * * * *

(e) If you use the carbon mass balance method in § 98.173(b)(1) to determine CO_2 emissions, you must, except as provided in § 98.174(b)(4), report the following information for each process:

* * * * *

■ 33. Section 98.177 is amended by revising paragraph (b) to read as follows:

§ 98.177 Records that must be retained.

* * * * *

(b) When the carbon mass balance method is used to estimate emissions for a process, the monthly mass of each process input and output that are used to determine the annual mass, except that no determination of the mass of steel output from decarburization vessels is required.

* * * * *

Subpart S—[AMENDED]

■ 34. Section 98.190 is amended by revising paragraph (a) to read as follows:

§ 98.190 Definition of the source category.

(a) Lime manufacturing plants (LMPs) engage in the manufacture of a lime product by calcination of limestone, dolomite, shells or other calcareous substances as defined in 40 CFR 63.7081(a)(1).

* * * * *

■ 35. Section 98.193 is amended by:

■ a. Revising paragraph (a).

■ b. Revising paragraph (b)(1).

■ c. Revising paragraph (b)(2) introductory text.

■ d. Revising paragraph (b)(2)(ii) introductory text.

■ e. Revising the parameters ''$EF_{LKD,i,n}$'', ''$CaO_{LKD,i,n}$'' and ''$MgO_{LKD,i,n}$'' of Equation S–2.

■ f. Revising paragraph (b)(2)(iii) introductory text.

■ g. Revising the parameters ''$E_{waste,i}$'', ''$CaO_{waste,i}$'', ''$MgO_{waste,i}$'', and ''$M_{waste,i}$'' of Equation S–3.

■ h. Revising paragraph (b)(2)(iv) introductory text.

■ i. Revising the parameters ''E_{CO2}'', ''$EF_{LKD,i,n}$'', ''$M_{LKD,i,n}$'', ''$E_{waste,i}$'', ''b'' and ''z'' of Equation S–4 to read as follows:

§ 98.193 Calculating GHG emissions.

* * * * *

(a) If all lime kilns meet the conditions specified in § 98.33(b)(4)(ii) or (b)(4)(iii), you must calculate and report under this subpart the combined process and combustion CO_2 emissions from all lime kilns by operating and maintaining a CEMS to measure CO_2 emissions according to the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part (General Stationary Fuel Combustion Sources).

(b) * * *

(1) Calculate and report under this subpart the combined process and combustion CO_2 emissions from all lime kilns by operating and maintaining a CEMS to measure CO_2 emissions from all lime kilns according to the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part (General Stationary Fuel Combustion Sources).

(2) Calculate and report process and combustion CO_2 emissions from all lime kilns separately using the procedures specified in paragraphs (b)(2)(i) through (b)(2)(v) of this section.

* * * * *

(ii) You must calculate a monthly emission factor for each type of calcined byproduct or waste sold (including lime kiln dust) using Equation S–2 of this section:

* * * * *

$EF_{LKD,\ i,\ n}$ = Emission factor for calcined lime byproduct or waste type i sold, for month n (metric tons CO_2/ton lime byproduct).

$CaO_{LKD,\ i,\ n}$ = Calcium oxide content for calcined lime byproduct or waste type i sold, for month n (metric tons CaO/metric ton lime).

$MgO_{LKD,\ i\ ,n}$ = Magnesium oxide content for calcined lime byproduct or waste type i sold, for month n (metric tons MgO/metric ton lime).

* * * * *

(iii) You must calculate the annual CO_2 emissions from each type of calcined byproduct or waste that is not sold (including lime kiln dust and scrubber sludge) using Equation S–3 of this section:

* * * * *

$E_{waste,\ i}$ = Annual CO_2 emissions for calcined lime byproduct or waste type i that is not sold (metric tons CO_2).

* * * * *

$CaO_{waste,\ i}$ = Calcium oxide content for calcined lime byproduct or waste type i that is not sold (metric tons CaO/metric ton lime).

$MgO_{waste,\ i}$ = Magnesium oxide content for calcined lime byproduct or waste type i that is not sold (metric tons MgO/metric ton lime).

$M_{waste,\ i}$ = Annual weight or mass of calcined byproducts or wastes for lime type i that is not sold (tons).

* * * * *

(iv) You must calculate annual CO_2 process emissions for all lime kilns using Equation S–4 of this section:

* * * * *

E_{CO2} = Annual CO_2 process emissions from lime production from all lime kilns (metric tons/year).

* * * * *

$EF_{LKD, i, n}$ = Emission factor of calcined byproducts or wastes sold for lime type i in calendar month n, (metric tons CO_2/ton byproduct or waste) from Equation S–2 of this section.

$M_{LKD, i, n}$ = Monthly weight or mass of calcined byproducts or waste sold (such as lime kiln dust, LKD) for lime type i in calendar month n (tons).

$E_{waste, i}$ = Annual CO_2 emissions for calcined lime byproduct or waste type i that is not sold (metric tons CO_2) from Equation S–3 of this section.

* * * * *

b = Number of calcined byproducts or wastes that are sold.

z = Number of calcined byproducts or wastes that are not sold.

* * * * *

■ 36. Section 98.194 is amended by:

■ a. Revising paragraph (a).

■ b. Revising paragraph (b).

■ c. Revising paragraph (c) introductory text.

§ 98.194 Monitoring and QA/QC requirements.

(a) You must determine the total quantity of each type of lime product that is produced and each calcined byproduct or waste (such as lime kiln dust) that is sold. The quantities of each should be directly measured monthly with the same plant instruments used for accounting purposes, including but not limited to, calibrated weigh feeders, rail or truck scales, and barge measurements. The direct measurements of each lime product shall be reconciled annually with the difference in the beginning of and end of year inventories for these products, when measurements represent lime sold.

(b) You must determine the annual quantity of each calcined byproduct or waste generated that is not sold by either direct measurement using the same instruments identified in paragraph (a) of this section or by using a calcined byproduct or waste generation rate.

(c) You must determine the chemical composition (percent total CaO and percent total MgO) of each type of lime product that is produced and each type of calcined byproduct or waste sold according to paragraph (c)(1) or (2) of this section. You must determine the chemical composition of each type of lime product that is produced and each type of calcined byproduct or waste sold on a monthly basis. You must determine the chemical composition for each type of calcined byproduct or waste that is not sold on an annual basis.

* * * * *

■ 37. Section 98.195 is amended by revising paragraph (a).

§ 98.195 Procedures for estimating missing data.

* * * * *

(a) For each missing value of the quantity of lime produced (by lime type), and quantity of calcined byproduct or waste produced and sold, the substitute data value shall be the best available estimate based on all available process data or data used for accounting purposes.

* * * * *

■ 38. Section 98.196 is amended by revising paragraphs (a)(1), (a)(2), (a)(4), (a)(5), (a)(7), (b)(1) through (b)(6), (b)(9), (b)(10), (b)(11), and (b)(14) to read as follows:

§ 98.196 Data reporting requirements.

* * * * *

(a) * * *

(1) Method used to determine the quantity of lime that is produced and quantity of lime that is sold.

(2) Method used to determine the quantity of calcined lime byproduct or waste sold.

* * * * *

(4) Beginning and end of year inventories for calcined lime byproducts or wastes sold, by type.

(5) Annual amount of calcined lime byproduct or waste sold, by type (tons).

* * * * *

(7) Annual amount of calcined lime byproduct or waste that is not sold, by type (tons).

* * * * *

(b) * * *

(1) Annual CO_2 process emissions from all lime kilns combined (metric tons).

(2) Monthly emission factors (metric ton CO_2/ton lime product) for each lime product type produced.

(3) Monthly emission factors for each calcined byproduct or waste by lime type that is sold.

(4) Standard method used (ASTM or NLA testing method) to determine chemical compositions of each lime type produced and each calcined lime byproduct or waste type.

(5) Monthly results of chemical composition analysis of each type of lime product produced and calcined byproduct or waste sold.

(6) Annual results of chemical composition analysis of each type of lime byproduct or waste that is not sold.

* * * * *

(9) Method used to determine the quantity of calcined lime byproduct or waste sold.

(10) Monthly amount of calcined lime byproduct or waste sold, by type (tons).

(11) Annual amount of calcined lime byproduct or waste that is not sold, by type (tons).

* * * * *

(14) Beginning and end of year inventories for calcined lime byproducts or wastes sold.

* * * * *

Subpart V—[AMENDED]

■ 39. Section 98.222 is amended by revising paragraph (a) to read as follows:

§ 98.222 GHGs to report.

(a) You must report N_2O process emissions from each nitric acid train as required by this subpart.

* * * * *

■ 40. Section 98.223 is amended by:

■ a. Revising paragraphs (b) introductory text, (b)(1), (b)(3), (d) introductory text, and (e).

■ b. Revising parameters ''E_{N2Ot}'', ''P_t'', ''DF'', and ''AF'' of Equation V–3a.

■ c. Revising paragraph (g)(2) introductory text.

■ d. Revising parameters ''E_{N2Ot}'', ''$EF_{N2O, t}$'', ''P_t'', ''DF_1'', ''AF_1'', ''DF_2'', ''AF_2'', ''DF_N'', and ''AF_N'' of Equation V–3b.

■ e. Revising paragraph (g)(3) introductory text.

■ f. Revising parameters ''E_{N2Ot}'', ''$EF_{N2O, t}$'', ''P_t'', ''DF_N'', ''AF_N'', and ''FC_N'' of Equation V–3c.

■ g. Revising parameter ''E_{N2Ot}'' of Equation V–3d.

■ h. Revising paragraph (i).

§ 98.223 Calculating GHG emissions.

* * * * *

(b) You must conduct an annual performance test for each nitric acid train according to paragraphs (b)(1) through (b)(3) of this section.

(1) You must conduct the performance test at the absorber tail gas vent, referred to as the test point, for each nitric acid train according to § 98.224(b) through (f). If multiple nitric acid trains exhaust to a common abatement technology and/or emission point, you must sample each process in the ducts before the emissions are combined, sample each process when only one process is operating, or sample the combined emissions when multiple processes are operating and base the site-specific emission factor on the combined production rate of the multiple nitric acid trains.

* * * * *

(3) You must measure the production rate during the performance test and

calculate the production rate for the test period in tons (100 percent acid basis) per hour.

* * * * *

(d) If nitric acid train ''t'' exhausts to any N_2O abatement technology ''N'', you must determine the destruction efficiency for each N_2O abatement technology ''N'' according to paragraphs (d)(1), (d)(2), or (d)(3) of this section.

* * * * *

(e) If nitric acid train ''t'' exhausts to any N_2O abatement technology ''N'', you must determine the annual amount of nitric acid produced on nitric acid train ''t'' while N_2O abatement technology ''N'' is operating according to § 98.224(f). Then you must calculate the abatement utilization factor for each N_2O abatement technology ''N'' for each nitric acid train ''t'' according to Equation V–2 of this section.

* * * * *

(g) * * *

(1) * * *

* * * * *

E_{N2Ot} = Annual N_2O mass emissions from nitric acid train ''t'' according to this Equation V–3a (metric tons).

* * * * *

P_t = Annual nitric acid production from nitric acid train ''t'' (ton acid produced, 100 percent acid basis).

DF = Destruction efficiency of N_2O abatement technology N that is used on nitric acid train ''t'' (decimal fraction of N_2O removed from vent stream).

AF = Abatement utilization factor of N_2O abatement technology ''N'' for nitric acid train ''t'' (decimal fraction of annual production during which abatement technology is operating).

* * * * *

(2) If multiple N_2O abatement technologies are located in series after your test point, you must use the emissions factor (determined in Equation V–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual nitric acid production (determined in paragraph (i) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation V–3b of this section:

* * * * *

E_{N2Ot} = Annual N_2O mass emissions from nitric acid train ''t'' according to this Equation V–3b (metric tons).

$EF_{N2O,\ t}$ = N_2O emissions factor for nitric acid train ''t'' (lb N_2O/ton nitric acid produced).

P_t = Annual nitric acid produced from nitric acid train ''t'' (ton acid produced, 100 percent acid basis).

DF_1 = Destruction efficiency of N_2O abatement technology 1 (decimal fraction of N_2O removed from vent stream).

AF_1 = Abatement utilization factor of N_2O abatement technology 1 (decimal fraction of time that abatement technology 1 is operating).

DF_2 = Destruction efficiency of N_2O abatement technology 2 (decimal fraction of N_2O removed from vent stream).

AF_2 = Abatement utilization factor of N_2O abatement technology 2 (decimal fraction of time that abatement technology 2 is operating).

DF_N = Destruction efficiency of N_2O abatement technology N (decimal fraction of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology N (decimal fraction of time that abatement technology N is operating).

* * * * *

(3) If multiple N_2O abatement technologies are located in parallel after your test point, you must use the emissions factor (determined in Equation V–1 of this section), the destruction efficiency (determined in paragraph (d) of this section), the annual nitric acid production (determined in paragraph (i) of this section), and the abatement utilization factor (determined in paragraph (e) of this section), according to Equation V–3c of this section:

* * * * *

E_{N2Ot} = Annual N_2O mass emissions from nitric acid train ''t'' according to this Equation V–3c (metric tons).

$EF_{N2O,\ t}$ = N_2O emissions factor for nitric acid train ''t'' (lb N_2O/ton nitric acid produced).

P_t = Annual nitric acid produced from nitric acid train ''t'' (ton acid produced, 100 percent acid basis).

DF_N = Destruction efficiency of N_2O abatement technology ''N'' (decimal fraction of N_2O removed from vent stream).

AF_N = Abatement utilization factor of N_2O abatement technology ''N'' (decimal fraction of time that abatement technology ''N'' is operating).

FC_N = Fraction control factor of N_2O abatement technology ''N'' (decimal fraction of total emissions from nitric acid train ''t'' that are sent to abatement technology ''N'').

* * * * *

(4) * * *

* * * * *

E_{N2Ot} = Annual N_2O mass emissions from nitric acid train ''t'' according to this Equation V–3d (metric tons).

* * * * *

(i) You must determine the total annual amount of nitric acid produced on each nitric acid train ''t'' (tons acid produced, 100 percent acid basis), according to § 98.224(f).

■ 41. Section 98.224 is amended by revising paragraphs (c) introductory text, (e), and (f) to read as follows:

§ 98.224 Monitoring and QA/QC requirements.

* * * * *

(c) You must determine the production rate(s) (100 percent acid basis) from each nitric acid train during the performance test according to paragraphs (c)(1) or (c)(2) of this section.

* * * * *

(e) You must determine the total monthly amount of nitric acid produced. You must also determine the monthly amount of nitric acid produced while N_2O abatement technology is operating from each nitric acid train. These monthly amounts are determined according to the methods in paragraphs (c)(1) or (2) of this section.

(f) You must determine the annual amount of nitric acid produced. You must also determine the annual amount of nitric acid produced while N_2O abatement technology is operating for each nitric acid train. These annual amounts are determined by summing the respective monthly nitric acid quantities determined in paragraph (e) of this section.

■ 42. Section 98.226 is amended by:

■ a. Revising paragraph (a) and paragraph (n) introductory text.

■ b. Adding and reserving paragraph (o).

■ c. Revising paragraph (p).

§ 98.226 Data reporting requirements.

* * * * *

(a) Nitric Acid train identification number.

* * * * *

(n) If you requested Administrator approval for an alternative method of determining N_2O emissions under § 98.223(a)(2), each annual report must also contain the information specified in paragraphs (n)(1) through (n)(4) of this section for each nitric acid production facility.

* * * * *

(o) [Reserved]

(p) Fraction control factor for each abatement technology (percent of total emissions from the nitric acid train that are sent to the abatement technology) if Equation V–3c is used.

Subpart X—[AMENDED]

■ 43. Section 98.242 is amended by revising paragraph (b)(2) to read as follows:

§ 98.242 GHGs to report.

* * * * *

(b) * * *

(2) If you comply with § 98.243(c), report CO_2, CH_4, and N_2O combustion

emissions under subpart C of this part (General Stationary Fuel Combustion Sources) by following the requirements of subpart C for all fuels, except emissions from burning petrochemical process off-gas in any combustion unit are not to be reported under subpart C of this part. Determine the applicable Tier in subpart C of this part (General Stationary Fuel Combustion Sources) based on the maximum rated heat input capacity of the stationary combustion source.

* * * * *

■ 44. Section 98.243 is amended by:

■ a. Revising paragraph (b).

■ b. Revising paragraphs (c)(3) and (c)(4).

■ c. Revising the parameters ''C_g'', ''$(F_{gf})_{i,\ n}$'', ''$(P_{gp})_{i,\ n}$'', and ''$(MW_p)_i$'' of Equation X–1.

■ d. Removing the parameter ''$(MW_f)_I$'' of Equation X–1 and adding parameter ''$(MW_f)_{i,\ n}$'' in its place.

■ e. Revising paragraph (d)(3)(i).

§ 98.243 Calculating GHG emissions.

* * * * *

(b) *Continuous emission monitoring system (CEMS).* Route all process vent emissions and emissions from stationary combustion units that burn any amount of process off-gas to one or more stacks and determine GHG emissions as specified in paragraphs (b)(1) through (3) of this section.

(1) Determine CO_2 emissions from each stack (except flare stacks) according to the Tier 4 Calculation Methodology requirements in subpart C of this part.

(2) For each stack (except flare stacks) that includes emissions from combustion of petrochemical process off-gas, calculate CH_4 and N_2O emissions in accordance with subpart C of this part (use Equation C–10 and the ''fuel gas'' emission factors in Table C–2 of subpart C of this part.

(3) For each flare, calculate CO_2, CH_4, and N_2O emissions using the methodology specified in § 98.253(b)(1) through (b)(3).

(c) * * *

(3) Collect a sample of each feedstock and product at least once per month and determine the carbon content of each sample according to the procedures of § 98.244(b)(4). If multiple valid carbon content measurements are made during the monthly measurement period, average them arithmetically. However, if a particular liquid or solid feedstock is delivered in lots, and if multiple deliveries of the same feedstock are received from the same supply source in a given calendar month, only one representative sample is required. Alternatively, you may use the results of analyses conducted by a feedstock supplier, or product customer, provided the sampling and analysis is conducted at least once per month using any of the procedures specified in § 98.244(b)(4).

(4) If you determine that the monthly average concentration of a specific compound in a feedstock or product is greater than 99.5 percent by volume or mass, then as an alternative to the sampling and analysis specified in paragraph (c)(3) of this section, you may determine carbon content in accordance with paragraphs (c)(4)(i) through (iii) of this section.

(i) Calculate the carbon content assuming 100 percent of that feedstock or product is the specific compound.

(ii) Maintain records of any determination made in accordance with this paragraph (c)(4) along with all supporting data, calculations, and other information.

(iii) Reevaluate determinations made under this paragraph (c)(4) after any process change that affects the feedstock or product composition. Keep records of the process change and the corresponding composition determinations. If the feedstock or product composition changes so that the average monthly concentration falls below 99.5 percent, you are no longer permitted to use this alternative method.

(5) * * *

(i) * * *

* * * * *

C_g = Annual net contribution to calculated emissions from carbon (C) in gaseous materials, including streams containing CO_2 recovered for sale or use in another process (kg/yr).

$(F_{gf})_{i,n}$ = Volume or mass of gaseous feedstock i introduced in month ''n'' (scf or kg). If you measure mass, the term $(MW_f)_i$/MVC is replaced with ''1''.

* * * * *

$(MW_f)_{i,n}$ = Molecular weight of gaseous feedstock i in month ''n''(kg/kg-mole).

* * * * *

$(P_{gp})_{i,n}$ = Volume or mass of gaseous product i produced in month ''n'' (scf or kg). If you measure mass, the term $(MW_p)_i$/MVC is replaced with ''1''.

* * * * *

$(MW_p)_{i,n}$ = Molecular weight of gaseous product i in month ''n'' (kg/kg-mole).

* * * * *

(d) * * *

(3) * * *

(i) For all gaseous fuels that contain ethylene process off-gas, use the emission factors for ''Fuel Gas'' in Table C–2 of subpart C of this part (General Stationary Fuel Combustion Sources).

* * * * *

■ 45. Section 98.244 is amended by:

■ a. Revising the last sentence of paragraph (b)(4) introductory text, and paragraphs (b)(4)(xiii), (b)(4)(xiv), and (b)(4)(xv)(A).

■ b. Adding paragraph (c).

§ 98.244 Monitoring and QA/QC requirements.

* * * * *

(b) * * *

(4) * * * Analyses conducted in accordance with methods specified in paragraphs (b)(4)(i) through (b)(4)(xv) of this section may be performed by the owner or operator, by an independent laboratory, by the supplier of a feedstock, or by a product customer.

* * * * *

(xiii) The results of chromatographic analysis of a feedstock or product, provided that the chromatograph is operated, maintained, and calibrated according to the manufacturer's instructions.

(xiv) The results of mass spectrometer analysis of a feedstock or product, provided that the mass spectrometer is operated, maintained, and calibrated according to the manufacturer's instructions.

(xv) * * *

(A) An industry standard practice or a method published by a consensus-based standards organization if such a method exists for carbon black feedstock oils and carbon black products. Consensus-based standards organizations include, but are not limited to, the following: ASTM International (100 Barr Harbor Drive, P.O. Box CB700, West Conshohocken, Pennsylvania 19428–B2959, (800) 262–1373, *http://www.astm.org),* the American National Standards Institute (ANSI, 1819 L Street, NW., 6th floor, Washington, DC 20036, (202) 293–8020, *http://www.ansi.org*), the American Gas Association (AGA, 400 North Capitol Street, NW., 4th Floor, Washington, DC 20001, (202) 824–7000, *http://www.aga.org*), the American Society of Mechanical Engineers (ASME, Three Park Avenue, New York, NY 10016–5990, (800) 843–2763, *http://www.asme.org*), the American Petroleum Institute (API, 1220 L Street, NW., Washington, DC 20005–4070, (202) 682–8000, *http://www.api.org*), and the North American Energy Standards Board (NAESB, 801 Travis Street, Suite 1675, Houston, TX 77002, (713) 356–0060, *http://www.naesb.org*). The method(s) used shall be documented in the monitoring plan required under § 98.3(g)(5).

* * * * *

(c) If you comply with § 98.243(b) or (d), conduct monitoring and QA/QC for flares in accordance with § 98.254.

■ 46. Section 98.245 is revised to read as follows:

§ 98.245 Procedures for estimating missing data.

For missing feedstock and product flow rates, use the same procedures as for missing fuel usage as specified in § 98.35(b)(2). For missing feedstock and product carbon contents and missing molecular weights for gaseous feedstocks and products, use the same procedures as for missing carbon contents and missing molecular weights for fuels as specified in § 98.35(b)(1). For missing flare data, follow the procedures in § 98.255(b) and (c).

■ 47. Section 98.246 is amended by:

■ a. Revising paragraphs (a)(6), (a)(8), (a)(9), (a)(11) introductory text, (b)(2), (b)(4), and (b)(5).

■ b. Removing and reserving paragraphs (b)(5)(i) through (iv), and (b)(6).

■ c. Revising paragraph (c)(4).

§ 98.246 Data reporting requirements.

* * * * *

(a) * * *

(6) For each feedstock and product, provide the information specified in paragraphs (a)(6)(i) through (a)(6)(iii) of this section.

(i) Name of each method used to determine carbon content or molecular weight in accordance with 98.244(b)(4);

(ii) Description of each type of device (e.g., flow meter, weighing device) used to determine flow or mass in accordance 98.244(b)(1) through (3).

(iii) Identification of each method (i.e., method number, title, or other description) used to determine flow or mass in accordance with 98.244(b)(1) through (3).

* * * * *

(8) Identification of each combustion unit that burned both process off-gas and supplemental fuel, including combustion units that are not part of the petrochemical process unit.

(9) If you comply with the alternative to sampling and analysis specified in § 98.243(c)(4), the number of days during which off-specification product was produced, and if applicable, the date of any process change that reduced the composition to less than 99.5 percent.

* * * * *

(11) If you determine carbon content or composition of a feedstock or product using a method under § 98.244(b)(4)(xv)(B), report the information listed in paragraphs (a)(11)(i) through (a)(11)(iii) of this section. Include the information in paragraph (a)(11)(i) of this section in each annual report. Include the information in paragraphs (a)(11)(ii) and (a)(11)(iii) of this section only in the first applicable annual report, and provide any changes to this information in subsequent annual reports.

* * * * *

(b) * * *

(2) For CEMS used on stacks that include emissions from stationary combustion units that burn any amount of off-gas from the petrochemical process, report the relevant information required under § 98.36(c)(2) and (e)(2)(vi) for the Tier 4 calculation methodology. Sections § 98.36(c)(2)(ii) and (c)(2)(ix) do not apply for the purposes of this subpart.

(3) For CEMS used on stacks that do not include emissions from stationary combustion units, report the information required under § 98.36(b)(6), (b)(7), and § 98.36(e)(2)(vi).

(4) For each CEMS monitoring location that meets the conditions in paragraph (b)(2) or (3) of this section, provide an estimate based on engineering judgment of the fraction of the total CO_2 emissions that is attributable to the petrochemical process unit.

(5) For each CEMS monitoring location that meets the conditions in paragraph (b)(2) of this section, report the CH_4 and N_2O emissions expressed in metric tons of each gas. For each CEMS monitoring location provide an estimate based on engineering judgment of the fraction of the total CH_4 and N_2O emissions that is attributable to combustion of off-gas from the petrochemical process unit.

(i) [Reserved]

(ii)[Reserved]

(iii) [Reserved]

(iv)[Reserved]

(6) [Reserved]

* * * * *

(c) * * *

(4) Name and annual quantity of each feedstock (metric tons).

* * * * *

48. Section 98.247 is amended by revising paragraphs (b) introductory text and (b)(2) to read as follows:

§ 98.247 Records that must be retained.

* * * * *

(b) If you comply with the mass balance methodology in § 98.243(c), then you must retain records of the information listed in paragraphs (b)(1) through (b)(4) of this section.

* * * * *

(2) Start and end times for time periods when off-specification product is produced, if you comply with the alternative methodology in § 98.243(c)(4) for determining carbon content of product.

* * * * *

■ 49. Section 98.248 is amended by revising the definition of ''Product'' to read as follows:

§ 98.248 Definitions.

* * * * *

Product, as used in § 98.243, means each of the following carbon-containing outputs from a process: The petrochemical, recovered byproducts, and liquid organic wastes that are not combusted onsite. Product does not include process vent emissions, fugitive emissions, or wastewater.

Subpart Y—[AMENDED]

■ 50. Section 98.252 is amended by revising the parenthetical phrase preceding the last two sentences in paragraph (a) introductory text, and revising paragraph (i), to read as follows:

§ 98.252 GHGs to report.

* * * * *

(a) * * * (Use the default CH_4 and N_2O emission factors for ''Fuel Gas'' in Table C–2 of this part. For Tier 3, use either the default high heat value for fuel gas in Table C–1 of subpart C of this part or a calculated HHV, as allowed in Equation C–8 of subpart C of this part.) * * *

* * * * *

(i) CO_2 emissions from non-merchant hydrogen production process units (not including hydrogen produced from catalytic reforming units) following the calculation methodologies, monitoring and QA/QC methods, missing data procedures, reporting requirements, and recordkeeping requirements of subpart P of this part.

■ 51. Section 98.253 is amended by:

■ a. Revising the parameter ''$EmFCH_4$'' to Equation Y–4 and ''EmF_{N2O}'' to Equation Y–5.

■ b. Revising paragraphs (f)(2), (f)(3), and (f)(4) introductory text.

■ c. Revising parameters ''F_{SG}'' and ''MF_c'' to Equation Y–12.

■ d. Revising paragraphs (j) introductory text, (k) introductory text, and (m) introductory text.

§ 98.253 Calculating GHG emissions.

* * * * *

(b) * * *

(2) * * *

* * * * *

$EmFCH_4$ = Default CH_4 emission factor for ''Fuel Gas'' from Table C–2 of subpart C

of this part (General Stationary Fuel Combustion Sources) (kg CH_4/MMBtu).

* * * * *

(3) * * *

* * * * *

EmF_{N2O} = Default N_2O emission factor for ''Fuel Gas'' from Table C–2 of subpart C of this part (General Stationary Fuel Combustion Sources) (kg N_2O/MMBtu).

* * * * *

(f) * * *

(2) Flow measurement. If you have a continuous flow monitor on the sour gas feed to the sulfur recovery plant or the sour gas feed sent for off-site sulfur recovery, you must use the measured flow rates when the monitor is operational to calculate the sour gas flow rate. If you do not have a continuous flow monitor on the sour gas feed to the sulfur recovery plant or the sour gas feed sent for off-site sulfur recovery, you must use engineering calculations, company records, or similar estimates of volumetric sour gas flow.

(3) Carbon content. If you have a continuous gas composition monitor capable of measuring carbon content on the sour gas feed to the sulfur recovery plant or the sour gas feed sent for off-site for sulfur recovery, or if you monitor gas composition for carbon content on a routine basis, you must use the measured carbon content value. Alternatively, you may develop a site-specific carbon content factor using limited measurement data or engineering estimates or use the default factor of 0.20.

(4) Calculate the CO_2 emissions from each on-site sulfur recovery plant and for sour gas sent off-site for sulfur recovery using Equation Y–12 of this section.

* * * * *

F_{SG} = Volumetric flow rate of sour gas (including sour water stripper gas) fed to the sulfur recovery plant or the sour gas feed sent for off-site for sulfur recovery (scf/year).

* * * * *

MF_C = Mole fraction of carbon in the sour gas fed to the sulfur recovery plant or the four gas feed sent for off-site for sulfur recovery (kg-mole C/kg-mole gas); default = 0.20.

* * * * *

(j) For each process vent not covered in paragraphs (a) through (i) of this section that can reasonably be expected to contain greater than 2 percent by volume CO_2 or greater than 0.5 percent by volume of CH_4 or greater than 0.01 percent by volume (100 parts per million) of N_2O, calculate GHG emissions using the Equation Y–19 of this section. You must also use Equation Y–19 of this section to calculate CH_4 emissions for catalytic reforming unit depressurization and purge vents when methane is used as the purge gas, CH_4 emissions if you elected to use the method in paragraph (i)(1) of this section, and CO_2 and/or CH_4 emissions, as applicable, if you elected this method as an alternative to the methods in paragraphs (f), (h), or (k) of this section.

* * * * *

(k) For uncontrolled blowdown systems, you must calculate CH_4 emissions either using the methods for process vents in paragraph (j) of this section regardless of the CH_4 concentration or using Equation Y–20 of this section. Blowdown systems where the uncondensed gas stream is routed to a flare or similar control device is considered to be controlled and is not required to estimate emissions under this paragraph (k).

* * * * *

(m) For storage tanks, except as provided in paragraph (m)(3) of this section, calculate CH_4 emissions using the applicable methods in paragraphs (m)(1) and (m)(2) of this section.

* * * * *

■ 52. Section 98.256 is amended by:

■ a. Revising paragraphs (f)(6), (h) introductory text, (h)(2), (h)(3), (h)(4), (h)(5), and (h)(6).

■ b. Adding paragraph (j)(10).

■ c. Revising paragraph (k)(4).

■ d. Adding paragraph (k)(6).

■ e. Revising paragraph (o)(4)(vi).

■ f. Removing and reserving paragraphs (o)(5) through (7).

§ 98.256 Data reporting requirements.

* * * * *

(f) * * *

(6) If you use a CEMS, the relevant information required under § 98.36 for the Tier 4 Calculation Methodology, the CO_2 annual emissions as measured by the CEMS (unadjusted to remove CO_2 combustion emissions associated with additional units, if present) and the process CO_2 emissions as calculated according to § 98.253(c)(1)(ii). Report the CO_2 annual emissions associated with sources other than those from the coke burn-off in accordance with the applicable subpart (*e.g.,* subpart C of this part in the case of a CO boiler).

* * * * *

(h) For on-site sulfur recovery plants and for emissions from sour gas sent off-site for sulfur recovery, the owner and operator shall report:

* * * * *

(2) For each on-site sulfur recovery plant, the maximum rated throughput (metric tons sulfur produced/stream day), a description of the type of sulfur recovery plant, and an indication of the method used to calculate CO_2 annual emissions for the sulfur recovery plant (*e.g.,* CO_2 CEMS, Equation Y–12, or process vent method in § 98.253(j)).

(3) The calculated CO_2 annual emissions for each on-site sulfur recovery plant, expressed in metric tons. The calculated annual CO_2 emissions from sour gas sent off-site for sulfur recovery, expressed in metric tons.

(4) If you use Equation Y–12 of this subpart, the annual volumetric flow to the on-site and off-site sulfur recovery plant (in scf/year), the molar volume conversion factor (in scf/kg-mole), and the annual average mole fraction of carbon in the sour gas (in kg-mole C/kg-mole gas).

(5) If you recycle tail gas to the front of an on-site sulfur recovery plant, indicate whether the recycled flow rate and carbon content are included in the measured data under § 98.253(f)(2) and (3). Indicate whether a correction for CO_2 emissions in the tail gas was used in Equation Y–12. If so, then report the value of the correction, the annual volume of recycled tail gas (in scf/year) and the annual average mole fraction of carbon in the tail gas (in kg-mole C/kg-mole gas). Indicate whether you used the default (95%) or a unit specific correction, and if a unit specific correction is used, report the approach used.

(6) If you use a CEMS, the relevant information required under § 98.36 for the Tier 4 Calculation Methodology, the CO_2 annual emissions as measured by the CEMS and the annual process CO_2 emissions calculated according to § 98.253(f)(1). Report the CO_2 annual emissions associated with fuel combustion in accordance with subpart C of this part (General Stationary Fuel Combustion Sources).

* * * * *

(j) * * *

(10) If you use Equation Y–19 of this subpart, the relevant information required under paragraph (l)(5) of this section.

(k) * * *

(4) For each set of coking drums that are the same dimensions: The number of coking drums in the set, the height and diameter of the coke drums (in feet), the cumulative number of vessel openings for all delayed coking drums in the set, the typical venting pressure (in psig), void fraction (in cf gas/cf of vessel), and the mole fraction of methane in coking gas (in kg-mole CH_4/kg-mole gas, wet basis).

* * * * *

(6) If you use Equation Y–19 of this subpart, the relevant information required under paragraph (l)(5) of this section for each set of coke drums or vessels of the same size.

* * * * *

(o) * * *

(4) * * *

(vi) If you did not use Equation Y–23, the tank-specific methane composition data and the annual gas generation volume (scf/yr) used to estimate the cumulative CH_4 emissions for storage tanks used to process unstabilized crude oil.

(5) [Reserved]

(6) [Reserved]

(7) [Reserved]

* * * * *

Subpart Z—[AMENDED]

■ 53. Section 98.263 is amended by revising paragraph (b)(1)(ii) introductory text and the parameter ''$CO_{2n,i}$'' of Equation Z–1b to read as follows:

§ 98.263 Calculating GHG emissions.

* * * * *

(b) * * *

(1) * * *

(ii) If your process measurement provides the CO_2 content directly as an output, calculate and report the process CO_2 emissions from each wet-process phosphoric acid process line using Equation Z–1b of this section:

* * * * *

$CO_{2n,i}$ = Carbon dioxide content of a grab sample batch of phosphate rock by origin i obtained during month n (percent by weight, expressed as a decimal fraction).

* * * * *

■ 54. Section 98.264 is amended by revising paragraphs (a) and (b) to read as follows:

§ 98.264 Monitoring and QA/QC requirements.

(a) You must obtain a monthly grab sample of phosphate rock directly from the rock being fed to the process line before it enters the mill using one of the following methods. You may conduct the representative bulk sampling using a method published by a consensus standards organization, or you may use industry consensus standard practice methods, including but not limited to the Phosphate Mining States Methods Used and Adopted by the Association of Fertilizer and Phosphate Chemists (AFPC). If phosphate rock is obtained from more than one origin in a month, you must obtain a sample from each origin of rock or obtain a composite representative sample.

(b) You must determine the carbon dioxide or inorganic carbon content of each monthly grab sample of phosphate rock (consumed in the production of phosphoric acid). You may use a method published by a consensus standards organization, or you may use industry consensus standard practice methods, including but not limited to the Phosphate Mining States Methods Used and Adopted by AFPC.

* * * * *

■ 55. Section 98.265 is amended by adding introductory text and revising paragraph (a) to read as follows:

§ 98.265 Procedures for estimating missing data.

A complete record of all measured parameters used in the GHG emissions calculations is required. Therefore, whenever a quality-assured value of a required parameter is unavailable, a substitute data value for the missing parameter must be used in the calculations as specified in paragraphs (a) and (b) of this section.

(a) For each missing value of the inorganic carbon content or CO_2 content of phosphate rock (by origin), you must use the appropriate default factor provided in Table Z–1 of this subpart. Alternatively, you must determine a substitute data value by calculating the arithmetic average of the quality-assured values of inorganic carbon contents or CO_2 contents of phosphate rock of origin i (see Equation Z–1a or Z–1b of this subpart) from samples immediately preceding and immediately following the missing data incident. If no quality-assured data on inorganic carbon contents or CO_2 contents of phosphate rock of origin i are available prior to the missing data incident, the substitute data value shall be the first quality-assured value for inorganic carbon contents or CO_2 contents for phosphate rock of origin i obtained after the missing data period.

* * * * *

■ 56. Section 98.266 is amended by revising paragraphs (a), (b), (d), (f)(5), (f)(6), and (f)(8) to read as follows:

§ 98.266 Data reporting requirements.

* * * * *

(a) Annual phosphoric acid production, by origin of the phosphate rock (tons).

(b) Annual phosphoric acid production capacity (tons).

* * * * *

(d) Annual phosphate rock consumption from monthly measurement records by origin (tons).

* * * * *

(f) * * *

(5) Monthly inorganic carbon content of phosphate rock for each wet-process phosphoric acid process line for which Equation Z–1a is used (percent by weight, expressed as a decimal fraction), or CO_2 content (percent by weight, expressed as a decimal fraction) for which Equation Z–1b is used.

(6) Monthly mass of phosphate rock consumed, by origin, in production for each wet-process phosphoric acid process line (tons).

* * * * *

(8) Number of times missing data procedures were used to estimate phosphate rock consumption (months), inorganic carbon contents of the phosphate rock (months), and CO_2 contents of the phosphate rock (months).

* * * * *

■ 57. Section 98.267 is amended by revising paragraphs (a) and (c) to read as follows:

§ 98.267 Records that must be retained.

* * * * *

(a) Monthly mass of phosphate rock consumed by origin (tons).

* * * * *

(c) Documentation of the procedures used to ensure the accuracy of monthly phosphate rock consumption by origin.

Subpart AA—[AMENDED]

■ 58. Section 98.273 is amended by revising paragraph (a)(3) introductory text and the parameter ''(EF)'' of Equation AA–1 to read as follows:

§ 98.273 Calculating GHG emissions.

(a) * * *

(3) Calculate biogenic CO_2 emissions and emissions of CH_4 and N_2O from biomass using measured quantities of spent liquor solids fired, site-specific HHV, and default emissions factors, according to Equation AA–1 of this section:

* * * * *

(EF) = Default emission factor for CO_2, CH_4, or N_2O, from Table AA–1 of this subpart (kg CO_2, CH_4, or N_2O per mmBtu).

* * * * *

■ 59. Section 98.276 is amended by revising paragraphs (e) and (k) to read as follows:

§ 98.276 Data reporting requirements.

* * * * *

(e) The default emission factor for CO_2, CH_4, or N_2O, used in Equation AA–1 of this subpart (kg CO_2, CH_4, or N_2O per mmBtu).

* * * * *

(k) Annual production of pulp and/or paper products produced (metric tons) as follows:

(1) Report the total annual production of unbleached virgin pulp produced

onsite during the reporting year in air-dried metric tons per year. This total annual production value is the sum of all kraft, semichemical, soda, and sulfite pulp produced onsite, prior to bleaching, through all virgin pulping lines.

(i) Do not include secondary fiber repulped for paper production in the virgin pulp production total.

(ii) You must report a positive (non-zero) value for pulp production unless your pulp mill did not operate during the reporting year.

(2) Report the total annual production of paper products exiting the paper machine(s), prior to application of any off-machine coatings, in air-dried metric tons per year. If you operate multiple paper machines, report the sum (total) of the air-dried metric tons of paper produced during the reporting year for all paper machines at the mill.

■ 60. Tables AA–1 and AA–2 are revised to read as follows:

TABLE AA–1 TO SUBPART AA OF PART 98—KRAFT PULPING LIQUOR EMISSIONS FACTORS FOR BIOMASS-BASED CO_2, CH_4, AND N_2O

Wood furnish	Biomass-based emissions factors (kg/mmBtu HHV)		
	CO_2[a]	CH_4	N_2O
North American Softwood	94.4	0.0019	0.00042
North American Hardwood	93.7	0.0019	0.00042
Bagasse	95.5	0.0019	0.00042
Bamboo	93.7	0.0019	0.00042
Straw	95.1	0.0019	0.00042

[a] Includes emissions from both the recovery furnace and pulp mill lime kiln.

TABLE AA–2 TO SUBPART AA OF PART 98—KRAFT LIME KILN AND CALCINER EMISSIONS FACTORS FOR CH_4 AND N_2O

Fuel	Fossil fuel-based emissions factors (kg/mmBtu HHV)			
	Kraft lime kilns		Kraft calciners	
	CH_4	N_2O	CH_4	N_2O
Residual Oil (any type)	0.0027	0	0.0027	0.0003.
Distillate Oil (any type)	0.0027	0	0.0027	0.0004.
Natural Gas	0.0027	0	0.0027	0.0001.
Biogas	0.0027	0	0.0027	0.0001.
Petroleum coke	0.0027	0	NA[a]	NA[a].
Other Fuels	See Table C–2	0	See Table C–2	See Table C–2.

[a] Emission factors for kraft calciners are not available.

Subpart BB—[AMENDED]

■ 61. Section 98.282 is amended by revising paragraph (a) to read as follows:

§ 98.282 GHGs to report.

* * * * *

(a) CO_2 process emissions from all silicon carbide process units or furnaces combined.

* * * * *

■ 62. Section 98.283 is amended by:

■ a. Revising the introductory text.

■ b. Revising paragraphs (a), (b) introductory text, and (b)(2) introductory text.

■ c. Revising the parameter ''T_n'' in Equation BB–2.

■ d. Removing paragraph (d).

§ 98.283 Calculating GHG emissions.

You must calculate and report the combined annual process CO_2 emissions from all silicon carbide process units and production furnaces using the procedures in either paragraph (a) or (b) of this section.

(a) Calculate and report under this subpart the combined annual process CO_2 emissions by operating and maintaining CEMS according to the Tier 4 Calculation Methodology specified in § 98.33(a)(4) and all associated requirements for Tier 4 in subpart C of this part (General Stationary Fuel Combustion Sources).

(b) Calculate and report under this subpart the combined annual process CO_2 emissions using the procedures in paragraphs (b)(1) and (b)(2) of this section.

* * * * *

(2) Calculate annual CO_2 process emissions from the silicon carbide production facility according to Equation BB–2 of this section:

* * * * *

T_n = Petroleum coke consumption in calendar month n (tons).

* * * * *

■ 63. Section 98.286 is amended by revising paragraph (b) introductory text to read as follows:

§ 98.286 Data reporting requirements.

* * * * *

(b) If a CEMS is not used to measure process CO_2 emissions, you must report the information in paragraph (b)(1) through (b)(8) of this section for all silicon carbide process units or production furnaces combined:

* * * * *

Subpart DD—[AMENDED]

■ 64. Section 98.304 is amended by revising paragraphs (c)(1) and (c)(2) to read as follows:

§ 98.304 Monitoring and QA/QC requirements.

* * * * *

(c) * * *

(1) Ensure that cylinders returned to the gas supplier are consistently weighed on a scale that is certified to be accurate and precise to within 2 pounds of true weight and is periodically recalibrated per the manufacturer's specifications. Either measure residual gas (the amount of gas remaining in returned cylinders) or have the gas supplier measure it. If the gas supplier weighs the residual gas, obtain from the gas supplier a detailed monthly accounting, within ± 2 pounds, of

residual gas amounts in the cylinders returned to the gas supplier.

(2) Ensure that cylinders weighed for the beginning and end of year inventory measurements are weighed on a scale that is certified to be accurate and precise to within 2 pounds of true weight and is periodically recalibrated per the manufacturer's specifications. All scales used to measure quantities that are to be reported under § 98.306 must be calibrated using calibration procedures specified by the scale manufacturer. Calibration must be performed prior to the first reporting year. After the initial calibration, recalibration must be performed at the minimum frequency specified by the manufacturer.

* * * * *

Subpart FF—[AMENDED]

■ 65. Section 98.320 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 98.320 Definition of the source category.

* * * * *

(b) * * *

(1) Each ventilation system shaft or vent hole, including both those points where mine ventilation air is emitted and those where it is sold, used onsite, or otherwise destroyed (including by ventilation air methane (VAM) oxidizers).

(2) Each degasification system well or gob gas vent hole, including degasification systems deployed before, during, or after mining operations are conducted in a mine area. This includes both those wells and vent holes where coal bed gas is emitted, and those where the gas is sold, used onsite, or otherwise destroyed (including by flaring).

* * * * *

■ 66. Section 98.322 is amended by revising paragraphs (b) and (d) to read as follows:

§ 98.322 GHGs to report.

* * * * *

(b) You must report CH_4 destruction from systems where gas is sold, used onsite, or otherwise destroyed (including by VAM oxidation and by flaring).

* * * * *

(d) You must report under this subpart the CO_2 emissions from coal mine gas CH_4 destruction occurring at the facility, where the gas is not a fuel input for energy generation or use (*e.g.,* flaring and VAM oxidation).

* * * * *

■ 67. Section 98.323 is amended by:

■ a. Revising parameters ''V'', ''MCF'', ''(f_{H2O})'', and ''P'' of Equation FF–2.

■ b. Revising paragraphs (a)(2) and (b)(1).

■ c. Revising Equation FF–3 and parameters ''V_i'', ''MCF_i'', ''P_i'', and ''(f_{H2O})'' of Equation FF–3.

■ d. Removing parameter ''(CH_{4D})'' of Equation FF–4 and adding parameter ''$(CH_{4D})_{i,j}$'' in its place.

■ e. Revising paragraph (c) introductory text and Equation FF–6.

§ 98.323 Calculating GHG emissions.

(a) * * *

* * * * *

V = Volumetric flow rate for the quarter (acfm) based on sampling or a flow rate meter. If a flow rate meter is used and the meter automatically corrects to standard temperature and pressure, then use scfm and replace ''520°R/T × P/1 atm'' with ''1''.

MCF = Moisture correction factor for the measurement period, volumetric basis. = 1 when V and C are measured on a dry basis or if both are measured on a wet basis. = $1-(f_{H2O})$ when V is measured on a wet basis and C is measured on a dry basis. = $1/[1-(f_{H2O})]$ when V is measured on a dry basis and C is measured on a wet basis.

(f_{H2O}) = Moisture content of the methane emitted during the measurement period, volumetric basis (cubic feet water per cubic feet emitted gas).

* * * * *

P = Absolute pressure at which flow is measured (atm) for the quarter. The annual average barometric pressure from the nearest NOAA weather service station may be used as a default.

* * * * *

(2) Values of V, C, T, P, and (f_{H2O}), if applicable, must be based on measurements taken at least once each quarter with no fewer than 6 weeks between measurements. If measurements are taken more frequently than once per quarter, then use the average value for all measurements taken. If continuous measurements are taken, then use the average value over the time period of continuous monitoring.

* * * * *

(b) * * *

$$CH_{4D} = \sum_{i=1}^{n}\left(V_i * MCF_i * \frac{C_i}{100\%} * 0.0423 * \frac{520°R}{T_i} * \frac{P_i}{1atm} * 1{,}440 * \frac{0.454}{1{,}000}\right) \quad \text{(Eq. FF-3)}$$

* * * * *

V_i = Measured volumetric flow rate for the days in the week when the degasification system is in operation at that monitoring point, based on sampling or a flow rate meter (acfm). If a flow rate meter is used and the meter automatically corrects to standard temperature and pressure, then use scfm and replace ''$520°R/T_i \times P_i/1$ atm'' with ''1''.

MCF_i = Moisture correction factor for the measurement period, volumetric basis. = 1 when V_i and C_i are measured on a dry basis or if both are measured on a wet basis. = $1-(f_{H2O})_I$ when V_i is measured on a wet basis and C_i is measured on a dry basis. = $1/[1-(f_{H2O})_i]$ when V_i is measured on a dry basis and C_i is measured on a wet basis.

(f_{H2O}) = Moisture content of the CH_4 emitted during the measurement period, volumetric basis (cubic feet water per cubic feet emitted gas).

* * * * *

P_i = Absolute pressure at which flow is measured (atm).

* * * * *

(1) Values for V, C, T, P, and (f_{H2O}), if applicable, must be based on measurements taken at least once each calendar week with at least 3 days between measurements. If measurements are taken more frequently than once per week, then use the average value for all measurements taken that week. If continuous measurements are taken, then use the average values over the time period of continuous monitoring when the continuous monitoring equipment is properly functioning.

(2) * * *

* * * * *

$(CH_{4D})_{i,j}$ = Weekly CH_4 liberated from a degasification monitoring point (metric tons CH_4).

* * * * *

(c) If gas from a degasification system or ventilation system is sold, used onsite, or otherwise destroyed (including by flaring or VAM oxidation), you must calculate the quarterly CH_4 destroyed for each destruction device and each point of offsite transport to a destruction device, using Equation FF–5 of this section. You must measure CH_4 content and flow rate according to the provisions in § 98.324, and calculate the methane routed to the destruction device (CH_4) using either Equation FF–

1 or Equation FF–4 of this section, as applicable.

* * * * *

(1) * * *

$$CH_{4Destroyed\ Total} = \sum_{i=1}^{d} (CH_{4Destroyed})_i \qquad \text{(Eq. FF-6)}$$

* * * * *

■ 68. Section 98.324 is amended by revising paragraphs (b) introductory text, (c)(2), and parameter ''C_{CH4}'' of Equation FF–9 to read as follows:

§ 98.324 Monitoring and QA/QC requirements.

* * * * *

(b) For CH_4 liberated from ventilation systems, determine whether CH_4 will be monitored from each ventilation shaft and vent hole, from a centralized monitoring point, or from a combination of the two options. Operators are allowed flexibility for aggregating emissions from more than one ventilation point, as long as emissions from all are addressed, and the methodology for calculating total emissions documented. Monitor by one of the following options:

* * * * *

(c) * * *

(2) Collect weekly (once each calendar week, with at least three days between measurements) or more frequent samples, for all degasification wells and gob gas vent holes. Determine weekly or more frequent flow rates, methane concentration, temperature, and pressure from these degasification wells and gob gas vent holes. Methane composition should be determined either by submitting samples to a lab for analysis, or from the use of methanometers at the degasification monitoring site. Follow the sampling protocols for sampling of methane emissions from ventilation shafts, as described in § 98.324(b)(1). You must record the date of sampling, flow, temperature, pressure, and moisture measurements, the methane concentration (percent), the bottle number of samples collected, and the location of the measurement or collection.

* * * * *

(d) * * *

(2) * * *

(iii) * * *

* * * * *

C_{CH4} = Methane (CH_4) concentration in the gas (volume %) for use in Equations FF–1 and FF–3 of this subpart.

* * * * *

■ 69. Section 98.326 is amended by revising paragraphs (a), (f), (h), (i), (j), (o), and (r), and adding paragraphs (r)(1), (r)(2), (r)(3), (t), and (u) to read as follows:

§ 98.326 Data reporting requirements.

* * * * *

(a) Quarterly CH_4 liberated from each ventilation monitoring point, (metric tons CH_4).

* * * * *

(f) Quarterly volumetric flow rate for each ventilation monitoring point and units of measure (scfm or acfm), date and location of each measurement, and method of measurement (quarterly sampling or continuous monitoring), used in Equation FF–1 of this subpart.

* * * * *

(h) Weekly volumetric flow rate used to calculate CH_4 liberated from degasification systems and units of measure (acfm or scfm), and method of measurement (sampling or continuous monitoring), used in Equation FF–3 of this subpart.

(i) Quarterly CH_4 concentration (%) used to calculate CH_4 liberated from degasification systems and if the data is based on CEMS or weekly sampling.

(j) Weekly volumetric flow rate used to calculate CH_4 destruction for each destruction device and each point of offsite transport, and units of measure (acfm or scfm).

* * * * *

(o) Temperatures (°R), pressure (atm), moisture content, and the moisture correction factor (if applicable) used in Equation FF–1 and FF–3 of this subpart; and the gaseous organic concentration correction factor, if Equation FF–9 was required.

* * * * *

(r) Identification information and description for each well and shaft, including paragraphs (r)(1) through (r)(3) of this section:

(1) Indication of whether the well or shaft is monitored individually, or as part of a centralized monitoring point. Note which method (sampling or continuous monitoring) was used.

(2) Start date and close date of each well or shaft.

(3) Number of days the well or shaft was in operation during the reporting year.

* * * * *

(t) Quarterly CH_4 routed to each destruction device or offsite transfer point used in Equation FF–5 of this subpart (metric tons).

(u) Mine Safety and Health Administration (MSHA) identification for this coal mine.

Subpart HH—[AMENDED]

■ 70. Section 98.343 is amended by:

■ a. Revising the parameters ''DOC'' and ''F'' of Equation HH–1.

■ b. Revising Equation HH–4 and the parameters ''N'' and ''0.0423'' of Equation HH–4.

■ c. Revising paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii)(A), and (b)(2)(iii)(B).

■ d. Revising parameter ''OX'' of Equation HH–5 at paragraph (c)(1).

■ e. Revising paragraphs (c)(3)(i) and (c)(3)(ii).

§ 98.343 Calculating GHG emissions.

(a) * * *

(1) * * *

* * * * *

DOC = Degradable organic carbon from Table HH–1 of this subpart [fraction (metric tons C/metric ton waste)].

* * * * *

F = Fraction by volume of CH_4 in landfill gas from measurement data for the current reporting year, if available (fraction, dry basis, corrected to 0 percent oxygen); otherwise, use the default of 0.5.

* * * * *

(b) * * *

(1) * * *

$$R = \sum_{n=1}^{N} \left((V)_n \times (K_{MC})_n \times \frac{(C_{CH4})_n}{100\%} \times 0.0423 \times \frac{520°R}{(T)_n} \times \frac{(P)_n}{1\ atm} \times \frac{0.454}{1{,}000} \right) \qquad \text{(Eq. HH-4)}$$

* * * * *

N = Total number of measurement periods in a year. Use daily averaging periods for a continuous monitoring system and N = 365 (or N = 366 for leap years). For monthly sampling, as provided in paragraph (b)(2) of this section, use N=12.

* * * * *

0.0423 = Density of CH_4 lb/cf at 520°R or 60 degrees Fahrenheit and 1 atm.

* * * * *

(2) * * *

(i) Continuously monitor gas flow rate and determine the cumulative volume of landfill gas each month and the cumulative volume of landfill gas each year that is collected and routed to a destruction device (before any treatment equipment). Under this option, the gas flow meter is not required to automatically correct for temperature, pressure, or, if necessary, moisture content. If the gas flow meter is not equipped with automatic correction for temperature, pressure, or, if necessary, moisture content, you must determine these parameters as specified in paragraph (b)(2)(iii) of this section.

(ii) Determine the CH_4 concentration in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar month; if only one measurement is made each calendar month, there must be at least fourteen days between measurements.

(iii) * * *

(A) Determine the temperature and pressure in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar month; if only one measurement is made each calendar month, there must be at least fourteen days between measurements.

(B) If the CH_4 concentration is determined on a dry basis and flow is determined on a wet basis or CH_4 concentration is determined on a wet basis and flow is determined on a dry basis, and the flow meter does not automatically correct for moisture content, determine the moisture content in the landfill gas that is collected and routed to a destruction device (before any treatment equipment) in a location near or representative of the location of the gas flow meter at least once each calendar month; if only one measurement is made each calendar month, there must be at least fourteen days between measurements.

(c) * * *

(1) * * *

* * * * *

OX = Oxidation fraction. Use the appropriate oxidation fraction default value from Table HH–4 of this subpart.

* * * * *

(3) * * *

(i) Calculate CH_4 emissions from the modeled CH_4 generation and measured CH_4 recovery using Equation HH–6 of this section.

$$\text{Emissions} = \left[\left(G_{CH4} - \sum_{n-1}^{N} R_n\right) \times (1 - OX) + \sum_{n-1}^{N} \left\{R_n \times \left(1 - \left(DE_n \times f_{Dest,n}\right)\right)\right\}\right] \quad \text{(Eq. HH-6)}$$

Where:

Emissions = Methane emissions from the landfill in the reporting year (metric tons CH_4).

G_{CH4} = Modeled methane generation rate in reporting year from Equation HH–1 of this section or the quantity of recovered CH_4 from Equation HH–4 of this section, whichever is greater (metric tons CH_4).

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N=1.

R_n = Quantity of recovered CH_4 from Equation HH–4 of this section for the nth measurement location (metric tons).

OX = Oxidation fraction. Use the appropriate oxidation fraction default value from Table HH–4 of this subpart.

DE_n = Destruction efficiency (lesser of manufacturer's specified destruction efficiency and 0.99) for the nth measurement location. If the gas is transported off-site for destruction, use DE = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate DE_n as the arithmetic average of the DE values determined for each destruction device associated with that measurement location.

$f_{Dest,\ n}$ = Fraction of hours the destruction device associated with the nth measurement location was operating during active gas flow calculated as the annual operating hours for the destruction device divided by the annual hours flow was sent to the destruction device as measured at the nth measurement location. If the gas is destroyed in a back-up flare (or similar device) or if the gas is transported off-site for destruction, use f_{Dest}= 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate $f_{Dest,\ n}$ as the arithmetic average of the f_{Dest} values determined for each destruction device associated with that measurement location.

(ii) Calculate CH_4 generation and CH_4 emissions using measured CH_4 recovery and estimated gas collection efficiency and Equations HH–7 and HH–8 of this section.

$$MG = \frac{1}{CE} \sum_{n=1}^{N} \left[\frac{R_n}{f_{Rec,n}}\right] \times (1 - OX) \quad \text{(Eq. HH-7)}$$

$$\text{Emissions} = \left[\left(\frac{1}{CE}\left\{\sum_{n-1}^{N}\left[\frac{R_n}{f_{Rec,n}}\right]\right\} - \sum_{n-1}^{N} R_n\right) \times (1 - OX) + \sum_{n=1}^{N} \left\{R_n \times \left(1 - \left(DE_n \times f_{Dest,n}\right)\right)\right\}\right] \quad \text{(Eq. HH-8)}$$

Where:

MG = Methane generation, adjusted for oxidation, from the landfill in the reporting year (metric tons CH_4).

Emissions = Methane emissions from the landfill in the reporting year (metric tons CH_4).

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N=1.

R_n = Quantity of recovered CH_4 from Equation HH–4 of this section for the nth measurement location (metric tons CH_4).

CE = Collection efficiency estimated at landfill, taking into account system coverage, operation, and cover system materials from Table HH–3 of this subpart. If area by soil cover type information is not available, use default value of 0.75 (CE4 in table HH–3 of this subpart) for all areas under active influence of the collection system.

$f_{Rec,\ n}$ = Fraction of hours the recovery system associated with the nth measurement location was operating (annual operating hours/8760 hours per year or annual operating hours/8784 per year for a leap year).

OX = Oxidation fraction. Use appropriate oxidation fraction default value from Table HH–4 of this subpart.

DE_n = Destruction efficiency, (lesser of manufacturer's specified destruction efficiency and 0.99) for the nth measurement location. If the gas is transported off-site for destruction, use DE = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate DE_n as the arithmetic average of the DE values determined for each destruction device associated with that measurement location.

$f_{Dest,n}$ = Fraction of hours the destruction device associated with the nth measurement location was operating during active gas flow calculated as the annual operating hours for the destruction device divided by the annual hours flow was sent to the destruction device as measured at the nth measurement location. If the gas is destroyed in a back-up flare (or similar device) or if the gas is transported off-site for destruction, use f_{Dest} = 1. If the volumetric flow and CH_4 concentration of the recovered gas is measured at a single location providing landfill gas to multiple destruction devices (including some gas destroyed on-site and some gas sent off-site for destruction), calculate $f_{Dest,n}$ as the arithmetic average of the f_{Dest} values determined for each destruction device associated with that measurement location.

■ 71. Section 98.344 is amended by revising paragraph (e) and adding paragraph (f) to read as follows:

§ 98.344 Monitoring and QA/QC requirements.

* * * * *

(e) For landfills electing to measure the fraction by volume of CH_4 in landfill gas (F), follow the requirements in paragraphs (e)(1) and (e)(2) of this section.

(1) Use a gas composition monitor capable of measuring the concentration of CH_4 on a dry basis that is properly operated, calibrated, and maintained according to the requirements specified in paragraph (b) of this section. You must either use a gas composition monitor that is also capable of measuring the O_2 concentration correcting for excess (infiltration) air or you must operate, maintain, and calibrate a second monitor capable of measuring the O_2 concentration on a dry basis according to the manufacturer's specifications.

(2) Use Equation HH–10 of this section to correct the measured CH_4 concentration to 0% oxygen. If multiple CH_4 concentration measurements are made during the reporting year, determine F separately for each measurement made during the reporting year, and use the results to determine the arithmetic average value of F for use in Equation HH–1 of this part.

$$F = \left(\frac{C_{CH4}}{100\%}\right) \times \left[20.9_c \Big/ \left(20.9 - \%O_2\right)\right] \qquad \text{(Eq. HH-10)}$$

Where:

F = Fraction by volume of CH_4 in landfill gas (fraction, dry basis, corrected to 0% oxygen).

C_{CH4} = Measured CH_4 concentration in landfill gas (volume %, dry basis).

20.9_c = Defined O_2 correction basis, (volume %, dry basis).

20.9 = O_2 concentration in air (volume %, dry basis).

$\%O_2$ = Measured O_2 concentration in landfill gas (volume %, dry basis).

(f) The owner or operator shall document the procedures used to ensure the accuracy of the estimates of disposal quantities and, if applicable, gas flow rate, gas composition, temperature, pressure, and moisture content measurements. These procedures include, but are not limited to, calibration of weighing equipment, fuel flow meters, and other measurement devices. The estimated accuracy of measurements made with these devices shall also be recorded, and the technical basis for these estimates shall be provided.

■ 72. Section 98.345 is amended by revising paragraph (c) to read as follows:

§ 98.345 Procedures for estimating missing data.

* * * * *

(c) For missing daily waste disposal quantity data for disposal in the reporting year, the substitute value shall be the average daily waste disposal quantity for that day of the week as measured on the week before and week after the missing daily data.

■ 73. Section 98.346 is amended by revising paragraphs (d)(1), (e), (h), (i)(5), (i)(8), (i)(10), (i)(11), and (i)(12) to read as follows:

§ 98.346 Data reporting requirements.

* * * * *

(d) * * *

(1) Degradable organic carbon (DOC) and fraction of DOC dissimilated (DOC_F) values used in the calculations.

* * * * *

(e) Fraction of CH_4 in landfill gas (F), an indication of whether the fraction of CH_4 was determined based on measured values or the default value, and the methane correction factor used in the calculations. If an MCF other than the default of 1 is used, provide an indication of whether active aeration of the waste in the landfill was conducted during the reporting year, a description of the aeration system, including aeration blower capacity, the fraction of the landfill containing waste affected by aeration, the total number of hours during the year the aeration blower was operated, and other factors used as a basis for the selected MCF value.

* * * * *

(h) For landfills without gas collection systems, the annual methane emissions (i.e., the methane generation, adjusted for oxidation, calculated using Equation HH–5 of this subpart), reported in metric tons CH_4, the oxidation fraction used in the calculation, and an indication of whether passive vents and/or passive flares (vents or flares that are not considered part of the gas collection system as defined in § 98.6) are present at this landfill.

(i) * * *

(5) An indication of whether destruction occurs at the landfill facility, off-site, or both. If destruction occurs at the landfill facility, also report for each measurement location an indication of whether a back-up destruction device is present at the landfill, the annual operating hours for the primary destruction device, the annual operating hours for the back-up destruction device (if present), and the destruction efficiency used (percent).

* * * * *

(8) Methane generation corrected for oxidation calculated using Equation HH–5 of this subpart, reported in metric tons CH_4, and the oxidation fraction used in the calculation.

* * * * *

(10) Methane generation corrected for oxidation calculated using Equation HH–7 of this subpart, reported in metric tons CH_4, and the oxidation fraction used in the calculation.

(11) Methane emissions calculated using Equation HH–6 of this subpart, reported in metric tons CH_4, and the oxidation fraction used in the calculation.

(12) Methane emissions calculated using Equation HH–8 of this subpart, reported in metric tons CH_4, and the oxidation fraction used in the calculation.

■ 74. Section 98.348 is amended by adding definitions for ''Landfill capacity'' and ''Leachate recirculation'' in alphabetical order to read as follows:

§ 98.348 Definitions.

* * * * *

Landfill capacity means the maximum amount of solid waste a landfill can accept. For the purposes of this subpart, for landfills that have a permit, the *landfill capacity* can be determined in terms of volume or mass in the most recent permit issued by the state, local, or Tribal agency responsible for regulating the landfill, plus any in-place waste not accounted for in the most recent permit. If the owner or operator chooses to convert from volume to mass to determine its capacity, the calculation must include a site-specific density.

Leachate recirculation means the practice of taking the leachate collected from the landfill and reapplying it to the landfill by any of one of a variety of methods, including pre-wetting of the waste, direct discharge into the working face, spraying, infiltration ponds, vertical injection wells, horizontal gravity distribution systems, and pressure distribution systems.

* * * * *

■ 75. Table HH–1 to Subpart HH is amended by revising the entry for ''OX'' as follows:

TABLE HH–1 TO SUBPART HH OF PART 98—EMISSIONS FACTORS, OXIDATION FACTORS AND METHODS

Factor	Default value	Units
* * *	* *	*
Other parameters—All MSW landfills		
* *	* *	*
OX	See Table HH–4 of this subpart.	
* *	* *	*

■ 76. Table HH–2 to Subpart HH is revised to read as follows:

TABLE HH–2 TO SUBPART HH OF PART 98—U.S. PER CAPITA WASTE DISPOSAL RATES

Year	Waste per capita ton/cap/yr
1950	0.63
1951	0.63
1952	0.63
1953	0.63
1954	0.63
1955	0.63
1956	0.63
1957	0.63
1958	0.63
1959	0.63
1960	0.63
1961	0.64
1962	0.64
1963	0.65
1964	0.65
1965	0.66
1966	0.66
1967	0.67
1968	0.68
1969	0.68
1970	0.69
1971	0.69
1972	0.70
1973	0.71
1974	0.71
1975	0.72
1976	0.73
1977	0.73
1978	0.74
1979	0.75
1980	0.75
1981	0.76
1982	0.77
1983	0.77
1984	0.78
1985	0.79
1986	0.79
1987	0.80
1988	0.80
1989	0.83
1990	0.82
1991	0.76
1992	0.74
1993	0.76
1994	0.75
1995	0.70
1996	0.68
1997	0.69
1998	0.75
1999	0.75
2000	0.80
2001	0.91
2002	1.02
2003	1.02
2004	1.01
2005	0.98
2006	0.95
2007	0.95
2008	0.95
2009 and all later years	0.95

■ 77. Table HH–4 to Subpart HH is added to read as follows:

TABLE HH–4 TO SUBPART HH OF PART 98—LANDFILL METHANE OXIDATION FRACTIONS

If your methane flux rate[a] for the reporting year is:	Use this landfill methane oxidation raction:
Less than 10 grams per square meter per day (g/m²/d)	0.35
10 to 70 g/m²/d	0.25
Greater than 70 g/m²/d	0.10

[a]Methane flux rate (in grams per square meter per day; g/m²/d) is the mass flow rate of methane per unit area at the bottom of the surface soil prior to any oxidation and is calculated as follows.

For Equation HH-5 of this subpart, or for Equation TT-6 of subpart TT of this part,

$$MF = K \times G_{CH4} / SArea$$

For Equation HH-6 of this subpart,

$$MF = K \times \left(G_{CH4} - \sum_{n-1}^{N} R_n \right) \Big/ SArea$$

For Equations HH-7 of this subpart,

$$MF = K \times \left(\frac{1}{CE} \sum_{n-1}^{N} \left[\frac{R_n}{f_{Rec,n}} \right] \right) \Big/ SArea$$

For Equation HH-8 of this subpart,

$$MF = K \times \left(\frac{1}{CE} \left\{ \sum_{n-1}^{N} \left[\frac{R_n}{f_{Rec,n}} \right] \right\} - \sum_{n-1}^{N} R_n \right) \Big/ SArea$$

Where:

MF = Methane flux rate from the landfill in the reporting year (grams per square meter per day, $g/m^2/d$).

K = unit conversion factor = $10^6/365$ (g/metric ton per days/year) or $10^6/366$ for a leap year.

SArea = The surface area of the landfill containing waste at the beginning of the reporting year (square meters, m^2).

G_{CH4} = Modeled methane generation rate in reporting year from Equation HH–1 of this subpart, or, for application with Equation HH–6 only, the greater of the modeled methane generation rate in reporting year from Equation HH–1 of this subpart and the quantity of recovered CH_4 from Equation HH–4 of this subpart (metric tons CH_4).

CE = Collection efficiency estimated at landfill, taking into account system coverage, operation, and cover system materials from Table HH–3 of this subpart. If area by soil cover type information is not available, use default value of 0.75 (CE4 in table HH–3 of this subpart) for all areas under active influence of the collection system.

N = Number of landfill gas measurement locations (associated with a destruction device or gas sent off-site). If a single monitoring location is used to monitor volumetric flow and CH_4 concentration of the recovered gas sent to one or multiple destruction devices, then N=1.

R_n = Quantity of recovered CH_4 from Equation HH–4 of this subpart for the nth measurement location (metric tons).

$f_{Rec,n}$ = Fraction of hours the recovery system associated with the nth measurement location was operating (annual operating hours/8760 hours per year or annual operating hours/8784 hours per year for a leap year).

Subpart II—[AMENDED]

■ 78. Section 98.353 is amended by revising the parameters ''f_{Dest_1}'' and ''f_{Dest_2}'' of Equation II–6 to read as follows:

§ 98.353 Calculating GHG emissions.

* * * * *

(d) * * *

(2) * * *

* * * * *

f_{Dest1} = Fraction of hours the primary destruction device was operating calculated as the annual hours when the destruction device was operating divided by the annual operating hours of the biogas recovery system. If the biogas is transported off-site for destruction, use f_{Dest} = 1.

* * * * *

f_{Dest2} = Fraction of hours the back-up destruction device was operating calculated as the annual hours when the destruction device was operating divided by the annual operating hours of the biogas recovery system.

* * * * *

Subpart LL—[AMENDED]

■ 79. Section 98.386 is amended by:

■ a. Removing and reserving paragraphs (a)(1) and (a)(5).

■ b. Revising paragraph (a)(4), (a)(8), (a)(9)(v), and (a)(11)(v).

■ c. Removing and reserving paragraph (a)(13).

■ d. Revising paragraphs (a)(14), (a)(15) and (a)(18).

■ e. Removing and reserving paragraph (b)(1).

■ f. Revising paragraphs (b)(4), (b)(5)(v), and (b)(6)(i).

■ g. Removing and reserving paragraph (c)(1).

■ h. Revising paragraphs (c)(4), (c)(5)(v), (d)(2), and (d)(3) to read as follows:

§ 98.386 Data reporting requirements.

* * * * *

(a) * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(2) of this section.

* * * * *

(8) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(6) of this section.

(9) * * *

(v) The calculated CO_2 emissions factor in metric tons CO_2 per barrel or per metric ton of product.

* * * * *

(11) * * *

(v) The calculated CO_2 emissions factor in metric tons CO2 per barrel or metric ton of product.

* * * * *

(14) For each specific type of biomass that enters the coal-to-liquid facility to be co-processed with fossil fuel-based feedstock to produce a product reported in paragraph (a)(6) of this section, report the annual quantity in metric tons or barrels.

(15) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(14) of this section.

* * * * *

(18) Annual CO_2 emissions in metric tons that would result from the complete combustion or oxidation of

each type of biomass feedstock co-processed with fossil fuel-based feedstocks reported in paragraph (a)(14) of this section, calculated according to § 98.393(c).

* * * * *

(b) * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (b)(2) of this section.

(5) * * *

(v) The calculated CO_2 emissions factor in metric tons per barrel or per metric ton of product.

(6) * * *

(i) The density test results in metric tons per barrel.

* * * * *

(c) * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (c)(2) of this section.

(5) * * *

(v) The calculated CO_2 emissions factor in metric tons per barrel or per metric ton of product.

* * * * *

(d) * * *

(2) For a product that enters the facility to be further refined or otherwise used on site that is a blended feedstock, producers must meet the reporting requirements of paragraph (a)(2) of this section by reflecting the individual components of the blended feedstock.

(3) For a product that is produced, imported, or exported that is a blended product, producers, importers, and exporters must meet the reporting requirements of paragraphs (a)(6), (b)(2), and (c)(2) of this section, as applicable, by reflecting the individual components of the blended product.

Subpart MM—[AMENDED]

■ 80. Section 98.393 is amended by:

■ a. Revising the parameter ''$Product_i$'' to Equation MM–1 in paragraph (a)(1).

■ b. Revising the parameter ''$Product_i$'' to Equation MM–1 in paragraph (a)(2).

■ c. Revising paragraphs (h)(1) introductory text and (h)(2) introductory text.

§ 98.393 Calculating GHG emissions.

(a) * * *

(1) * * *

* * * * *

$Product_i$ = Annual volume of product ''i'' produced, imported, or exported by the reporting party (barrels). For refiners, this volume only includes products ex refinery gate, and excludes products that entered the refinery but are not reported under § 98.396(a)(2). For natural gas liquids, volumes shall reflect the individual components of the product as listed in Table MM–1 to subpart MM.

* * * * *

(2) * * *

* * * * *

$Product_i$ = Annual mass of product ''i'' produced, imported, or exported by the reporting party (metric tons). For refiners, this mass only includes products ex refinery gate, and excludes products that entered the refinery but are not reported under § 98.396(a)(2).

* * * * *

(h) * * *

(1) A reporter using Calculation Method 1 to determine the emission factor of a petroleum product shall calculate the CO_2 emissions associated with that product using Equation MM–8 of this section in place of Equation MM–1 of this section.

* * * * *

(2) A refinery using Calculation Method 1 of this subpart to determine the emission factor of a non-crude petroleum feedstock shall calculate the CO_2 emissions associated with that feedstock using Equation MM–9 of this section in place of Equation MM–2 of this section.

* * * * *

■ 81. Section 98.394 is amended by:

■ a. Revising paragraphs (a)(1) introductory text and (a)(3).

■ b. Adding paragraph (b)(3).

■ c. Revising paragraph (c) introductory text.

■ d. Removing and reserving paragraph (d).

§ 98.394 Monitoring and QA/QC requirements.

(a) * * *

(1) The quantity of petroleum products, natural gas liquids, and biomass, shall be determined as follows:

* * * * *

(3) The annual quantity of crude oil received shall be determined according to one of the following methods. You may use an appropriate standard method published by a consensus-based standards organization or you may use an industry standard practice.

(b) * * *

(3) For units and processes that operate continuously with infrequent outages, it may not be possible to complete the calibration of a flow meter or other measurement device without disrupting normal process operation. In such cases, the owner or operator may postpone the calibration until the next scheduled maintenance outage. The best available information from company records may be used in the interim. Such postponements shall be documented in the monitoring plan that is required under § 98.3(g)(5).

(c) Procedures for Calculation Method 2 of this subpart.

* * * * *

■ 82. Section 98.395 is amended by:

■ a. Revising paragraph (a) introductory text.

■ b. Revising paragraph (b).

■ c. Removing paragraph (c).

§ 98.395 Procedures for estimating missing data.

(a) *Determination of quantity.* Whenever the quality assurance procedures in § 98.394(a) cannot be followed to measure the quantity of one or more petroleum products, natural gas liquids, types of biomass, feedstocks, or crude oil during any period (e.g., if a meter malfunctions), the following missing data procedures shall be used:

* * * * *

(b) *Determination of emission factor.* Whenever any of the procedures in § 98.394(c) cannot be followed to develop an emission factor for any reason, Calculation Method 1 of this subpart must be used in place of Calculation Method 2 of this subpart for the entire reporting year.

■ 83. Section 98.396 is amended by:

■ a. Removing and reserving paragraph (a)(1).

■ b. Revising paragraph (a)(4).

■ c. Removing and reserving paragraph (a)(5).

■ d. Revising paragraphs (a)(8), (a)(9) introductory text, (a)(9)(iii), (a)(9)(v), (a)(10) introductory text, (a)(11) introductory text, and (a)(11)(iii).

■ e. Removing and reserving paragraph (a)(13).

■ f. Revising paragraphs (a)(15) and (a)(18).

■ g. Revising paragraphs (a)(20), (a)(21) and (a)(22).

■ h. Removing paragraph (a)(23).

■ i. Removing and reserving paragraph (b)(1).

■ j. Revising paragraphs (b)(2), (b)(4), (b)(5) introductory text, and (b)(6) introductory text.

■ k. Removing and reserving paragraph (c)(1).

■ l. Revising paragraph (c)(4), (c)(5) introductory text, (c)(6) introductory text, (d)(2), and (d)(3).

§ 98.396 Data reporting requirements.

* * * * *

(a) * * *

(1) [Reserved]

* * * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(2) of this section.

(5) [Reserved]

* * * * *

(8) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(6) of this section.

(9) For every feedstock reported in paragraph (a)(2) of this section for which Calculation Method 2 of this subpart was used to determine an emissions factor, report:

* * * * *

(iii) The carbon share test results in percent mass.

* * * * *

(v) The calculated CO_2 emissions factor in metric tons CO_2 per barrel or per metric ton of product.

(10) For every non-solid feedstock reported in paragraph (a)(2) of this section for which Calculation Method 2 of this subpart was used to determine an emissions factor, report:

* * * * *

(11) For every petroleum product and natural gas liquid reported in paragraph (a)(6) of this section for which Calculation Method 2 of this subpart was used to determine an emissions factor, report:

* * * * *

(iii) The carbon share test results in percent mass.

* * * * *

(13) [Reserved]

* * * * *

(15) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (a)(14) of this section.

* * * * *

(18) The CO_2 emissions in metric tons that would result from the complete combustion or oxidation of each type of biomass feedstock co-processed with petroleum feedstocks reported in paragraph (a)(14) of this section, calculated according to § 98.393(c).

* * * * *

(20) For all crude oil that enters the refinery, report the annual quantity in barrels.

(21) The quantity of bulk NGLs in metric tons or barrels received for processing during the reporting year. Report only quantities of bulk NGLs not reported in (a)(2) of this section.

(22) Volume of crude oil in barrels that you injected into a crude oil supply or reservoir.

(b) In addition to the information required by § 98.3(c), each importer shall report all of the following information at the corporate level:

(1) [Reserved]

(2) For each petroleum product and natural gas liquid listed in Table MM–1 of this subpart, report the annual quantity in metric tons or barrels. For natural gas liquids, quantity shall reflect the individual components of the product.

* * * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (b)(2) of this section.

(5) For each product reported in paragraph (b)(2) of this section for which Calculation Method 2 of this subpart used was used to determine an emissions factor, report:

* * * * *

(6) For each non-solid product reported in paragraph (b)(2) of this section for which Calculation Method 2 of this subpart was used to determine an emissions factor, report:

* * * * *

(c) * * *

(1) [Reserved]

* * * * *

(4) Each standard method or other industry standard practice used to measure each quantity reported in paragraph (c)(2) of this section.

(5) For each product reported in paragraph (c)(2) of this section for which Calculation Method 2 of this subpart was used to determine an emissions factor, report:

* * * * *

(6) For each non-solid product reported in paragraph (c)(2) of this section for which Calculation Method 2 of this subpart used was used to determine an emissions factor, report:

* * * * *

(d) * * *

(2) For a product that enters the refinery to be further refined or otherwise used on site that is a blended non-crude feedstock, refiners must meet the reporting requirements of paragraphs (a)(2) of this section by reflecting the individual components of the blended non-crude feedstock.

(3) For a product that is produced, imported, or exported that is a blended product, refiners, importers, and exporters must meet the reporting requirements of paragraphs (a)(6), (b)(2), and (c)(2) of this section, as applicable, by reflecting the individual components of the blended product.

■ 84. Section 98.397 is amended by revising paragraphs (b) and (d) to read as follows:

§ 98.397 Records that must be retained.

* * * * *

(b) Reporters shall maintain records to support quantities that are reported under this subpart, including records documenting any estimations of missing data and the number of calendar days in the reporting year for which substitute data procedures were followed. For all reported quantities of petroleum products, natural gas liquids, and biomass, reporters shall maintain metering, gauging, and other records normally maintained in the course of business to document product and feedstock flows including the date of initial calibration and the frequency of recalibration for the measurement equipment used.

* * * * *

(d) Reporters shall maintain laboratory reports, calculations and worksheets used in the measurement of density and carbon share for any petroleum product or natural gas liquid for which CO_2 emissions were calculated using Calculation Method 2.

* * * * *

■ 85. Section 98.398 is amended by:

■ a. Adding the definitions for ''Bulk NGLs'' and ''Natural Gas Liquids (NGLs)'' in alphabetical order.

■ b. Removing the definition of ''Batch''.

§ 98.398 Definitions.

* * * * *

Bulk NGLs for purposes of reporting under this subpart means mixtures of NGLs that are sold or delivered as undifferentiated product.

Natural Gas Liquids (NGLs) for the purposes of reporting under this subpart means hydrocarbons that are separated from natural gas as liquids through the process of absorption, condensation, adsorption, or other methods, and are sold or delivered as differentiated product. Generally, such liquids consist of ethane, propane, butanes, or pentanes plus.

■ 86. Table MM–1 to Subpart MM is amended by:

■ a. Revising the entries for Ethane, Ethylene, Propane, Propylene, Butane, Butylene, Isobutane, and Isobutylene.

■ b. Adding footnotes 3 and 4.

TABLE MM–1 TO SUBPART MM OF PART 98—DEFAULT FACTORS FOR PETROLEUM PRODUCTS AND NATURAL GAS LIQUIDS[1] [2]

Products	Column A: density (metric tons/bbl)	Column B: carbon share (% of mass)	Column C: emission factor (metric tons CO_2/bbl)
* * * * * *	*		
Other Petroleum Products and Natural Gas Liquids			
* * * * * *	*		
Ethane[3]	0.0579	79.89	0.170
Ethylene[4]	0.0492	85.63	0.154
Propane[3]	0.0806	81.71	0.241
Propylene[3]	0.0827	85.63	0.260
Butane[3]	0.0928	82.66	0.281
Butylene[3]	0.0972	85.63	0.305
Isobutane[3]	0.0892	82.66	0.270
Isobutylene[3]	0.0949	85.63	0.298
* * * * * *	*		

[1] In the case of products blended with some portion of biomass-based fuel, the carbon share in Table MM–1 of this subpart represents only the petroleum-based components.

[2] Products that are derived entirely from biomass should not be reported, but products that were derived from both biomass and a petroleum product (i.e., co-processed) should be reported as the petroleum product that it most closely represents.

[3] The density and emission factors for components of LPG determined at 60 degrees Fahrenheit and saturation pressure (LPGs other than ethylene)

[4] The density and emission factor for ethylene determined at 41 degrees Fahrenheit and saturation pressure.

Subpart NN—[AMENDED]

■ 87. Section 98.400 is amended by revising paragraphs (a) and (b) to read as follows:

§ 98.400 Definition of the source category.

* * * * *

(a) Natural gas liquids fractionators are installations that fractionate natural gas liquids (NGLs) into their constituent liquid products or mixtures of products (ethane, propane, normal butane, isobutane or pentanes plus) for supply to downstream facilities.

(b) Local Distribution Companies (LDCs) are companies that own or operate distribution pipelines, not interstate pipelines or intrastate pipelines, that physically deliver natural gas to end users and that are within a single state that are regulated as separate operating companies by State public utility commissions or that operate as independent municipally-owned distribution systems. LDCs do not include pipelines (both interstate and intrastate) delivering natural gas directly to major industrial users and farm taps upstream of the local distribution company inlet.

* * * * *

■ 88. Section 98.403 is amended by:

■ a. Revising the parameter ''$Fuel_h$'' to Equation NN–2.

■ b. Revising paragraphs (b)(1) introductory text and (b)(2)(i).

■ c. Revising parameters ''CO_{2k}'' and ''Fuel'' to Equation NN–4.

■ d. Revising paragraph (b)(3).

■ e. Revising paragraph (b)(4).

■ f. Revising paragraph (c)(2) introductory text.

■ g. Revising parameter ''CO_2'' to Equation NN–8.

§ 98.403 Calculating GHG emissions.

(a) * * *

(2) * * *

* * * * *

$Fuel_h$ = Total annual volume of product ''h'' supplied (volume per year, in Mscf for natural gas and bbl for NGLs).

* * * * *

(b) * * *

(1) For natural gas that is received for redelivery to downstream gas transmission pipelines and other local distribution companies, use Equation NN–3 of this section and the default values for the CO_2 emission factors found in Table NN–2 of this subpart. Alternatively, reporter-specific CO_2 emission factors may be used, provided they are developed using methods outlined in § 98.404.

* * * * *

(2)(i) For natural gas delivered to end-users registering a supply equal to or greater than 460,000 Mscf per year, use Equation NN–4 of this section and the default values for the CO_2 emission factors found in Table NN–2 of this subpart.

(ii) * * *

* * * * *

$CO_{2\ k}$ = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas delivered to each end-user that receives a supply equal to or greater than 460,000 Mscf per year (metric tons).

Fuel = Total annual volume of natural gas supplied to this end-user, if known, otherwise, the annual volume supplied to this meter (Mscf per year).

* * * * *

(3) For the net change in natural gas stored on system by the LDC during the reporting year, use Equation NN–5a of this section. For natural gas that is received by means other than through the city gate, and is not otherwise accounted for by Equation NN–1 or NN–2 of this section, use Equation NN–5b of this section.

(i) For natural gas received by the LDC that is injected into on-system storage, and/or liquefied and stored, and for gas removed from storage and used for deliveries, use Equation NN–5a of this section and the default value for the CO_2 emission factors found in Table NN–2 of this subpart. Alternatively, a reporter-specific CO_2 emission factor may be used, provided it is developed using methods outlined in § 98.404.

$$CO_{2l} = [Fuel_1 - Fuel_2] * EF \qquad \text{(Eq. NN-5a)}$$

Where:

CO_{2l} = Annual CO_2 mass emissions that would result from the combustion or oxidation of the net change in natural gas stored on system by the LDC within the reporting year (metric tons).

$Fuel_1$ = Total annual volume of natural gas added to storage on-system or liquefied and stored in the reporting year (Mscf per year).

$Fuel_2$ = Total annual volume of natural gas that is removed from storage or vaporized and removed from storage and used for deliveries to customers or other LDCs by the LDC within the reporting year (Mscf per year).

EF = Annual average CO_2 emission factor for natural gas placed into/removed from storage (MT CO_2/Mscf).

(ii) For natural gas received by the LDC that bypassed the city gate, use Equation NN–5b of this section. This includes natural gas received directly by LDC systems from producers or natural gas processing plants from local production, received as a liquid and vaporized for delivery, or received from any other source that bypassed the city gate. Use the default value for the CO_2 emission factors found in Table NN–2 of this subpart. Alternatively, a reporter-specific CO_2 emission factor may be used, provided it is developed using methods outlined in § 98.404.

$$CO_{2n} = Fuel_z * EF_z \qquad \text{(Eq. NN-5b)}$$

Where:

CO_{2n} = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas received that bypassed the city gate and is not otherwise accounted for by Equation NN–1 or NN–2 of this section (metric tons).

$Fuel_z$ = Total annual volume of natural gas received that was not otherwise accounted for by Equation NN–1 or NN–2 of this section (natural gas from producers and natural gas processing plants from local production, or natural gas that was received as a liquid, vaporized and delivered, and any other source that bypassed the city gate). (Mscf per year)

EF_z = Fuel-specific CO_2 emission factor (MT CO_2/Mscf)

(4) Calculate the total CO_2 emissions that would result from the complete combustion or oxidation of the annual supply of natural gas to end-users that receive a supply less than 460,000 Mscf per year using Equation NN–6 of this section.

$$CO_2 = CO_{2i} + CO_{2n} - CO_{2j} - \sum CO_{2k} - CO_{2l} \qquad \text{(Eq. NN-6)}$$

Where:

CO_2 = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas delivered to LDC end-users not covered in paragraph (b)(2) of this section (metric tons).

CO_{2i} = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas received at the city gate as calculated in paragraph (a)(1) or (a)(2) of this section (metric tons).

CO_{2n} = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas that was received by the LDC directly from sources bypassing the city gate, and is not otherwise accounted for in Equation NN–1 or NN–2 of this section, as calculated in paragraph (b)(3)(ii) of this section (metric tons).

CO_{2j} = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas delivered to transmission pipelines or other LDCs as calculated in paragraph (b)(1) of this section (metric tons).

CO_{2k} = Annual CO_2 mass emissions that would result from the combustion or oxidation of natural gas delivered to each end-user that receives a supply equal to or greater than 460,000 Mscf per year as calculated in paragraph (b)(2) of this section (metric tons).

CO_{2l} = Annual CO_2 mass emissions that would result from the combustion or oxidation of the net change in natural gas stored by the LDC within the reported year as calculated in paragraph (b)(3)(i) of this section (metric tons).

(c) * * *

(2) Calculate the total CO_2 equivalent emissions that would result from the combustion or oxidation of fractionated NGLs supplied less the quantity received from other fractionators using Equation NN–8 of this section.

* * * * *

CO_2 = Annual CO_2 mass emissions that would result from the combustion or oxidation of fractionated NGLs delivered to customers or on behalf of customers less the quantity received from other fractionators (metric tons).

* * * * *

■ 89. Section 98.404 is amended by:

■ a. Revising paragraphs (a)(5) introductory text, (a)(7), (a)(8) introductory text, and (a)(8)(ii).

■ b. Adding paragraph (a)(8)(iii).

■ c. Revising paragraphs (a)(9), (c)(2), (d)(1), and (d)(2).

■ d. Adding paragraph (d)(3).

§ 98.404 Monitoring and QA/QC requirements.

(a) * * *

(5) For an LDC using Equation NN–1 or NN–2 of this subpart, the point(s) of measurement for the natural gas volume received shall be the LDC city gate meter(s).

* * * * *

(7) An LDC using Equation NN–4 of this subpart shall measure natural gas at the end-user's meter(s). Where an end-user is known to have more than one meter located at their facility, the reporter shall measure the natural gas at each meter and sum the annual volume delivered to all meters located at the end-user's facility to determine the total volume delivered to the end-user. Otherwise, the reporter shall consider the total annual volume delivered through each single meter at a single particular location to be the volume delivered to an individual end-user.

(8) An LDC using Equation NN–5a and/or NN–5b of this subpart shall measure natural gas as follows:

* * * * *

(ii) $Fuel_2$ shall be measured at the meters used for measuring on-system storage withdrawals and/or LNG vaporization injection.

(iii) $Fuel_z$ shall be measured using established business practices.

(9) An LDC shall measure all natural gas under the following standard industry temperature and pressure conditions: Cubic foot of gas at a temperature of 60 degrees Fahrenheit and at an absolute pressure of one atmosphere.

* * * * *

(c) * * *

(2) When a reporter used the default EF provided in this section to calculate Equation NN–2, NN–3, NN–4, NN–5a, NN–5b, or NN–7 of this subpart, the

appropriate value shall be taken from Table NN–2 of this subpart.

* * * * *

(d) * * *

(1) Equipment used to measure quantities in Equations NN–1, NN–2, NN–5a and NN–5b of this subpart shall be calibrated prior to its first use for reporting under this subpart, using a suitable standard method published by a consensus based standards organization or according to the equipment manufacturer's directions.

(2) Equipment used to measure quantities in Equations NN–1, NN–2, NN–5a, and NN–5b of this subpart shall be recalibrated at the frequency specified by the standard method used or by the manufacturer's directions.

(3) Equipment used to measure quantities in Equations NN–3 and NN–4 of this subpart shall be recalibrated at the frequency commonly used within the industry.

■ 90. Section 98.405 is amended by removing and reserving paragraph (c)(3).

■ 91. Section 98.406 is amended by:

■ a. Revising paragraph (a)(4).

■ b. Revising paragraphs (a)(7), (b)(2), and (b)(3).

■ c. Removing and reserving paragraph (b)(4).

■ d. Revising paragraphs (b)(5), (b)(7), (b)(9), and (b)(12) introductory text.

§ 98.406 Data reporting requirements.

(a) * * *

(4) Annual quantities (in barrels) of y-grade, o-grade, and other bulk NGLs:

(i) Received.

(ii) Supplied to downstream users that are not fractionated by the reporter.

* * * * *

(7) Annual CO_2 mass emissions (metric tons) that would result from the combustion or oxidation of fractionated NGLs supplied less the quantity received from other fractionators, calculated in accordance with § 98.403(c)(2). If the calculated value is negative, the reporter shall report the value as zero.

* * * * *

(b) * * *

(2) Annual volume in Mscf of natural gas placed into storage or liquefied and stored ($Fuel_1$ in Equation NN–5a).

(3) Annual volume in Mscf of natural gas withdrawn from on-system storage and annual volume in Mscf of vaporized liquefied natural gas (LNG) withdrawn from storage for delivery on the distribution system ($Fuel_2$ in Equation NN–5a).

(4) [Reserved]

(5) Annual volume in Mscf of natural gas that bypassed the city gate(s) and was supplied through the LDC distribution system. This includes natural gas from producers and natural gas processing plants from local production, or natural gas that was vaporized upon receipt and delivered, and any other source that bypassed the city gate ($Fuel_z$ in Equation NN–5b).

* * * * *

(7) Annual volume in Mscf of natural gas delivered by the LDC to each end-user facility that received from the LDC deliveries equal to or greater than 460,000 Mscf during the calendar year, if known; otherwise, report the annual volume in Mscf of natural gas delivered by the LDC to each meter registering supply equal to or greater than 460,000 Mscf during the calendar year.

* * * * *

(9) Annual CO_2 emissions (metric tons) that would result from the complete combustion or oxidation of the annual supply of natural gas to end-users registering less than 460,000 Mscf, calculated in accordance with § 98.403(b)(4). If the calculated value is negative, the reporter shall report the value as zero.

* * * * *

(12) The customer name, address, and meter number of each end-user reported in paragraph (b)(7) of this section. Additionally, report whether the quantity of natural gas reported in paragraph (b)(7) of this section is the total quantity delivered to the end-user, or the quantity delivered to a specific meter.

* * * * *

■ 92. Section 98.407 is amended by revising the introductory text to read as follows:

§ 98.407 Records that must be retained.

In addition to the information required by § 98.3(g), the reporter shall retain the following records:

* * * * *

■ 93. Tables NN–1 and NN–2 to subpart NN are revised to read as follows:

TABLE NN–1 TO SUBPART NN OF PART 98—DEFAULT FACTORS FOR CALCULATION METHODOLOGY 1 OF THIS SUBPART

Fuel	Default higher heating value[1]	Default CO_2 emission factor (kg CO_2/MMBtu)
Natural Gas	1.026 MMBtu/Mscf	53.06
Propane	3.84 MMBtu/bbl	62.87
Normal butane	4.34 MMBtu/bbl	64.77
Ethane	2.85 MMBtu/bbl	59.60
Isobutane	4.16 MMBtu/bbl	64.94
Pentanes plus	4.62 MMBtu/bbl	70.02

[1] Conditions for higher heating values presented in MMBtu/bbl are 60°F and saturation pressure.

TABLE NN–2 TO SUBPART NN OF PART 98—DEFAULT VALUES FOR CALCULATION METHODOLOGY 2 OF THIS SUBPART

Fuel	Unit	Default CO_2 emission value (MT CO_2/Unit) [1]
Natural Gas	Mscf	0.0544
Propane	Barrel	0.241
Normal butane	Barrel	0.281
Ethane	Barrel	0.170
Isobutane	Barrel	0.270
Pentanes plus	Barrel	0.324

[1] Conditions for emission value presented in MT CO_2/bbl are 60°F and saturation pressure.

Subpart PP—[AMENDED]

■ 94. Section 98.423 is amended by revising paragraph (a)(3)(i) introductory text to read as follows:

§ 98.423 Calculating CO_2 supply.

(a) * * *

(3) * * *

(i) For facilities with production process units or production wells that capture or extract a CO_2 stream and either measure it after segregation or do not segregate the flow, calculate the total CO_2 supplied in accordance with Equation PP–3a.

* * * * *

■ 95. Section 98.426 is amended by revising paragraphs (b)(4)(i), (b)(4)(ii), (f)(10), and (f)(11) to read as follows:

§ 98.426 Data reporting requirements.

* * * * *

(b) * * *

(4) * * *

(i) Quarterly density of the CO_2 stream in metric tons per standard cubic meter if you report the concentration of the CO_2 stream in paragraph (b)(3) of this section in weight percent.

(ii) Quarterly density of CO_2 in metric tons per standard cubic meter if you report the concentration of the CO_2 stream in paragraph (b)(3) of this section in volume percent.

* * * * *

(f) * * *

(10) Injection of CO_2 for enhanced oil and natural gas recovery that is covered by subpart UU of this part.

(11) Geologic sequestration of carbon dioxide that is covered by subpart RR of this part.

* * * * *

Subpart QQ—[AMENDED]

■ 96. Section 98.433 is amended by revising the parameter ''St'' of Equation QQ–1 and Equation QQ–2 to read as follows:

§ 98.433 Calculating GHG contained in pre-charged equipment or closed-cell foams.

(a) * * *

* * * * *

S_t = Mass of fluorinated GHG per unit of equipment type t or foam type t (charge per piece of equipment, kg) or density of fluorinated GHG in foam (charge per cubic foot of foam, kg per cubic foot).

* * * * *

(b) * * *

* * * * *

S_t = Mass in CO_2e of the fluorinated GHGs per unit of equipment type t or foam type t (charge per piece of equipment, kg) or density of fluorinated GHG in foam (CO_2e per cubic foot of foam, kg CO_2e per cubic foot).

* * * * *

■ 97. Section 98.434 is amended by revising paragraph (b) to read as follows:

§ 98.434 Monitoring and QA/QC requirements.

* * * * *

(b) The inputs to the annual submission must be reviewed against the import or export transaction records to ensure that the information submitted to EPA is being accurately transcribed as the correct chemical or blend in the correct pre-charged equipment or closed-cell foam in the correct quantities and units.

■ 98. Section 98.436 is amended by:

■ a. Revising paragraphs (a)(3), (a)(4), (a)(6)(ii), (a)(6)(iii), (b)(3), (b)(4), (b)(6)(ii), and (b)(6)(iii).

Removing and reserving paragraphs (a)(5), (a)(6)(iv), (b)(5), and (b)(6)(iv).

§ 98.436 Data reporting requirements.

(a) * * *

(3) For closed-cell foams that are imported inside of equipment, the identity of the fluorinated GHG contained in the foam, the mass of the fluorinated GHG contained in the foam in each piece of equipment, and the number of pieces of equipment imported with each unique combination of mass and identity of fluorinated GHG within the closed-cell foams.

(4) For closed cell-foams that are not imported inside of equipment, the identity of the fluorinated GHG in the foam, the density of the fluorinated GHG in the foam (kg fluorinated GHG/cubic foot), and the volume of foam imported (cubic feet) for each type of closed-cell foam with a unique combination of fluorinated GHG density and identity.

(5) [Reserved]

(6) * * *

(ii) For closed-cell foams that are imported inside of equipment, the mass of the fluorinated GHGs in CO_2e contained in the foam in each piece of equipment and the number of pieces of equipment imported for each equipment type.

(iii) For closed-cell foams that are not imported inside of equipment, the density in CO_2e of the fluorinated GHGs in the foam (kg CO_2e/cubic foot) and the volume of foam imported (cubic feet) for each type of closed-cell foam.

(iv) [Reserved]

* * * * *

(b) * * *

(3) For closed-cell foams that are exported inside of equipment, the identity of the fluorinated GHG contained in the foam in each piece of equipment, the mass of the fluorinated GHG contained in the foam in each piece of equipment, and the number of pieces of equipment exported with each unique combination of mass and identity of fluorinated GHG within the closed-cell foams.

(4) For closed-cell foams that are not exported inside of equipment, the identity of the fluorinated GHG in the foam, the density of the fluorinated GHG in the foam (kg fluorinated GHG/cubic foot), and the volume of foam exported (cubic feet) for each type of closed-cell foam with a unique combination of fluorinated GHG density and identity.

(5) [Reserved]

(6) * * *

(ii) For closed-cell foams that are exported inside of equipment, the mass of the fluorinated GHGs in CO_2e contained in the foam in each piece of equipment and the number of pieces of equipment imported for each equipment type.

(iii) For closed-cell foams that are not exported inside of equipment, the density in CO_2e of the fluorinated GHGs in the foam (kg CO_2 e/cubic foot) and the volume of foam imported (cubic feet) for each type of closed-cell foam.

(iv) [Reserved]

* * * * *

■ 99. Section 98.438 is amended by revising the definitions for ''Closed-cell foam'' and ''Pre-charged electrical equipment component'' to read as follows:

§ 98.438 Definitions.

* * * * *

Closed-cell foam means any foam product, excluding packaging foam, that is constructed with a closed-cell structure and a blowing agent containing a fluorinated GHG. Closed-cell foams include but are not limited to polyurethane (PU) foam contained in equipment, PU continuous and discontinuous panel foam, PU one component foam, PU spray foam, extruded polystyrene (XPS) boardstock foam, and XPS sheet foam. Packaging foam means foam used exclusively during shipment or storage to temporarily enclose items.

* * * * *

Pre-charged electrical equipment component means any portion of electrical equipment that is charged with a fluorinated greenhouse gas prior to sale or distribution or offer for sale or distribution in interstate commerce.

Subpart RR—[AMENDED]

■ 100. Section 98.443 is amended by:

■ a. Revising the parameter ''$S_{r,p}$'' of Equation RR–2 at paragraph (a)(2).

■ b. Revising paragraph (d)(3) introductory text.
■ c. Revising the parameter ''CO_{2FI}'' of Equation RR–12.

§ 98.443 Calculating CO_2 geologic sequestration.

* * * * *

(a) * * *

(2) * * *

* * * * *

$S_{r,p}$ = Quarterly volume of contents in containers r redelivered to another facility without being injected into your well in quarter p (standard cubic meters).

* * * * *

(d) * * *

(3) To aggregate production data, you must sum the mass of all of the CO_2 separated at each gas-liquid separator in accordance with the procedure specified in Equation RR–9 of this section. You must assume that the total CO_2 measured at the separator(s) represents a percentage of the total CO_2 produced. In order to account for the percentage of CO_2 produced that is estimated to remain with the produced oil or other fluid, you must multiply the quarterly mass of CO_2 measured at the separator(s) by a percentage estimated using a methodology in your approved MRV plan. If fluids containing CO_2 from injection wells covered under this source category are produced and not processed through a gas-liquid separator, the concentration of CO_2 in the produced fluids must be measured at a flow meter located prior to reinjection or reuse using methods in § 98.444(f)(1). The considerations you intend to use to calculate CO_2 from produced fluids for the mass balance equation must be described in your approved MRV plan in accordance with § 98.448(a)(5).

* * * * *

(f) * * *

(2) * * *

* * * * *

CO_{2FI} = Total annual CO_2 mass emitted (metric tons) from equipment leaks and vented emissions of CO_2 from equipment located on the surface between the flow meter used to measure injection quantity and the injection wellhead, for which a calculation procedure is provided in subpart W of this part.

■ 101. Section 98.446 is amended by revising paragraph (b)(5) to read as follows:

§ 98.446 Data reporting requirements.

* * * * *

(b) * * *

(5) The standard or method used to calculate each value in paragraphs (b)(1), (b)(2), and (b)(3) of this section.

* * * * *

Subpart SS—[AMENDED]

■ 102. Section 98.453 is amended by:
■ a. Revising paragraph (d).
■ b. Revising paragraph (h).
■ c. Revising the parameter ''MF'' of Equation SS–6.

§ 98.453 Calculating GHG emissions.

* * * * *

(d) Estimate the mass of SF_6 or PFCs disbursed to customers in new equipment or cylinders over the period p by monitoring the mass flow of the SF_6 or PFCs into the new equipment or cylinders using a flowmeter, or by weighing containers before and after gas from containers is used to fill equipment or cylinders, or by using the nameplate capacity of the equipment.

* * * * *

(h) If the mass of SF_6 or the PFC disbursed to customers in new equipment or cylinders over the period p is determined by using the nameplate capacity, or by using the nameplate capacity of the equipment and calculating the partial shipping charge, use the methods in either paragraph (h)(1) or (h)(2) of this section.

(1) Determine the equipment's actual nameplate capacity, by measuring the nameplate capacities of a representative sample of each make and model and calculating the mean value for each make and model as specified at § 98.454(f).

(2) If equipment is shipped with a partial charge, calculate the partial shipping charge by multiplying the nameplate capacity of the equipment by the ratio of the densities of the partial charge to the full charge.

(i) * * *

* * * * *

MF = The total annual mass of the SF_6 or PFCs, in pounds, used to fill equipment during equipment installation at electric transmission or distribution facilities.

* * * * *

■ 103. Section 98.456 is amended by revising paragraphs (m), (o), and (p) to read as follows:

§ 98.456 Data reporting requirements.

* * * * *

(m) The values for EF_{ci} of Equation SS–5 of this subpart for each hose and valve combination and the associated valve fitting sizes and hose diameters.

* * * * *

(o) If the mass of SF_6 or the PFC disbursed to customers in new equipment over the period p is determined according to the methods required in § 98.453(h), report the mean value of nameplate capacity in pounds for each make, model, and group of conditions.

(p) If the mass of SF_6 or the PFC disbursed to customers in new equipment over the period p is determined according to the methods required in § 98.453(h), report the number of samples and the upper and lower bounds on the 95 percent confidence interval for each make, model, and group of conditions.

* * * * *

Subpart TT—[AMENDED]

■ 104. Section 98.460 is amended by revising paragraph (c)(2)(xiii) to read as follows:

§ 98.460 Definition of the source category.

* * * * *

(c) * * *

(2) * * *

(xiii) Other waste material that has a DOC value of 0.3 weight percent (on a wet basis) or less. DOC value must be determined using a 60-day anaerobic biodegradation test procedure identified in § 98.464(b)(4)(i).

* * * * *

■ 105. Section 98.463 is amended by:

■ a. Revising the parameter ''DOC_F'' of Equation TT–1.

■ b. Removing the parameter ''F_x'' of Equation TT–1 and adding in its place the parameter ''F''.

■ c. Revising Equation TT–4b.

■ d. Revising the parameter ''OX'' of Equation TT–6.

§ 98.463 Calculating GHG emissions.

(a) * * *

(1) * * *

* * * * *

DOC_F = Fraction of DOC dissimilated (fraction); use the default value of 0.5. If measured values of DOC are available using the 60-day anaerobic biodegradation test procedure identified in 98.464(b)(4)(i), use a default value of 1.0.

* * * * *

F = Fraction by volume of CH_4 in landfill gas (fraction, dry basis, corrected to 0% oxygen). If you have a gas collection system, use the annual average CH_4 concentration from measurement data for the current reporting year; otherwise, use the default value of 0.5.

* * * * *

(2) * * *

(ii) * * *

(C) * * *

* * * * *

$$W_x = \frac{WIP - \sum_{n=1}^{NYrData} W_{meas,n}}{(YrLast - YrOpen + 1 - NYrData)} \qquad \text{(Eq. TT-4b)}$$

* * * * *

(b) * * *

(1) * * *

* * * * *

OX = Oxidation fraction from Table HH–4 of subpart HH of this part.

* * * * *

■ 106. Section 98.464 is amended by:

■ a. Revising paragraph (b) introductory text.

■ b. Revising Equation TT–7.

■ c. Removing the parameters ''DOC_F'', ''$MCD_{control}$'', and ''$MC_{control}$'' of Equation TT–7.

■ d. Revising paragraph (c).

§ 98.464 Monitoring and QA/QC requirements.

* * * * *

(b) For each waste stream placed in the landfill during the reporting year for which you choose to determine volatile solids concentration and/or a waste stream-specific DOC_X, you must collect and test a representative sample of that waste stream using the methods specified in paragraphs (b)(1) through (b)(4) of this section, as applicable.

* * * * *

(4) * * *

(i) * * *

(E) * * *

$$DOC_x = \frac{MCD_{sample,x}}{M_{sample,x}} \qquad \text{(Eq. TT-7)}$$

Where:

DOC_X = Degradable organic content of the waste stream in Year X (weight fraction, wet basis)

$MCD_{sample,x}$ = Mass of carbon degraded in the waste stream sample in Year X as determined in paragraph (b)(4)(i)(C) of this section [milligrams (mg)].

$M_{sample,x}$ = Mass of waste stream sample used in the anaerobic degradation test in Year X (mg, wet basis).

* * * * *

(c) For each waste stream that was historically managed in the landfill but was not received during the first reporting year for which you choose to determine volatile solids concentration and/or a waste stream-specific DOC_X, you must determine volatile solids concentration or DOC_X of the waste stream as initially placed in the landfill using the methods specified in paragraph (c)(1) or (c)(2) of this section, as applicable.

(1) If you can identify a similar waste stream to the waste stream that was historically managed in the landfill, you must determine the volatile solids concentration or DOC_X of the similar waste stream using the applicable procedures in paragraphs (b)(1) through (b)(4) of this section.

(2) If you cannot identify a similar waste stream to the waste stream that was historically managed in the landfill, you may determine the volatile solids concentration or DOC_X of the historically managed waste stream using process knowledge. You must document the basis for the volatile solids concentration or DOC_X value as determined through process knowledge.

* * * * *

■ 107. Section 98.466 is amended by:

■ a. Revising paragraph (b)(1).

■ b. Adding paragraph (b)(5).

■ c. Revising paragraph (c) introductory text.

■ d. Removing and reserving paragraph (c)(1).

■ e. Revising paragraphs (c)(2), (c)(3) introductory text, and (c)(4) introductory text.

■ f. Adding paragraph (c)(5).

■ g. Revising paragraph (d)(3).

■ h. Revising paragraph (h).

§ 98.466 Data reporting requirements.

* * * * *

(b) * * *

(1) The number of waste steams (including ''Other Industrial Solid Waste (not otherwise listed)'' and ''Inerts'') for which Equation TT–1 of this subpart is used to calculate modeled CH_4 generation.

* * * * *

(5) For each waste stream, the decay rate (k) value used in the calculations.

(c) Report the following historical waste information:

(1) [Reserved]

(2) For each waste stream identified in paragraph (b) of this section, the method(s) for estimating historical waste disposal quantities and the range of years for which each method applies.

(3) For each waste stream identified in paragraph (b) of this section for which Equation TT–2 of this subpart is used, provide:

* * * * *

(4) If Equation TT–4a of this subpart is used, provide:

* * * * *

(5) If Equation TT–4b of this subpart is used, provide:

(i) WIP (i.e., the quantity of waste in-place at the start of the reporting year from design drawings or engineering estimates (metric tons) or, for closed landfills for which waste in-place quantities are not available, the landfill's design capacity).

(ii) The cumulative quantity of waste placed in the landfill for the years for which disposal quantities are available from company record or from Equation TT–3 of this part.

(iii) YrLast.

(iv) YrOpen.

(v) NYrData.

(d) * * *

(3) For each waste stream, the degradable organic carbon (DOC_X) value (mass fraction) for the specified year and an indication as to whether this was the default value from Table TT–1 to this subpart, a measured value using a 60-day anaerobic biodegradation test as specified in § 98.464(b)(4)(i), or a value based on total and volatile solids measurements as specified in § 98.464(b)(4)(ii). If DOC_x was determined by a 60-day anaerobic biodegradation test, specify the test method used.

* * * * *

(h) For landfills with gas collection systems, in addition to the reporting requirements in paragraphs (a) through (f) of this section, provide:

(1) The annual methane generation, adjusted for oxidation, calculated using Equation TT–6 of this subpart, reported in metric tons CH_4;

(2) The oxidation factor used in Equation TT–6 of this subpart; and

(3) All information required under 40 CFR 98.346(i)(1) through (i)(7) and 40 CFR 98.346(i)(9) through (i)(12).

■ 108. Section 98.467 is revised to read as follows:

§ 98.467 Records that must be retained.

In addition to the information required by § 98.3(g), you must retain the calibration records for all monitoring equipment, including the method or manufacturer's specification used for calibration, and all measurement data used for the purposes of paragraphs § 98.460(c)(2)(xii) or (c)(2)(xiii) or used to determine waste stream-specific DOC_X values for use in Equation TT–1 of this subpart.

■ 109. Table TT–1 to Subpart TT is amended by:

■ a. Revising the first four entries.

■ b. Adding a new entry following ''Construction and Demolition''.

TABLE TT–1 TO SUBPART TT—DEFAULT DOC AND DECAY RATE VALUES FOR INDUSTRIAL WASTE LANDFILLS

Industry/waste type	DOC (weight fraction, wet basis)	k [dry climate[a]] (yr thnsp; minus;1)	k [moderate climate[a]] (yr minus;1)	k [wet climate[a]] (yr minus;1)
Food Processing (other than sludge)	0.22	0.06	0.12	0.18
Pulp and Paper (other than sludge)	0.20	0.02	0.03	0.04
Wood and Wood Product (other than sludge)	0.43	0.02	0.03	0.04
Construction and Demolition	0.08	0.02	0.03	0.04
Industrial Sludge	0.09	0.02	0.04	0.06
* * * * * * * * *				

[a] The applicable climate classification is determined based on the annual rainfall plus the recirculated leachate application rate. Recirculated leachate application rate (in inches/year) is the total volume of leachate recirculated from company records or engineering estimates and applied to the landfill divided by the area of the portion of the landfill containing waste [with appropriate unit conversions].

(1) Dry climate = precipitation plus recirculated leachate less than 20 inches/year

(2) Moderate climate = precipitation plus recirculated leachate from 20 to 40 inches/year (inclusive)

(3) Wet climate = precipitation plus recirculated leachate greater than 40 inches/year

Alternatively, landfills that use leachate recirculation can elect to use the k value for wet climate rather than calculating the recirculated leachate rate.

(1) Dry climate = precipitation plus recirculated leachate less than 20 inches/year.

(2) Moderate climate = precipitation plus recirculated leachate from 20 to 40 inches/year (inclusive).

(3) Wet climate = precipitation plus recirculated leachate greater than 40 inches/year.

Subpart UU—[AMENDED]

■ 110. Section 98.473 is amended by revising:

■ a. The parameter ''D'' of Equation UU–2 in paragraph (a)(2).

■ b. The parameter ''$S_{r,p}$'' of Equation UU–2 in paragraph (b)(2).

§ 98.473 Calculating CO_2 received.

(a) * * *

(2) * * *

* * * * *

D = Density of CO_2 at standard conditions (metric tons per standard cubic meter): 0.0018682.

* * * * *

(b) * * *

(2) * * *

* * * * *

$S_{r,p}$ = Quarterly volume of contents in containers r that is redelivered to another facility without being injected into your well in quarter p (standard cubic meters).

* * * * *

■ 111. Section 98.476 is amended by:

■ a. Revising paragraph (b)(5).

■ b. Adding paragraph (e).

§ 98.476 Data reporting requirements.

* * * * *

(b) * * *

(5) The standard or method used to calculate each value in paragraphs (b)(1), (b)(2), and (b)(3) of this section.

* * * * *

(e) Report the following:

(1) Whether the facility received a Research and Development project exemption from reporting under 40 CFR part 98, subpart RR, for this reporting year. If you received an exemption, report the start and end dates of the exemption approved by EPA.

(2) Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations to enhance the recovery of oil during this reporting year.

(3) Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations to enhance the recovery of natural gas during this reporting year.

(4) Whether the facility includes a well or group of wells where a CO_2 stream was injected into subsurface geologic formations for acid gas disposal during this reporting year.

(5) Whether the facility includes a well or group of wells where a CO_2 stream was injected for a purpose other than those listed in paragraphs (e)(1) through (4) of this section. If you injected CO_2 for another purpose, report the purpose of the injection.

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Part III

Commodity Futures Trading Commission

Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act; Notice

COMMODITY FUTURES TRADING COMMISSION

RIN 3038–AE02

Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in the Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: The Commodity Futures Trading Commission (''CFTC'' or ''Commission'') is issuing a final order (''Final Order'') in response to a consolidated petition (''Petition'') [1] from certain regional transmission organizations (''RTOs'') and independent system operators (''ISOs'') (collectively, ''Requesting Parties'') to exempt specified transactions (''Covered Transactions'') from the provisions of the Commodity Exchange Act (''CEA'' or ''Act''),[2] and Commission regulations. The Final Order exempts contracts, agreements, and transactions for the purchase or sale of the limited electric energy-related products that are specifically described within the Final Order from the provisions of the CEA and Commission regulations, with the exception of the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the Act and any implementing regulations promulgated under these sections including, but not limited to Commission regulations 23.410(a) and (b), 32.4, and part 180. To be eligible for the exemption contained in the Final Order, the contract, agreement, or transaction must be offered or entered into in a market administered by a Requesting Party pursuant to that Requesting Party's tariff, rate schedule, or protocol (collectively, ''Tariff''), and the relevant Tariff must have been approved or permitted to have taken effect by either the Federal Energy Regulatory Commission (''FERC'') or the Public Utility Commission of Texas (''PUCT''), as applicable. In addition, the contract, agreement, or transaction must be entered into by persons who are ''appropriate persons,'' as defined in sections 4(c)(3)(A) through (J) of the Act,[3] ''eligible contract participants,'' as defined in section 1a(18) of the Act and Commission regulations,[4] or persons who are in the business of: (i) Generating, transmitting, or distributing electric energy, or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system. The Final Order also extends to any person or class of persons offering, entering into, rendering advice, or rendering other services with respect to the Covered Transactions. Finally, the Final Order is subject to other conditions set forth therein. Authority for issuing the exemption is found in section 4(c)(6) of the Act.[5]

A copy of the Petition is available on the Commission's Web site at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4capplication.pdf*; the attachments to the Petition are posted at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4cappattach.pdf*. A chart submitted by the Requesting Parties that sets forth the status of their respective implementation of the standards set forth in FERC Order No. 741 (''FERC Order No. 741 Implementation Chart'') is posted at *http://www.cftc.gov/stellent/groups/public/@requestsandactions/documents/ifdocs/iso-rto4cappfercchart.pdf*, and a revised version of the chart (''Revised FERC Order No. 741 Implementation Chart'') is posted at *http://www.cftc.gov/stellent/groups/public/@rulesandproducts/documents/ifdocs/rtoisoltr011813.pdf*. A copy of the ''Notice of Proposed Order and Request for Comment on a Petition from Certain Independent System Operators and Regional Transmission Organizations to Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act'' (''Proposed Order'') is available at 77 FR 52138, Aug. 28, 2012, and on the Commission's Web site at *http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-20965a.pdf*. A copy of the comment file is also available on the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1265*.

DATES: *Effective date:* April 2, 2013.

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[1] In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012).

[2] 7 U.S.C. 1 *et seq.*

[3] 7 U.S.C. 6(c)(3)(A)–(J).

[4] 7 U.S.C. 1a(18). ''Further Definition of 'Swap Dealer,' 'Security-Based Swap Dealer,' 'Major Swap Participant,' 'Major Security-Based Swap Participant,' and 'Eligible Contract Participant,' '' 77 FR 30596, May 23, 2012.

[5] 7 U.S.C. 6(c)(6).

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I. Relevant Dodd-Frank Provisions

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'').[6] Title VII of the Dodd-Frank Act amended the CEA [7] and altered the scope of the Commission's exclusive jurisdiction.[8] In particular, it expanded the Commission's exclusive jurisdiction, which had included futures traded, executed and cleared on CFTC-regulated exchanges and clearinghouses, to also cover swaps traded, executed, or cleared on CFTC-regulated exchanges or clearinghouses.[9] As a result, the Commission's exclusive jurisdiction now includes swaps as well as futures, and is clearly expressed in CEA section 2(a)(1)(A), which reads:

The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in the Wall Street Transparency and Accountability Act of 2010 (including an amendment made by that Act) and subparagraphs (C), (D), and (I) of this paragraph and subsections (c) and (f), with respect to accounts, agreements (including any transaction which is of the character of * * * an ''option''), and transactions involving swaps or contracts of sale of a commodity for future delivery (including significant price discovery contracts) traded or executed on a contract market * * * or a swap execution facility * * * or any other board of trade, exchange, or market * * *.[10]

The Dodd-Frank Act also added a savings clause that addresses the roles of the Commission, FERC, and state agencies as they relate to certain agreements, contracts, or transactions traded pursuant to the tariff or rate schedule of an RTO or ISO.[11] Toward that end, paragraph (I) of CEA section 2(a)(1) repeats the Commission's exclusive jurisdiction and clarifies that the Commission retains its authorities over agreements, contracts or transactions traded pursuant to FERC- or state-approved tariff or rate schedules.[12] The same paragraph (I) also explains that the FERC and state agencies preserve their existing authorities over agreements, contracts, or transactions ''entered into pursuant to a tariff or rate schedule approved by [FERC] or a State regulatory agency,'' that are: ''(I) not executed, traded, or cleared on'' an entity or trading facility subject to registration or ''(II) executed, traded, or cleared on a registered entity or trading facility owned or operated by a[n RTO] or [ISO].'' [13]

The Dodd-Frank Act granted the Commission specific powers to exempt certain contracts, agreements, or transactions from duties otherwise required by statute or Commission regulation by adding new sections to the CEA, sections 4(c)(6)(A) and (B). Specifically, sections 4(c)(6)(A) and (B) provide for exemptions for certain transactions entered into (a) pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality.[14]

The Commission must act ''in accordance with'' sections 4(c)(1) and (2) of the CEA, when issuing an exemption under section 4(c)(6).[15]

[6] *See* Dodd-Frank Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.htm.*

[7] 7 U.S.C. 1 *et seq.*

[8] Section 722(e) of the Dodd-Frank Act.

[9] *See* 7 U.S.C. 2(a)(1)(A). The Dodd-Frank Act also added section 2(h)(1)(A), which requires swaps to be cleared if required to be cleared and not subject to a clearing exception or exemption. *See* 7 U.S.C. 2(h)(1)(A).

[10] 7 U.S.C. 2(a)(1)(A).

[11] *See* 7 U.S.C. 2(a)(1)(I).

[12] *See* 7 U.S.C. 2(a)(1)(I)(i) and (ii).

[13] 7 U.S.C. 2(a)(1)(I)(i)(II). The savings clause in CEA section 2(a)(1)(I) provides that:

(I)(i) Nothing in this Act shall limit or affect any statutory authority of the Federal Energy Regulatory Commission or a State regulatory authority (as defined in section 3(21) of the Federal Power Act (16 U.S.C. 796(21)) with respect to an agreement, contract, or transaction that is entered into pursuant to a tariff or rate schedule approved by the Federal Energy Regulatory Commission or a State regulatory authority and is—

(I) not executed, traded, or cleared on a registered entity or trading facility; or

(II) executed, traded, or cleared on a registered entity or trading facility owned or operated by a regional transmission organization or independent system operator.

(ii) In addition to the authority of the Federal Energy Regulatory Commission or a State regulatory authority described in clause (i), nothing in this subparagraph shall limit or affect—

(I) any statutory authority of the Commission with respect to an agreement, contract, or transaction described in clause (i); or

(II) the jurisdiction of the Commission under subparagraph (A) with respect to an agreement, contract, or transaction that is executed, traded, or cleared on a registered entity or trading facility that is not owned or operated by a regional transmission organization or independent system operator (as defined by sections 3(27) and (28) of the Federal Power Act (16 U.S.C. 796(27), 796(28)).

In addition, Dodd-Frank Act section 722(g) (not codified in the United States Code) expressly states that FERC's pre-existing statutory enforcement authority is not limited or affected by amendments to the CEA. Section 722(g) states:

(g) AUTHORITY OF FERC.—Nothing in the Wall Street Transparency and Accountability Act of 2010 or the amendments to the Commodity Exchange Act made by such Act shall limit or affect any statutory enforcement authority of the Federal Energy Regulatory Commission pursuant to section 222 of the Federal Power Act and section 4A of the Natural Gas Act that existed prior to the date of enactment of the Wall Street Transparency and Accountability Act of 2010.

[14] The exemption language in section 4(c)(6) reads:

(6) If the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—

(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;

(B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or

(C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

[15] Section 4(c) was added to the CEA by the Futures Trading Practices Act of 1992, Pub. L. 102–564. The Commission's authority under section 4(c) was explained by the Conferees:

In granting exemptive authority to the Commission under new section 4(c), the Conferees recognize the need to create legal certainty for a number of existing categories of instruments which trade today outside of the forum of a designated contract market.

The provision included in the Conference substitute is designed to give the Commission broad flexibility in addressing these products

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In this respect, the Conferees expect and strongly encourage the Commission to use its new exemptive power promptly upon enactment of this legislation in four areas where significant concerns of legal uncertainty have arisen: (1) Hybrids, (2) swaps, (3) forwards, and (4) bank deposits and accounts.

The Commission is not required to ascertain whether a particular transaction would fall within its jurisdiction prior to exercising its exemptive authority under section 4(c). The Conferees stated that they did:

not intend that the exercise of exemptive authority by the Commission would require any determination beforehand that the agreement, instrument, or transaction for which an exemption

Continued

Section 4(c)(1) of the CEA grants the Commission the authority to exempt any transaction or class of transactions, including swaps, from certain provisions of the CEA, in order to ''promote responsible economic or financial innovation and fair competition.'' [16] Section 4(c)(2) [17] of the Act further provides that the Commission may not grant exemptive relief unless it determines that: (1) The exemption would be consistent with the public interest and the purposes of the CEA; (2) the transaction will be entered into solely between ''appropriate persons;'' [18] and (3) the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.[19] In enacting section 4(c), Congress noted that the purpose of the provision is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.[20]

II. Background

A. The Petition

On February 7, 2012, the Requesting Parties [21] filed a joint Petition [22] with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA [23] and section 712(f) of the Dodd-Frank Act [24] to exempt certain contracts, agreements and transactions for the purchase or sale of specified electric energy [25] products, that are offered pursuant to a FERC- or PUCT-approved Tariff,[26] from most provisions of the Act.[27] The Requesting Parties include three RTOs (Midwest Independent Transmission System Operator, Inc. (''MISO''); ISO New England, Inc. (''ISO NE''); and PJM Interconnection, L.L.C. (''PJM'')), and two ISOs (California Independent System Operator Corporation (''CAISO'') and New York Independent System Operator, Inc. (''NYISO'')), whose central role as transmission utilities is subject to regulation by FERC. The Requesting Parties also include the Electric Reliability Council of Texas, Inc. (''ERCOT''), an entity that performs the role of an ISO, but whose central role as a transmission utility in the electric energy market is subject to regulation by PUCT, the authority with jurisdiction to regulate rates and charges for the sale of electric energy within the state of Texas.[28] The Requesting Parties represented that the roles, responsibilities and services of ISOs and RTOs are substantially similar.[29] As described in the Proposed Order, the Requesting Parties represented that FERC encouraged the formation of ISOs to consolidate and manage the operation of electric energy transmission facilities in order to provide open, non-discriminatory transmission service for generators and transmission customers.[30] The Requesting Parties also represented that FERC encouraged the formation of RTOs to administer the transmission grid on a regional basis.[31]

The Requesting Parties specifically petitioned the Commission to exempt from most provisions of the CEA certain ''financial transmission rights,'' ''energy transactions,'' ''forward capacity transactions,'' and ''reserve or regulation transactions,'' as defined in the Petition, if such transactions are offered or entered into pursuant to a Tariff under which a Requesting Party operates that has been approved by FERC or PUCT, as applicable, as well as any persons (including the Requesting Parties, their members and their market participants) offering, entering into, rendering advice, or rendering other services with respect to such transactions.[32] The Requesting Parties asserted that each of the transactions for which an exemption was requested is (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, or in the case of ERCOT, PUCT, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to the regulation and oversight of FERC or PUCT, as applicable.[33] The Requesting Parties expressly excluded from the Petition a request for relief from sections 4b, 4*o,* 6(c), and 9(a)(2) of the Act,[34] and such provisions explicitly have been carved out of the exemption set forth in the Final Order.[35] The Requesting Parties asked that, due to the commonalities in the Requesting Parties' markets, the exemption apply to all Requesting Parties and their respective market participants with respect to each category of electric energy-related transactions described in the Petition, regardless of whether such transactions are offered or entered into at the current time pursuant to an individual Requesting Party's Tariff.[36] The Requesting Parties asserted that this uniformity would avoid an individual Requesting Party being required to seek future amendments to the exemption in order to offer or enter into the same type of transactions currently offered by another Requesting Party.[37]

B. The Proposal

On August 28, 2012, the Commission issued the Proposed Order.[38]

1. Transactions Proposed to Be Exempted

The Commission proposed to exempt the purchase and sale of four types of transactions [39] defined within the Proposed Order: (1) Financial Transmission Rights (''FTRs''), (2) Energy Transactions, (3) Forward Capacity Transactions, and (4) Reserve

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is sought is subject to the Act. Rather, this provision provides flexibility for the Commission to provide legal certainty to novel instruments where the determination as to jurisdiction is not straightforward * * *

H.R. Rep. No. 102–978, 102d Cong. 2d Sess. at 82–83 (1992).

[16] 7 U.S.C. 6(c)(1).

[17] 7 U.S.C. 6(c)(2).

[18] Section 4(c)(3) of the CEA further outlines who may constitute an appropriate person for the purpose of a particular 4(c) exemption and includes, as relevant to this Final Order:

(a) Any person that qualifies for one of ten defined categories of appropriate persons; or

(b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

[19] 7 U.S.C. 6(c)(2).

[20] H.R. Rep. No. 102–978, 102d Cong. 2d Sess. at 82–83 (1992).

[21] In the preamble to the Proposed Order, the Requesting Parties were also referred to as ''Petitioners.'' For consistency with the Final Order, the term ''Requesting Parties'' is used throughout the preamble to the Final Order.

[22] Requesting Parties submitted an amended Petition on June 11, 2012. Citations herein to ''Petition'' are to the amended Petition.

[23] 7 U.S.C. 6(c)(6).

[24] *See* section 712(f) of the Dodd-Frank Act.

[25] In the Proposed Order, ''electric energy'' was also referred to as ''electricity'' and ''electric power.'' For the sake of consistency in the Final Order, the term ''electric energy'' is used throughout the Final Order.

[26] ''Tariff'' collectively refers to a tariff, rate schedule, or protocol, to account for differences in terminology used by the Requesting Parties and their respective regulators.

[27] *See* 77 FR 52139. *See also* Petition at 2–3, 6.

[28] *See* 77 FR 52139. *See also* Petition at 2–4; 16 Tex. Admin. Code (''TAC'') 25.1 (1998).

[29] *See* 77 FR 52139. *See also* Petition at 2 n.2.

[30] *See* 77 FR 52139. *See also* FERC Order No. 888 Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Facilities (''FERC Order No. 888''), 61 FR 21540, April 24, 1996.

[31] *See* 77 FR 52139. *See also* Petition at 3.

[32] *See* 77 FR 52139. *See also* Petition at 2–3.

[33] *See* 77 FR 52139. *See also* Petition at 11.

[34] *See* 77 FR 52139. *See also* Petition at 3.

[35] *See* discussion in section IV.D. *infra.*

[36] *See* 77 FR 52139. *See also* Petition at 6.

[37] *See id.*

[38] 77 FR 52138.

[39] In the preamble to the Proposed Order, the term ''Transactions'' was used to collectively refer to the transactions covered by the Proposed Order. For clarity, the term ''Covered Transactions'' is used throughout the preamble to the Final Order to refer collectively to the transactions covered by the Final Order.

or Regulation Transactions, pursuant to section 4(c)(6) of the CEA.[40]

An ''FTR'' was proposed to be defined as ''a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electricity, established on an electricity market administered by a Requesting Party at a specified source (*i.e.,* where electricity is deemed injected into the grid of a Requesting Party) and a specified sink (*i.e.,* where electricity is deemed withdrawn from the grid of a Requesting Party).'' [41] As set forth in the Proposed Order, FTRs would be exempt only where each FTR is linked to, and the aggregate volume of FTRs for any period of time is limited by, the physical capability (after accounting for counterflow) of the electric energy transmission system operated by the Requesting Party offering the contract for such period; a Requesting Party serves as the market administrator for the market on which the FTR is transacted; each party to the FTR is a member of a particular Requesting Party (or is the Requesting Party itself); the FTR is executed on a market administered by that Requesting Party; and the FTR does not require any party to make or take physical delivery of electric energy.[42]

''Energy Transactions'' were proposed to be defined as transactions in a ''Day-Ahead Market'' [43] or ''Real-Time Market'' (''RTM'') [44] as those terms were defined in the Proposed Order, for the purchase or sale of a specified quantity of electric energy at a specified location, including ''Demand Response,'' [45] as defined in the Proposed Order, where: (1) The price of electric energy is established at the time the Energy Transaction is executed; [46] (2) performance occurs in the RTM by either the physical delivery or receipt of the specified electric energy or a cash payment or receipt at the price established in the RTM; and (3) the aggregate cleared volume of both physical and cash-settled Energy Transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by a Requesting Party for that period of time.[47]

''Forward Capacity Transactions'' were proposed to include transactions in which a Requesting Party, for the benefit of load-serving entities (''LSEs'') purchases the rights described in the Proposed Order.[48] The Commission proposed to limit eligibility of Forward Capacity Transactions for the exemption by requiring that the aggregate cleared volume of all such transactions for any period of time must be limited to the physical capability of the electric energy transmission system operated by the applicable Requesting Party for that period of time.[49]

''Reserve Regulation Transactions'' were defined in the Proposed Order as transactions:

(1) In which a Requesting Party, for the benefit of [LSEs] and resources, purchases, through auction, the right, during a period of time specified in the Requesting Party's Tariff, to require the seller to operate electric facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of electricity to the electric power transmission system operated by the Requesting Party with:

(a) Physical performance by the seller's facilities within a response interval specified in the Requesting Party's Tariff (Reserve Transaction); or

(b) Prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in the Requesting Party's Day-Ahead or Real-Time Market, as those terms are defined in the Proposed Order, price for electricity applicable whenever the Requesting Party exercises its right that electric energy be delivered (including Demand Response, as defined [in the Proposed] Order);

(b) Compensation for the opportunity cost of not supplying or consuming electricity or other services during any period during which the Requesting Party requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by the Requesting Party for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in the Requesting Party's Tariff; and

(3) In which the value, quantity and specifications for such Transactions for a Requesting Party for any period of time are limited by the physical capability of the electric transmission system operated by Requesting Parties.[50]

Finally, in the Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not covered by the Proposed Order, because such activity would not be inextricably linked to the physical delivery of electric energy.[51]

The Commission proposed to limit the exemption to the transactions described in the Proposed Order in which all parties thereto fall within one of the appropriate persons categories in CEA sections 4(c)(3)(A) through (J), or, pursuant to CEA section 4(c)(3)(K), that otherwise qualify as an eligible contract participant (''ECP''), as such term is defined in section 1a(18)(A) of the Act and in Commission regulation 1.3(m).[52] The Proposed Order also required that the delineated ''Transactions be offered or sold pursuant to a Requesting Party's Tariff, which has been approved or permitted to take effect by: (1) In the case of ERCOT, the PUCT or (2) In the

[40] *Id.* at 52141, 52166–67.

[41] *Id.* at 52166. The proposed definition of FTRs included such rights ''in the form of options (*i.e.,* where one party has only the obligation to pay, and the other party only the right to receive, an amount as described above).'' *Id.*

[42] *Id.* at 52166. *See also id.* at 52141.

[43] '''Day-Ahead Market' '' was defined in the Proposed Order as ''an electricity market administered by a Requesting Party on which the price of electricity at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day-Ahead Market clears.'' *Id.* at 52167.

[44] '''Real-Time Market' '' was defined in the Proposed Order as ''an electricity market administered by a Requesting Party on which the price of electricity at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods within the same 24-hour period.'' *Id.*

[45] '' 'Demand Response' '' was defined in the Proposed Order as ''the right of a Requesting Party to require that certain sellers of such rights curtail their consumption of electric energy from the electric power transmission system operated by a Requesting Party during a future period of time as specified in the Requesting Party's Tariff.'' *Id.* The definition of Demand Response, as adopted in this Order, should be read to be consistent with FERC's definition of demand response, and thus any demand response rights recognized under this Order must comport with the definition provided by FERC. *See* 18 CFR 35.28(b)(4) (2012) (providing that demand response means a reduction in the consumption of electric energy by customers from their expected consumption in response to an increase in the price of electric energy or to incentive payments designed to induce lower consumption of electric energy).

[46] *See id.* at 52141–42, 52166–67. For purposes of the Final Order, the Commission is clarifying that Energy Transactions include virtual and convergence bids and offers, as they are methods of conducting such Energy Transactions. *See* section IV.A.1.c. *infra.*

[47] *See* 77 FR 52167. *See also id.* at 52142; Petition at 7.

[48] *See* 77 FR at 52167.

[49] *See id.*

[50] *See id. See also id.* at 52145.

[51] *See id.* at 52143.

[52] For those ECPs engaging in the transactions delineated in the Proposed Order in markets administered by a Requesting Party that do not fit within the categories of ''appropriate persons'' set forth in sections 4(c)(3)(A) through (J), the Commission proposed to determine that they are appropriate persons pursuant to section 4(c)(3)(K), ''in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.'' The Commission also noted that CEA section 2(e) permits all ECPs to engage in swaps transactions other than on a designated contract market (''DCM'') and that such entities should similarly be appropriate persons for the purpose of the Proposed Order. *See id.* at 52145–46.

case of all other Requesting Parties, FERC.'' [53]

2. Conditions to the Proposed Order

a. Conditions Precedent to the Proposed Order

In the Proposed Order, the Commission proposed two conditions precedent to the issuance of a final exemption. First, the Commission proposed that it would not issue a final order to a specific RTO or ISO until (i) such time as the Requesting Parties had adopted in their Tariffs all of the requirements set forth in FERC regulation 35.47; [54] (ii) such Tariff provisions have been approved or have been permitted to take effect by FERC or PUCT, as applicable; and (iii) such Tariff provisions, have become effective and have been fully implemented by the particular RTO or ISO.[55] Second, as an additional prerequisite to the issuance of a final order, the Commission proposed to require that each Requesting Party provide a well-reasoned legal opinion or memorandum from outside counsel that, in the Commission's sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code [56] in the event of the bankruptcy of the market participant.[57]

b. Conditions Subsequent to the Proposed Order

The Proposed Order included two information-sharing conditions subsequent. First, the Commission proposed that, after promulgation of the order, none of a Requesting Party's Tariffs or other governing documents may include any requirement that the Requesting Party notify a member prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[58]

Second, the Commission proposed that the exemption be conditioned upon information sharing arrangements that are satisfactory to the Commission between the Commission and FERC and between the Commission and PUCT being in full force and effect.[59]

3. Additional Limitations

In the Proposed Order, the Commission expressly noted that the proposed exemption was based upon the representations made in the Petition and in the supporting materials provided by the Requesting Parties and their counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA.[60] The Commission highlighted several of the Requesting Parties' representations of particular importance, including: (1) The exemption sought by the Requesting Parties relates to the transactions described in the Proposed Order, which are primarily entered into by commercial participants that are in the business of generating, transmitting, and distributing electric energy; [61] (2) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region; [62] (3) the transactions described in the Proposed Order are an essential means, designed by FERC and PUCT as an integral part of their statutory responsibilities, to enable the reliable delivery of affordable electric energy; [63] (4) each of the transactions defined in the Proposed Order taking place on the Requesting Parties' markets is monitored by Market Monitoring Units (''MMUs'') responsible to either FERC or, in the case of ERCOT, PUCT; [64] and (5) each transaction defined in the Proposed Order is directly tied to the physical capabilities of the Requesting Parties' electric energy grids.[65] In the Proposed Order, the Commission explicitly reserved the authority to, in its discretion, revisit any of the terms of the relief provided by the Proposed Order including, but not limited to, making a determination that certain entities should be subject to the Commission's jurisdiction.[66] The Commission also explicitly reserved the authority to, in its discretion, suspend, terminate, or otherwise modify or restrict the Proposed Order.[67] Finally, the Commission announced its intention to exclude from the exemptive relief its general anti-fraud, anti-manipulation, and enforcement authority under the CEA over the Requesting Parties and the transactions defined in the Proposed Order, including, but not limited to, sections 2(a)(1)(B), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[68]

II. Summary of the Comments

The public comment period on the Proposed Order ended on September 27, 2012. The Commission received twenty-three (23) comment letters on the Proposed Order,[69] the majority of which provided general support for the proposed exemption.[70] The comment

[53] *See id.*

[54] 18 CFR 35.47. *See* detailed discussion in section IV.3.a.i. *infra* regarding the requirements set forth in FERC regulation 35.47.

[55] *See* 77 FR 52164.

[56] *See* 11 U.S.C. 553.

[57] *See* 77 FR 52165.

[58] *See id.* at 52142.

[59] *See id.* When the Proposed Order was published, the Commission and FERC had already entered into a Memorandum of Understanding, *available at http://www.ferc.gov/legal/maj-ord-reg/mou/mou-33.pdf.*

[60] *See id.* at 52167. *See also id.* at 52142, 52165.

[61] *See id.* at 52142. *See also* Petition at 20.

[62] *See* 77 FR 52142.

[63] *See id. See also generally* FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); TAC 25.1; Petition at 11, 13–14.

[64] *See* 77 FR 52142. *See also* Petition at 15–18.

[65] *See* 77 FR 52142.

[66] *See id.* at 52167. *See* also *id.* at 52142.

[67] *See id.* at 52167–68. *See also id.* at 52142; Petition at 15–18.

[68] *See* 77 FR at 52166. *See also id.* at 52163.

[69] All comment letters are available through the Commission's Web site at: *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1265.* Comments addressing the Proposed Order were received from: AB Energy; American Public Power Association (''APPA''); Coalition of Physical Energy Companies (''COPE''); The Commercial Energy Working Group (''Commercial Working Group''); DC Energy, LLC (''DC Energy''); Staff of the Federal Energy Regulatory Commission (''FERC Staff''); Financial Institutions Energy Group (''FIEG''); Financial Marketers Coalition; the Industrial Coalitions (collectively referring to PJM Industrial Customer Coalition, NEPOOL Industrial Customer Coalition, and Coalition of Midwest Transmission Customers); Joint Trade Associations (collectively referring to Electric Power Supply Association, Edison Electric Institute; National Rural Electric Cooperative Association, APPA, and Large Public Power Council); New England Power Pool Participants Committee (''NEPOOL''); New York Public Service Commission (''NYPSC''); New York Transmission Owners (''NYTOs'') (collectively referring to Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., Long Island Power Authority, New York Power Authority, New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation d/b/a National Grid, Orange and Rockland Utilities, Inc., and Rochester and Electric Corporation); PUCT; Tarachand Enterprises, Inc. (''Tarachand''); and Texas Energy Association and Alliance for Retail Markets (collectively, ''TEAM/ARM''). The Requesting Parties jointly submitted a comment letter, which contained a supplement pertaining solely to NYISO (''NYISO Supplement to Requesting Parties' Comment Letter, Attachment B''). In addition, CAISO and ISO NE jointly submitted two supplemental comment letters (''CAISO/ISO NE January'' and ''CAISO/ISO NE March''), NYISO and PJM each submitted supplemental comment letters on their own behalf, and ERCOT submitted two supplemental comment letters (''ERCOT October'' and ''ERCOT December'').

[70] *See, e.g.,* APPA at 1; Commercial Working Group at 1; DC Energy at 1; FIEG at 1; Financial

letters addressed a variety of issues including: the scope of the transactions set forth in the Proposed Order; the scope of the definition of appropriate persons for purposes of the exemption; the use of the derivatives clearing organization (''DCO'') and swap execution facility (''SEF'') Core Principles in the public interest and purposes of the CEA analysis; both proposed conditions precedent (*i.e.,*— the requirements that the Requesting Parties fully comply with the standards set forth in FERC regulation 35.47 and submit a legal opinion or memorandum providing assurances regarding the netting arrangements in their respective approach to satisfying the standard set forth in FERC regulation 35.47(d)); the proposed information sharing agreement between the Commission and PUCT; the proposed condition subsequent that the Requesting Parties revise their Tariffs to remove requirements to notify their members upon receipt of requests for information by the Commission; whether other conditions should be imposed; the Commission's jurisdiction; the Commission's reservation of anti-fraud, anti-manipulation, and enforcement authority; the effectiveness of the exemption [71]; the issuance of a separate or collective Final Order; the extension of supplemental relief to all Requesting Parties; and other considerations regarding the costs and benefits of the exemptive relief. In determining the scope and content of the Final Order, the Commission has taken into account issues raised by commenters, including those issues with respect to the costs and benefits associated with the exemption.

IV. Determinations

A. Scope of the Final Order

1. Covered Transactions Subject to the Final Order

The Commission received multiple comments regarding the scope of the transactions that are covered by the exemption set forth in the Final Order, including comments requesting: (1) Clarification of the types of transactions that the Commission intended to include within the definitions of the transactions proposed for exemption; (2) a broad expansion of the Covered Transactions in the Final Order to include, for example, additional transactions that are ''logical outgrowths'' of a Requesting Party's core function as an RTO or ISO; (3) expansion of the exemptive relief specifically to include virtual and convergence bids and offers; and (4) an expedited process for expanding the exemption to include additional transactions.

a. Determinations With Respect to Types of Transactions

Some commenters requested that the Commission confirm that the exemption is not limited to products currently traded in their respective markets, and that modifications to existing products and new products, however named, that fall within the definitions of the Covered Transactions and that are offered pursuant to the Requesting Parties' Tariffs would be covered by the Final Order.[72] On the other hand, one commenter requested that the Commission identify, and provide notice and an opportunity to comment on, any specific categories of transactions that the Commission intends to exclude from the Final Order.[73]

The Commission confirms that the definitions of the Covered Transactions included in the Final Order do not limit the exemption to those products that are currently traded in a Requesting Party's markets. Any products that are offered by a Requesting Party, presently or in the future, pursuant to a FERC- or PUCT-approved Tariff and that fall within these definitions, as well as any modifications to existing products that are offered by a Requesting Party pursuant to a FERC- or PUCT-approved Tariff and that do not alter the characteristics of the Covered Transactions in a way that would cause such products to fall outside these definitions, are intended to be included within the Final Order. Accordingly, with respect to the request to expressly specify transactions that are excluded from the exemption, the Commission notes that a Requesting Party would not be required to request or to obtain future supplemental relief for a product that is modified as described above or a product that it subsequently (but does not currently) offer, if the product qualifies as one of the four types of Covered Transactions in the Final Order.

The Commission notes that the definitions of the Covered Transactions set forth in the Final Order are sufficiently broad to include modifications to existing products and new products that fall within such definitions. These definitions are substantially similar to the specific definitions that were requested in the Petition. Moreover, commenters have had the opportunity to identify and comment upon instances, if any, of existing transactions that fall outside the scope of the Proposed Order. In addition, the Commission is concerned that providing lists of excluded transactions may limit the Requesting Parties' flexibility, may require more frequent requests for supplemental relief (possibly incurring inadvertent delays), and may add market confusion. As such, consistent with the confirmation set forth above, the Commission believes it would be inappropriate and inefficient to set forth all transactions that would be excluded from the scope of the Final Order.

b. Determinations With Respect to Requests to Broadly Expand the Covered Transactions in the Final Order

Multiple commenters requested that the scope of transactions eligible for the exemption in the Final Order be expanded to include (a) transactions and services that are logical outgrowths of the Requesting Parties' functions as RTOs or ISOs,[74] (b) transactions that are directly related to, and a natural outgrowth of, the four categories of transactions set forth in the Proposed Order,[75] or (c) transactions and services that are ''economically comparable'' in substance to the four types of transactions described in the Proposed Order.[76] Commenters generally argued that such expansion was necessary to allow flexibility in the adaption and development of the transactions and services of the RTOs and ISOs, which flexibility is necessary for reliable and cost-effective distribution of electric energy services.[77] In addition, one

Marketers Coalition at 1; Industrial Coalitions at 1, 3; Joint Trade Associations at 1, 3, 5; NEPOOL at 2; NYTOs at 1, 3; PUCT at 2.

[71] *See* section IV.E. *infra.*

[72] *See* NYTOs at 5; Requesting Parties at 9–10.

[73] *See* Joint Trade Associations at 3 n.3.

[74] *See, e.g.,* FERC Staff at 5; FIEG at 2; Joint Trade Associations at 9; NEPOOL at 5.

[75] *See, e.g.,* PUCT at 7–8.

[76] *See, e.g.,* Requesting Parties at 10–11; NYTOs at 5.

[77] *See, e.g.,* FERC Staff at 5 (stating that the products and services offered by the RTOs and ISOs are an ''essential means for carrying out FERC's statutory responsibilities'' and that the failure to expand the scope of the exemption as requested could ''unduly inhibit or delay innovation by RTOs and ISOs''); Joint Trade Associations at 9–10 (arguing that the product restrictions contained in the Proposed Order ''could have a chilling effect'' on the development of ''more efficient or innovative market structures which, in turn, will affect the efficient operation of the markets''); NEPOOL at 4–5 (arguing that absent an expansion, market participants may need additional exemptions from the Commission for relatively minor modifications regardless of whether such modifications are designed to ensure reliability and cost-effective electric energy services); PUCT at 7–8 (asserting that requiring supplemental relief for products that are directly related to, and a natural outgrowth of, the four categories of transactions specified in the

Continued

commenter specifically asked whether 'logical outgrowth' ''transactions [should] be viewed as Commission-regulated until a future exemption is issued * * *'' [78]

Nonetheless, one commenter agreed that a modification to the Final Order should be required for new products that do not logically fit within the Final Order's specified categories, noting that the Commission should have the opportunity to evaluate whether exempting such products would be consistent with the public interest.[79] The Requesting Parties also stated that they ''have not requested a blanket exemption and agree that they should seek to supplement the Proposed Order if they develop new products that are potentially within the Commission's jurisdiction and that present significantly different economic characteristics from those products covered by the Proposed Order.'' [80]

As set forth above, the Commission re-affirms that the exemption extends to any transaction that falls within the Covered Transactions set forth in this Final Order, whether currently existing or later included in a Requesting Party's Tariff. The Commission declines, however, to magnify the Final Order to include the expansive terms requested by the specified commenters. Section 4(c)(6) of the CEA, by its terms, was not intended to permit a blanket exemption for all transactions entered into pursuant to a FERC- or PUCT- approved Tariff. Moreover, section 4(c)(6) expressly prohibits the Commission from issuing an exemption for such transactions unless it affirmatively determines that exempting them would be consistent with the public interest and the purposes of the CEA. While the Commission has been able to perform this evaluation for the Covered Transactions delineated in the Final Order, phrases such as ''logical outgrowth,'' ''natural outgrowth,'' and ''economically comparable'' are too vague and potentially too far reaching to permit meaningful analysis under the statutory standard of review. Commenters have not provided, by way of explanation or example, sufficient insight as to what, if any, boundaries an exemption would have if it were extended to the degrees requested.

Moreover, the Commission's determination that this exemption is in the public interest and consistent with the purposes of the CEA is grounded, in part, on certain characteristics of the Covered Transactions and market circumstances described by the Requesting Parties including, for example, that the Covered Transactions are ''part of, and inextricably linked to, the organized wholesale electricity markets that are subject to FERC or PUCT regulation and oversight.'' [81] Such qualities may or may not be shared by other, as yet undefined, transactions. Additionally, it is impossible for the Commission to determine whether unidentified transactions include novel features or have market implications or risks that are not present in the Covered Transactions, which could, in turn, impact the Commission's public interest and purposes of the CEA analysis or necessitate the inclusion of additional or differing terms and conditions in a final order.

Finally, there may be differences in opinion among the Requesting Parties with respect to the expansion of relief beyond the Covered Transactions. Indeed, the Requesting Parties themselves request that future supplemental relief not be automatically granted to all Requesting Parties and the Commission notes that it has already received supplemental requests for relief that would apply only to certain Requesting Parties, and might be objected to by other Requesting Parties.[82]

In light of these considerations and the potential for adverse consequences that may result from an exemption that includes transactions whose qualities and effect on the broader market cannot be fully appreciated absent further specification, a virtually unlimited exemption would be contrary to the public interest and purposes of the CEA. In addition, consideration of new categories of transactions could be aided by the public notice and comment process. Furthermore, the Commission notes that it is prepared to review requests for supplemental relief from the Requesting Parties.[83]

c. Determinations With Regards to Scope of ''Energy Transactions'' Definition

In discussing the scope of ''Energy Transactions'' included in the Proposed Order, the Commission stated that such transactions ''are also referred to as Virtual Bids or Convergence Bids.'' [84] Commenters noted,[85] however, that, in a later discussion of the categories of transactions to which the exemption would apply, the Commission stated that ''virtual and convergence bids/transactions'' would be included within the scope of the exemption only to the extent that they would qualify under one of the four categories of transactions explicitly defined in the Proposed Order.[86] Multiple commenters requested that the Commission clarify that virtual and convergence bids and offers are explicitly included within the scope of the Covered Transactions that qualify for an exemption under the Final Order.[87] Specifically, the Requesting Parties asked that the Final Order define ''Energy Transactions'' to include ''virtual and convergence bids and offers.'' [88]

Several commenters expressed concerns that certain statements regarding the physical nature of transactions proposed to be exempt, and the role of market participants as physical generators, transmitters, and distributors of electric energy, cast further doubt as to whether the Commission intended to include virtual and convergence bids and offers within the scope of the Proposed Order. One commenter noted that the Commission's statement that the transactions proposed to be exempt are ''primarily entered into by commercial participants that are in the business of generating, transmitting and distributing electricity'' suggested that virtual and convergence bids and offers may not qualify as Covered Transactions because both traditional and non-traditional utilities engage in such transactions, yet many do not own physical generation or wholesale

Final Order ''could have a chilling effect on innovation and overall market efficiency.'').

[78] COPE at 5.

[79] PUCT at 7.

[80] Requesting Parties at 11.

[81] 77 FR 52144. *See also* Petition at 11.

[82] *See* In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc. (April 30, 2012); In the Matter of the Application for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent System Operator Corporation (May 30, 2012).

[83] *See* 77 FR 52163.

[84] 77 FR 52142 (citing Petition at 6).

[85] *See, e.g.,* DC Energy at 2; PUCT at 5–6; Requesting Parties at 12.

[86] Specifically, the Proposed Order explained:

The particular categories of contracts, agreements and transactions to which the Proposed Exemption would apply correspond to the types of transactions for which relief was explicitly requested in the Petition. Petitioners requested relief for four specific types of transactions and the Proposed Exemption would exempt those transactions. With respect to those transactions, the Petition also included the parenthetical ''(including generation, demand response or convergence or virtual bids/transactions).'' The Commission notes that such transactions would be included within the scope of the exemption if they would qualify as the financial transmission rights, energy transactions, forward capacity transactions or reserve or regulation transactions for which relief is explicitly provided within the exemption.

77 FR 52163 (internal citations omitted).

[87] Commercial Working Group at 2; DC Energy at 2; FIEG at 2; NEPOOL at 10; Requesting Parties at 12; PUCT at 5.

[88] Requesting Parties at 13.

transmission facilities.[89] Similarly, the Requesting Parties requested the removal of the statement in the Proposed Order that provided ''[t]o be eligible for the proposed exemption, the contract, agreement, or transaction would be required to be offered or entered into in a market administered by a Petitioner pursuant to that Petitioner's tariff or protocol for the purposes of allocating such Petitioner's physical resources.'' [90] Finally, other commenters noted concern with the Commission's qualification that ''financial transactions that are not tied to the allocation of the physical capabilities of an electric transmission grid would not be suitable for exemption because such activity would not be inextricably linked to the physical delivery of electricity,'' [91] suggesting that the phrase potentially excluded virtual and convergence bids and offers from the scope of Covered Transactions, depending upon the interpretation of the relationship between virtual transactions and the physical delivery of electricity.[92]

Despite their uncertainty with respect to particular statements, multiple commenters contended that virtual and convergence bids and offers fell within the transactions described in the Proposed Order.[93] Commenters posited that virtual and convergence bids and offers, like all other transactions described in the Proposed Order, are entered into pursuant to FERC- or PUCT-approved Tariffs, and thus are subject to the oversight of the Requesting Parties' MMUs. In addition, certain commenters argued that virtual and convergence bids and offers are inextricably linked to the physical delivery of electric energy by being tied to the allocation of the physical capabilities of the electric energy transmission grid.[94]

Commenters represented that virtual and convergence bids and offers were established as a means by which to improve efficiency and competitiveness in the electric energy markets through the convergence of Day-Ahead Market and RTM prices,[95] and have been promoted by FERC and PUCT.[96] The Requesting Parties further explained that ''[a] Virtual Transaction is a cleared offer to sell energy in the day-ahead market (an 'incremental offer' or 'inc') or a cleared bid to buy energy in the day-ahead market (a 'decremental bid' or 'dec'),'' and ''may be submitted by market participants that do not have a physical position in the ISO/RTO markets, which is to say, they do not own generation or serve load.'' [97] Day-Ahead Market transactions are not, however, limited to non-generating or non-LSEs, as ''owners of physical generating units that are capacity resources in the ISO/RTO must submit an offer to sell the energy output of their units into the day-ahead market,'' and ''[s]imilarly, participants that serve load in an ISO/RTO market may additionally submit bids into the day-ahead market.'' [98] The Requesting Parties asserted that, because the Day-Ahead Market is cleared by modeling all bids and offers without distinction as to whether they are virtual or physical in nature, virtual and convergence bids and offers satisfy the proposed criteria that the aggregate cleared volume of Energy Transactions be limited by the physical capability of the electric energy transmission system in order for an Energy Transaction to be subject to the exemption.[99]

In response to commenters' concerns, the Commission has added language to the Energy Transactions definition to clarify in the Final Order that Energy Transactions ''includ[e] * * * Virtual and Convergence Bids and Offers.'' [100] This clarification is based on Requesting Parties' and other regulators' representations that virtual and convergence bids and offers are ''Energy Transactions'' in the ''Day-Ahead Market,'' as such terms are defined in the Final Order,[101] that enable market participants to buy and sell electric energy without physically producing or consuming it.[102] Although there is an apparent financial settlement nature of virtual and convergence bids and offers transacted in the Day-Ahead Market, Requesting Parties represented that they are inextricably linked to the physical delivery of electric energy due to their being subject to the same aggregate physical capabilities of the electric energy transmission grid as other

[89] *See* Financial Marketers Coalition at 3–4 (quoting 77 FR 52144). The Commission notes that the statement referenced by this commenter was intended to summarize a representation made by the Requesting Parties. *See* 77 FR 52144 (''Petitioners also explain that the Transactions are primarily entered into by commercial participants that are in the business of generating, transmitting, and distributing electricity'').

[90] Requesting Parties at 13 (citing 77 FR 52138).

[91] 77 FR 52143.

[92] *See* Financial Marketers Coalition at 7–8; FIEG at 2; NEPOOL at 3.

[93] *See, e.g.,* Requesting Parties at 12 (noting that virtual transactions fall into the category of ''Energy Transactions,'' specifically, as such term was defined in the Proposed Order). The Commercial Working Group noted that, in addition to virtual transactions, ''financial schedules'' and ''internal bilateral transactions'' can appropriately be placed in one of the four enumerated categories of transactions defined in the Proposed Order, and as such, should be explicitly included in the Final Order as Covered Transactions. *See* Commercial Working Group at 2. The Commission notes that financial schedules and internal bilateral transactions are the subject of a separate request for supplemental relief filed by CAISO and ISO NE and, therefore, the Commission is taking no position in this Final Order with respect to those products. *See* note 82 *supra.*

[94] Requesting Parties at 14 (''On a net basis, Virtual Transactions in the RTOs and ISOs are modeled identically to generation and load; therefore, the net cleared amount of all bids and offers (including virtual bids and offers) cannot exceed the physical capability of the grid to flow electricity.''); PUCT at 6; DC Energy at 2 (''[V]irtual energy transactions also serve to converge the Day-Ahead and Real-Time markets as well as provide liquidity and price discovery, all of which are inextricably linked to the physical capabilities of an efficient electricity market and grid.''); FIEG at 2 (''While virtual bids are indeed financial, they do not exist in isolation from the capabilities of the electric grid. Indeed, RTOs significantly restrict virtual bids based in large part on their potential to tangibly impact the electric grid itself.''); Financial Marketers Coalition at 8–9 (''Virtual Transactions cannot be entered into unless the selected node and the grid are capable of supporting the transaction. If the physical node is not available, the transaction is rejected. Thus the aggregate cleared volume of Virtual Transactions for any period is limited by the physical capability of the electricity system operated by the RTOs/ISOs and is based on the projected physical power needs of the system for the specific hour, day, month or year.'').

[95] PUCT at 6 (''The [Day-Ahead Market] was instituted in the ERCOT market to provide opportunities for increased efficiency in the market for physical energy transactions,'' and ''would not exist but for its direct linkage to the real-time market for energy and ancillary services necessary to operate the electric system.''); Financial Marketers Coalition at 8 (noting that Day-Ahead Market modeling ''results in both price and operational efficiency because it allows the system operator to determine which units to dispatch based on the best price and projected demands considering all offers and bids including virtuals.''); NEPOOL at 3 (''Virtual bidding allows virtual traders to supply power to service areas where physical competition is constrained due to insufficient transmission and to increase market efficiency by making pricing less volatile as day-ahead prices converge with real-time prices.'').

[96] PUCT at 6; Financial Marketers Coalition at 3–4, 12 (noting that FERC has encouraged, and in some cases even required, unbundling of services, and promoted market entry by non-traditional utilities lacking physical resources in order to enhance competition).

[97] Requesting Parties at 14. PUCT explained that, ''in the ERCOT market, Virtual Transactions are limited to transactions in the Day Ahead Market (DAM).'' PUCT at 6. The Financial Marketers Coalition defined a ''virtual transaction'' as ''a purchase or sale of energy in the day-ahead market that is settled against real-time energy prices.'' Financial Marketers Coalition at 2 n.2.

[98] Requesting Parties at 14.

[99] *See id.*

[100] *See* paragraph 5(b) of the Order. Additionally, in response to the Requesting Parties' comment, the Commission has not included any reference in the Final Order suggesting that the purpose of a Covered Transaction must be to allocate a Requesting Party's physical resources.

[101] Consistent with the Commission's understanding of industry practice as reflected in the Requesting Parties' current Tariffs, ''the day on which the Day-Ahead Market clears'' in the Order definition of ''Day-Ahead Market'' shall mean the same day that the relevant transaction in the Day-Ahead Market is entered into. *See* paragraph 5(e) of the Order.

[102] Requesting Parties at 14. *See also* PUCT at 6.

physical Energy Transactions.[103] Requesting Parties also represented that virtual and convergence bids and offers are integral to achieving increased efficiency, and ultimately lower consumer costs, through the convergence of Day-Ahead Market and RTM prices.[104] Accordingly, based on these representations, the Commission confirms that the inclusion of virtual and convergence bids and offers that are Energy Transactions within the scope of the Covered Transactions in the Final Order is consistent with the public interest and purposes of the CEA.

Finally, CAISO and ISO NE requested that the proposed definition of ''Energy Transactions'' be amended to allow for cash settlement based upon the Day-Ahead Market price (in addition to the Real-Time Market price), due to the fact that for both CAISO and ISO NE., the Day-Ahead Market may be preferable to the Real-Time Market as a source of settlement prices for certain energy transactions.[105] CAISO and ISO NE requested such a change to account for certain energy transactions in their markets that otherwise might not be included within the scope of the Energy Transactions definition, but nonetheless are settled ''under tariff provisions which have been approved by the FERC'' and that ''[o]nce entered into the settlement system * * *, are operationally treated the same as any other Energy Transaction included in the Commission's Proposed Order.'' [106] Accordingly, the Commission has amended the definition to provide that the requisite performance of an energy transaction may occur in the Real-Time Market through ''[a] cash payment or receipt at the price established in the *Day-Ahead Market or* Real-Time Market *(as permitted by each Requesting Party in its Tariff).''* [107] The Commission stresses that any Energy Transaction settling based upon the Day-Ahead Market price must be inextricably linked to the physical delivery of electric energy.

d. Determinations With Regards to the Process for Expanding the Transactions Covered by the Final Order

Several commenters requested a streamlined or expedited process for Commission review of supplemental requests for related exemptions submitted by the Requesting Parties.[108] Specifically, some commenters argued that Commission action is not necessary where a ''FERC- or PUCT-approved change was made to an already exempted transaction'' [109] and where Tariff changes that are related to core RTO and ISO market functions are filed and accepted by FERC.[110]

Another commenter generally noted that ''the Commission * * * should provide an efficient process for Petitioners to confirm the applicability of the exemptive relief to new or modified products in a timely manner,'' [111] while the Requesting Parties asked ''the Commission [to] adopt a process whereby a Petitioner could simultaneously provide the Commission a copy of its FERC filing (or in the case of ERCOT, the Protocol revisions)* * * .'' [112] The Requesting Parties proposed that, for FERC-regulated RTOs and ISOs, ''if, during the 60-day FERC review period, the Commission informs the Petitioners that the new or modified product is not covered by the exemption or that the Commission needs additional time to review the product, the Petitioner would delay offering the new product until such time as the Commission completes its review or grants supplemental relief.'' [113]

As discussed above, the Commission notes that that there is no need to review new or revised Tariffs that are limited to transactions that fall within the definitions of the Covered Transactions set forth in the Final Order. A supplemental exemption is not necessary in such instances. The Commission declines to adopt a streamlined or expedited process for the review of supplemental requests to expand the exemption to additional transactions. As noted above, section 4(c)(6) of the CEA mandates that the Commission, in granting any exemption thereunder, must act in accordance with CEA sections 4(c)(1) and (2). The Commission will strive to address any requests for supplemental relief as expeditiously as possible.

2. Additional Definitions and Provisions in the Final Order

The Commission proposed to exempt any persons (including the Requesting Parties, their members and their market participants) offering, entering into,[114] rendering advice, or rendering other services with respect to the transactions defined in the Proposed Order.[115] The Commission also proposed that, in order to be eligible for exemptive relief, ''[t]he agreement, contract or transaction must be offered or sold pursuant to a Requesting Party's tariff and that tariff must have been approved or permitted to take effect by: (1) [i]n the case of [ERCOT], the [PUCT] or (2) in the case of all other Requesting Parties, [FERC].''[116] The Commission did not receive any comments with respect to this requirement. In addition, this requirement is consistent with the range of the Commission's authority as set forth in section 4(c)(6) of the CEA and with the scope of the relief requested,[117] and therefore the Commission has not altered the requirement in the Final Order.

In the Proposed Order, the term ''Requesting Party'' was defined to include the six Requesting Parties (*i.e.,* CAISO, ERCOT, ISO NE., MISO, NYISO, and PJM) and any of their respective successors in interest.[118] The Commission has incorporated this definition into the Final Order without alteration. In the Proposed Order, ''[r]eference to a Requesting Party's 'tariff' includes a tariff, rate schedule or protocol,'' [119] in order to account for differences in terminology used by such entities and their respective regulators.[120] The Commission did not receive any comment on this definition and, accordingly, has incorporated this definition into the Final Order unchanged.

3. Conditions to the Final Order

a. Conditions to the Effectiveness of the Exemption Set Forth in the Final Order

i. FERC Regulation 35.47

On October 21, 2010, FERC adopted FERC regulation 35.47 [121] to encourage

[103] Requesting Parties at 14.

[104] *See, e.g.,* NYISO at 3–4.

[105] *See* CAISO/ISO NE March at 2–3.

[106] *Id.* at 3.

[107] *See* paragraph 5(b) of the Order (emphasis added).

[108] *See generally* Joint Trade Associations at 10; NEPOOL at 4; PUCT at 8; Requesting Parties at 10–11.

[109] *See generally* Joint Trade Associations at 10.

[110] *See generally* NEPOOL at 4.

[111] PUCT at 8.

[112] Requesting Parties at 10–11.

[113] *Id.*

[114] The Commission clarifies that the exemption is only available to persons ''entering into'' the Covered Transactions if such persons satisfy the criteria set forth in paragraph 2(b) of the Order (*i.e.,* such persons are ''appropriate persons,'' as defined in sections 4(c)(3)(A) through (J) of the CEA; ''eligible contract participants,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or ''persons who actively participate in the generation, transmission, or distribution of electric energy'' as defined in paragraph 5(g) of the Order.

[115] 77 FR at 52166.

[116] *Id.*

[117] *See id.* at 52142, 521664; Petition at 2–3.

[118] 77 FR 52167.

[119] *Id.*

[120] *See id.* at 52164.

[121] The Proposed Order referred to FERC Order 741 to collectively describe 75 FR 65942 (''FERC Original Order 741'') and 76 FR 10492 (''FERC

clear and consistent risk and credit practices in the organized wholesale electric energy markets to, inter alia, ''ensure that all rates charged for the transmission or sale of electric energy in interstate commerce are just, reasonable, and not unduly discriminatory or preferential.'' [122] As more fully described in the Proposed Order,[123] FERC regulation 35.47 directs each of the RTOs and ISOs within its jurisdiction to adopt Tariffs that implement specified credit practice reforms.[124] These credit reforms include limitations on the amount of credit an RTO or ISO may extend for each market participant; shortened billing and settlement periods of no more than seven days; the elimination of unsecured credit in FTR or equivalent markets; requiring RTOs and ISOs to ensure the enforceability of their netting arrangements in the event of the insolvency of a member by (1) establishing a single counterparty to all market participant transactions, (2) requiring each market participant to grant a security interest in the receivables of its transactions to the relevant RTO or ISO, or (3) providing another method that supports netting that is approved by FERC and that provides a similar level of protection to the market; adoption of a two-day grace period for curing collateral calls; establishment of minimum market participation eligibility requirements that apply consistently to all market participants and that require RTOs and ISOs to engage in periodic verification of market participant risk management policies and procedures; and Tariff clarifications regarding the conditions under which RTOs and ISOs will request additional collateral due to a material adverse change.[125] In the Proposed Order, the Commission stated that these credit requirements appear to achieve goals that are similar to the regulatory objectives of the Commission's DCO Core Principles,[126] and set forth a detailed analysis of each credit requirement and DCO Core Principle supporting such assertion.[127] Due, in part, to the consistency in regulatory objectives between FERC regulation 35.47 and several of the Commission's DCO Core Principles, the Commission proposed requiring each Requesting Party, including ERCOT, to comply with FERC regulation 35.47 as a condition precedent to the granting of a 4(c)(6) exemption for the transactions described in the Proposed Order.[128] The Commission requested comment on this proposal.[129]

Several commenters argued against this prerequisite, citing FERC's authority over the implementation of FERC regulation 35.47,[130] while others proposed that the Commission rely on FERC's determination that the Requesting Parties have complied with FERC regulation 35.47.[131] Further, commenters requested clarification from the Commission as to ''what will constitute a finding that an RTO or ISO is fully compliant with'' FERC regulation 35.47,[132] with one commenter suggesting that the Requesting Parties' ongoing efforts to comply with FERC regulation 35.47 are a sufficient demonstration of compliance.[133] In addition, several commenters proposed that a final order from FERC, or, with respect to ERCOT, PUCT, is adequate to demonstrate compliance and the Commission need not do any further analysis upon receipt of such a final order.[134]

With respect to ERCOT, several commenters objected to the condition precedent because ERCOT is subject to PUCT's jurisdiction and not that of FERC,[135] and further asserted ERCOT should be evaluated on its compliance with PUCT regulations.[136] One commenter cited the successful operation of the ERCOT market over the past decade as support for its position.[137] In addition, commenters noted that ERCOT has, in part, voluntarily and, in part, in conjunction with regulations set forth by PUCT, implemented protocols that are comparable to those identified in FERC regulation 35.47.[138] Indeed, these commenters argued that some of these efforts are more conservative than those required by FERC regulation 35.47, and thus these commenters expressed concern that the condition precedent will require ERCOT to adopt less stringent practices.[139]

ERCOT has represented that it implemented protocols that are comparable to [140] all of the standards set forth in FERC regulation 35.47, with the sole exception of the billing period requirement in the RTM.[141] FERC regulation 35.47(b) requires that RTO and ISO Tariffs ''[a]dopt a billing period of no more than seven days and allow a settlement period of no more than seven days.'' [142] ERCOT represented that its rules applicable to the Day-Ahead Market are more conservative than FERC regulation 35.47(b) obligations with respect to both the statement issuance and payment deadlines.[143] ERCOT's RTM settlement rules have a longer issuance period of nine days, but a shorter payment period of two bank business days within issuance of the statement and invoice.[144] ERCOT asserted that its ''RTM settlement timeline is consistent with the goals of FERC'' regulation 35.47 because RTM transactions are paid within eleven and thirteen days (shorter than the fourteen-day time frame established by FERC regulation 35.47(b)) for 92% of operating days and within the fourteen-day period for 98% of operating days.[145] ERCOT claimed that ERCOT RTM transactions that are paid beyond the fourteen days from the operating day are paid on the fifteenth day.[146] ERCOT also

Revised Order 741'') (slightly amending and clarifying FERC Original Order 741). The standards set forth in these FERC Orders are codified as FERC regulation 35.47 and, therefore, for clarity, reference herein is to the regulation.

[122] 75 FR 65942, 65942, Oct. 21, 2010. These requirements were later amended and clarified in an order on rehearing. *See* 76 FR 10492, Feb. 25, 2011.

[123] *See* 77 FR at 52147–48.

[124] *See id.*

[125] *See id.* at 52147–48, 52150–53.

[126] *See id.* at 52147.

[127] *See id.* at 52147–48; 52150–53.

[128] *See* 77 FR 52164–65. The Commission noted that, while ERCOT is not subject to FERC regulation, the fact that these mandates were developed specifically for RTOs and ISOs suggests that holding ERCOT to these standards may well be appropriate. *See id.* at 52165.

[129] *See id.* at 52172.

[130] *See, e.g.,* Joint Trade Associations at 15; COPE at 7.

[131] *See generally* Commercial Working Group at 4.

[132] *See, e.g.,* Joint Trade Associations at 14–15; Commercial Working Group at 4.

[133] *See, e.g.,* Joint Trade Associations at 15.

[134] *See, e.g., id.*

[135] *See, e.g.,* COPE at 7–8; Joint Trade Associations at 14; PUCT at 3, 11; Requesting Parties at 19.

[136] *See, e.g.,* COPE at 7–8; Joint Trade Associations at 14.

[137] *See* COPE at 8.

[138] *See* PUCT at 11; Requesting Parties at 19.

[139] *See* PUCT at 11–12; Requesting Parties at 19–22.

[140] *See* Revised FERC Order No. 741 Implementation Chart at 1 n.1, 3. *See also* Requesting Parties at 19 (''ERCOT has adopted credit standards that are either the same as or substantially equivalent to those set forth in FERC Order No. 741.'').

[141] *See* Requesting Parties at 19–22; Revised FERC Order No. 741 Implementation Chart. ERCOT indicates that it has implemented these practices ''with the approval of PUCT,'' Requesting Parties at 19, and that all applicable changes became effective on or before January 1, 2013, with the exception of a protocol that ''will further reduce the [Real-Time] settlement cycle in phases by an additional two days,'' which was in the stakeholder process'' as of January 18, 2012. Revised FERC Order No. 741 Implementation Chart.

[142] 18 CFR 35.47(b).

[143] *See* Requesting Parties at 20.

[144] *See id.*

[145] *Id.*

[146] *See id.* at 20–21. ERCOT represents that longer payment and settlement timelines are ''expected to be primarily due to weekend and holiday schedules.'' Revised FERC Order No. 741 Implementation Chart at 3. *See also* Requesting Parties at 21.

contended that any incremental risk related to ERCOT's RTM nine-day statement issuance period is mitigated because RTM positions in the ERCOT market are known and fully collateralized subsequent to the relevant operating day and prior to the FERC-required seven day statement issuance period.[147]

As discussed in detail below in section IV.B.2.e.ii., the Commission believes that the DCO Core Principles provide a useful framework to help measure the extent to which the exemption is in the public interest and consistent with the purposes of the CEA. Because substantial compliance with the standards set forth in FERC regulation 35.47 forms the basis for the determination that the Tariffs and activities of the Requesting Parties are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of the DCO Core Principles, such compliance is necessary for the Commission's public interest and purposes of the CEA determination.[148] Nonetheless, the Commission notes that each Requesting Party has represented to the Commission that its Tariffs have been revised to substantially meet the standards set forth in FERC regulation 35.47.[149] Indeed, the Commission notes that the Requesting Parties have represented that several of those Tariff revisions have already been approved or permitted to take effect by FERC or PUCT, as applicable.[150] As such, and after careful consideration of the comments, the Commission believes that for each Requesting Party that is regulated by FERC, full compliance with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of that Requesting Party's Tariffs necessary to implement the standards set forth in FERC regulation 35.47, is a necessary prerequisite to the effectiveness of the exemption in the Final Order with respect to that Requesting Party.

With respect to ERCOT, the Commission has considered the comments regarding ERCOT's efforts to reform its market protocols in a manner that is the same as or substantially similar to the credit requirements of FERC regulation 35.47. The Commission believes, on the basis of ERCOT's representations, as set forth above, that ERCOT's market protocols differ from the standards set forth in FERC regulation 35.47 in a manner that is sufficiently minor as to permit the Commission to accept them for the purpose of determining that the requested exemption with respect to ERCOT is in the public interest and consistent with the purposes of the CEA. Thus, for ERCOT, adopting measures that are substantially similar to standards that are the same as those set forth in FERC regulation 35.47, as measured by PUCT's permitting all of the ERCOT protocols that are discussed above and as set forth in the Revised FERC Order No. 741 Implementation Chart to take effect, is a necessary prerequisite to the effectiveness of the exemption in the Final Order with respect to ERCOT.

ii. Legal Memorandum or Legal Opinion of Counsel

The Proposed Order contemplated requiring, as a condition precedent to the issuance of a Final Order, that each Requesting Party provide a well-reasoned legal opinion or memorandum from outside counsel that, in the Commission's sole discretion, provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d)[151] will provide the Requesting Party with legally enforceable rights of set off against any of its market participants under title 11 of the United States Bankruptcy Code in the event of a bankruptcy of the market participant. This condition precedent was proposed in light of diversity among the Requesting Parties surrounding the interpretation of the single counterparty requirement and whether a Requesting Party's adopted practices would provide enforceable set-off rights.[152] The Commission requested comment on this proposal.[153]

The Commission received three types of comments on this requirement: (1) Comments that opposed the condition precedent; (2) comments that did not opine on the propriety of the requirement, but expressed concern with respect to the possible unintended and adverse tax consequences the obligation may have for the Requesting Parties; and (3) a comment that objected to the specific requirement that the memorandum or opinion of counsel be signed by the law firm as opposed to an individual partner of the law firm.

Commenters that opposed the condition precedent generally did so on the basis that the Commission ''should not be the arbiter of whether a FERC-approved RTO regime consistent with'' FERC regulation 35.47 ''meets bankruptcy goals,''[154] and that ''the existence of FERC regulation should be the premise upon which an exemption is granted.''[155]

In addition, two commenters urged the Commission to avoid taking any action that could undermine a Requesting Party's tax-exempt status and continued ability to use tax-exempt financing to finance its operations,[156] while the Requesting Parties asked the Commission to ''clarify that any memorandum or opinion of counsel need not be signed by a law firm that provides it, as opposed to any individual partner.''[157]

With respect to the comments opposing the condition precedent, the Commission reiterates that this requirement is designed to permit the Commission to avoid being the arbiter of whether a Requesting Party has satisfied the requirements of FERC regulation 35.47(d). The Commission notes that no Requesting Party has asserted that it would be unable to obtain such a document. In addition, the Commission notes that the ambiguities discussed in the Proposed Order with respect to some Requesting Parties' interpretations

[147] *See id.* at 21.

[148] In the case of ERCOT, which is regulated by PUCT, what is necessary is compliance with standards that are the same as those set forth in FERC regulation 35.47.

[149] *See* FERC Order No. 741 Implementation Chart; Revised FERC Order No. 741 Implementation Chart.

[150] *See* Revised FERC Order No. 741 Implementation Chart.

[151] FERC regulation 35.47(d) was adopted as part of the ''Credit Reforms in the Wholesale Electricity Market'' established by FERC Order No. 741. It requires an organized electric energy market to have tariff provisions that establish a single counterparty to all market participant transactions, or require each market participant in an organized wholesale electric energy market to grant a security interest to the organized wholesale electric market in the receivables of its transactions, or provide another method of supporting netting that provides a similar level of protection to the market and is approved by the Commission. In the alternative, the organized wholesale electric energy market is not permitted to net market participants' transactions and must establish credit based on market participants' gross obligations. 18 CFR 35.47(d).

[152] 77 FR 52165. Requesting Parties have defined the term ''single counterparty'' differently. In addition, each Requesting Party plans on implementing a central counterparty structure based on its individual views. Because of these differing views, the legal opinion or memorandum requirement is meant to provide comfort to the Commission that the single counterparty structure chosen by each Requesting Party provides enforceable set off rights, without having the Commission specify what would be an acceptable central counterparty structure, which could contrast with what FERC and PUCT have permitted.

[153] *See id.* at 52172.

[154] COPE at 8.

[155] *Id.*

[156] *See generally* APPA at 4; Joint Trade Associations at 15.

[157] Requesting Parties at 16–17.

of the single counterparty requirement have not been clarified.[158] The Commission continues to believe that the legal memorandum requirement will provide the Commission with assurance that the netting arrangements contained in the approach selected by each Requesting Party to satisfy the standards set forth in FERC regulation 35.47(d) (or in the case of ERCOT, standards that are the same as those set forth in FERC regulation 35.47(d)) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Bankruptcy Code, in the event of the bankruptcy of a market participant. However, the Commission believes that this condition may be met subsequent to the issuance of this Final Order, provided that as a condition to the effectiveness of the exemption set forth in this Final Order, the Commission must receive, from each Requesting Party, a legal memorandum or opinion of outside counsel that is satisfactory to the Commission. In addition, the Commission clarifies that it retains discretion as to whether the legal opinion or memorandum provides the Commission with the assurances desired, and may elect not to require that a memorandum or opinion be signed by the law firm if the circumstances so warrant. Moreover, as discussed further in section IV.E. below, the Commission is delegating its authority to review and accept the legal memoranda or opinions to the Director of the Division of Clearing and Risk and to his designees, in consultation with the General Counsel or the General Counsel's designees,[159] which will expedite the process by which the Requesting Parties are able to satisfy this condition.

With respect to the comment that the condition precedent requiring a legal memorandum or opinion of outside counsel may create adverse tax consequences, the Commission notes that such tax issues are beyond the scope of this Final Order.

b. Conditions Subsequent to the Final Order

i. Notification of Requests for Information

The Proposed Order included a condition requiring that ''neither the tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose tariff the agreement, contract, or transaction is to be offered or sold, shall include any requirement that the RTO or ISO notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.'' [160] As noted in the Proposed Order, a ''notice requirement could significantly compromise the Commission's enforcement efforts as there are likely to be situations where it would be neither prudent nor advisable for an entity under investigation by the Commission to learn of the investigation prior to Commission notification to the entity.'' [161] The Commission requested comment on this proposal and as to whether there may be an alternative condition that the Commission might use to achieve the same result.[162]

One commenter asked ''[d]oes the Commission's subpoena secrecy requirement described in the Proposed Order mandate that FERC approve tariff changes that are required by the Commission regardless of whether FERC views them to be 'just and reasonable' as required by the Federal Power Act?'' [163] Another commenter opposed this condition, arguing that ''[r]eopening a tariff could result in multiple issues arising, many of which have nothing to do with the notice of inquiry, and may result in undue delay.'' [164]

In response to the comments, the Commission recognizes that while this condition may require a Tariff change for some Requesting Parties, this is a necessary condition to the exemptive relief. As an initial matter, RTOs and ISOs amend their Tariffs on a regular basis. Thus, amending one Tariff provision would not necessarily result in opening unrelated Tariff provisions.[165] The Commission notes that none of the Requesting Parties have indicated in their comment letters that they need to revise their Tariffs to comply with this condition. Moreover, the Commission notes that RTOs and ISOs have proposed, and FERC has approved,[166] similar changes to RTO and ISO Tariffs enabling FERC Enforcement staff to issue subpoenas or requests for information without notification to RTO or ISO members.[167] This requirement provides the same protections to CFTC Enforcement investigations. Commenters have not explained why doing so would not be ''just and reasonable.'' In addition, the Commission notes that, in their respective comment letters, neither FERC staff nor the PUCT opposed the inclusion of this condition. Therefore, the Commission has determined that the removal of notice requirements from the Requesting Party's Tariffs will remain a condition to the Final Order.

ii. Information Sharing Agreements

The Proposed Order contemplated two conditions that addressed the Commission's ability to obtain information from the Requesting Parties.[168] First, with respect to ERCOT, the Proposed Order required that an information sharing arrangement acceptable to the Commission be executed between PUCT and the Commission and continue to be in effect. Second, for all FERC-regulated Requesting Parties, the Proposed Order required that information sharing arrangements between FERC and the Commission that are acceptable to the Commission continue to be in effect. The Commission specifically sought comment as to whether the information sharing arrangement to be executed between PUCT and the Commission should be a condition precedent to the effectiveness of a final exemption for ERCOT, and whether all Requesting Parties should be required, as a condition of any final exemption, to cooperate with the Commission's requests for information with respect to agreements, contracts, or transactions that are, or are related to, the agreements, contracts, or transactions that were the subject of the Proposed Order.[169]

Of those commenters that addressed the information sharing condition precedent for ERCOT, all viewpoints received requested that the Commission refrain from requiring that an information sharing agreement between PUCT and the Commission be in place prior to a final exemption becoming effective for ERCOT. The Requesting Parties and PUCT noted that fulfillment of such a requirement is beyond the control of ERCOT in terms of timing and terms, and therefore would be more appropriate as a condition subsequent to the effectiveness of the exemption in

[158] *See* 77 FR 52165.

[159] *See* paragraph 7 of the Order.

[160] *Id.* at 52166.

[161] *Id.*

[162] *See id.*

[163] COPE at 4 (internal footnote omitted).

[164] Commercial Working Group at 3 n.4.

[165] *See e.g.,* 18 CFR 35.9(c), 35.10(b)–(c) (providing procedures for amending individual tariff provisions, and requiring that OATT and other open access documents filed by ISOs or RTOs must be filed either as individual sheets or sections).

[166] In the absence of evidence to the contrary, the Commission would anticipate that PUCT would act similarly with respect to ERCOT.

[167] *See, e.g.,* PJM Interconnection, L.L.C. Open Access Transmission Tariff, Sixth Revised Volume No. 1, Attachment M, Market Monitoring Plan (permitting the MMU to provide information to FERC on a confidential basis without notice to any party).

[168] *See* 77 FR 52166.

[169] *See id.* at 52172.

order to avoid uncertainty.[170] Similarly, another commenter suggested that the Commission grant preliminary approval of the exemption for ERCOT while discussions between the Commission and PUCT remained ongoing due to ERCOT's comparable market position with respect to the other Requesting Parties, and the lack of any specific timeline under which the information sharing agreement must be completed.[171] Another commenter objected to the condition precedent, noting that ''[a] one-way information sharing requirement acceptable to the CFTC is beyond what is necessary and implies that the Commission does not trust PUCT regulation.'' [172] Finally, notwithstanding its objection to the condition precedent, PUCT expressed full support of working with the Commission to develop and execute an appropriate information sharing arrangement on a timely basis.[173]

Regarding the Commission's contemplation of affirmatively requiring all Requesting Parties to cooperate with requests for information as a condition of the exemption, commenters did not respond directly, although one commenter suggested that the imposition of additional requirements upon the Requesting Parties for purposes of obtaining information through FERC or PUCT as the Requesting Parties' primary regulator amounts to indirect regulation.[174]

In response to the comments opposing an information sharing agreement between PUCT and the Commission as a condition precedent to the effectiveness of relief for ERCOT, the Commission has determined not to pursue such a condition, and thus has stricken the execution of an information-sharing agreement with PUCT as a condition of the Final Order. Rather, with respect to ERCOT, the Final Order conditions the exemption upon ''the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance with such requests by sharing the requested information.'' [175] This revision dispels any concerns regarding potential delay to the effectiveness of the Final Order with respect to ERCOT that could result from the time it might take for PUCT and the Commission to complete an acceptable information sharing arrangement. This revision also responds to competitiveness concerns that ERCOT and the other Requesting Parties should be treated comparably with respect to conditions that could affect the timing of the effectiveness of the Final Order due to their comparable market positions.

Consistent with the revised language noted above requiring ERCOT to comply with the Commission's requests for related market data on an as-needed basis, the Commission has revised the information sharing condition applicable to the FERC-regulated Requesting Parties. The Final Order conditions the exemption with respect to FERC-regulated Requesting Parties upon: (1) Information sharing arrangements between the Commission and FERC that are acceptable to the Commission and that continue to be in effect [176] and (2) ''those Requesting Parties' compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within the Requesting Parties' possession for products in Requesting Parties' markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.'' [177] The Commission notes that the Proposed Order only provided for information sharing arrangements. Thus, to qualify for the exemption provided by the Final Order, the Requesting Parties must comply with the Commission's requests for related market data, regardless of whether the request is made directly (in the case of ERCOT) or through FERC (in the case of all other Requesting Parties).[178]

The Commission notes that any contemplated request for related market data would not be an attempt to indirectly regulate the Requesting Parties or their markets, contrary to some commenters' suggestion. In order for the Commission to determine that the Final Order is consistent with the public interest and the purposes of the CEA, the terms of the Final Order cannot adversely affect the ability of the Commission to discharge its regulatory duties under the CEA in monitoring energy markets under its jurisdiction.[179] Therefore, conditioning the exemption provided in the Final Order upon the Commission's ability to obtain related transactional and positional data from the Requesting Parties, and the Requesting Parties' compliance with such requests by sharing the requested information, is meant to enable the Commission to continue discharging its regulatory duties under the Act as set forth in CEA section 3.[180] The Commission notes that such requested information should already be in the possession of the Requesting Parties.

B. Section 4(c) Analysis

1. Overview of CEA Section 4(c)

a. Sections 4(c)(6)(A) and (B)

As discussed above in section I., the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which provide for exemptions for certain transactions entered into (a) pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality, as eligible for exemption pursuant to the Commission's 4(c) exemptive authority.[181] Indeed, 4(c)(6) provides

[170] Requesting Parties at 15; PUCT at 13.

[171] Commercial Working Group at 4.

[172] COPE at 8.

[173] PUCT at 13.

[174] COPE at 8.

[175] *See* paragraph 4(a)(2) of the Order. The Commission is finalizing this condition under authority in CEA section 4(c)(1) to issue 4(c) relief conditionally with respect to those entities requesting/benefiting from the relief. *See* 7 U.S.C. 6(c)(1).

[176] As discussed in the Proposed Order, the Commission notes that the CFTC and FERC executed a Memorandum of Understanding in 2005 pursuant to which the agencies have shared information successfully. 77 FR 52165.

[177] *See* paragraph 4(a)(1) of the Order.

[178] The Commission has delegated to the Director of the Division of Market Oversight and to such members of the Division's staff acting under his or her direction as he or she may designate, in consultation with the General Counsel or such members of the General Counsel's staff acting under his or her direction as he or she may designate, the authority to request information from Requesting Parties pursuant to sections 4(a)(1) and 4(a)(2) of the Order. *See* paragraph 7 of the Order.

[179] *See* 7 U.S.C. 6(c)(2)(B)(ii).

[180] 7 U.S.C. 5.

[181] The exemption language in section 4(c)(6) reads:

(6) If the Commission determines that the exemption would be consistent with the public interest and the purposes of this Act, the Commission shall, in accordance with paragraphs (1) and (2), exempt from the requirements of this Act an agreement, contract, or transaction that is entered into—

that ''[i]f the Commission determines that the exemption would be consistent with the public interest and the purposes of this chapter, the Commission *shall''* issue such an exemption.[182] However, any exemption considered under 4(c)(6)(A) and/or (B) must be done ''in accordance with [CEA section 4(c)(1) and (2)].'' [183]

b. Section 4(c)(1)

As described above in section I., CEA section 4(c)(1) requires that the Commission act ''by rule, regulation or order, after notice and opportunity for hearing.'' It also provides that the Commission may act ''either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively or both'' and that the Commission may provide an exemption from any provisions of the CEA except subparagraphs (C)(ii) and (D) of section 2(a)(1).[184]

c. Section 4(c)(2)

As set forth above in section I., CEA section 4(c)(2) requires the Commission to determine that: to the extent an exemption provides relief from any of the requirements of CEA section 4(a), the requirement should not be applied to the agreement, contract or transaction; the exempted agreement, contract, or transactions will be entered into solely between appropriate persons; [185] and the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.[186]

d. Section 4(c)(3)

As explained in section I. above, CEA section 4(c)(3) outlines who may constitute an appropriate person for the purpose of a 4(c) exemption, including as relevant to this Final Order: (a) Any person that fits in one of ten defined categories of appropriate persons; or (b) such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.

2. CEA Section 4(c) Determinations

a. Commission Jurisdiction

Subject to the limitations set forth in the CEA, sections 4(c)(6)(A) and (B) of the Act grant the Commission the authority to exempt certain electric energy transactions provided that the Commission determines, among other things, that such exemption is consistent with the public interest and purposes of the CEA.[187] The Commission received several comments relating to the Commission's interpretation of its jurisdiction pursuant to section 4(c)(6).

Two commenters argued that, the Commission should ''interpret the Dodd-Frank Act as not applying to any contract or agreement traded in an RTO or ISO market pursuant to a FERC-accepted or approved rate schedule or tariff'' and that the Commission should exclude RTO or ISO contracts or instruments from the definition of swap.[188] One of these commenters further argued that ''Congress did not intend for Petitioners to be subject to such regulation under the Dodd-Frank Act. Congress recognized the impropriety of imposing duplicative regulation over entities such as Petitioners and instructed the Commission and FERC to 'appl[y] their respective authorities in a manner so as to ensure the effective and efficient regulation in the public interest' and to '[avoid], to the extent possible, conflicting or duplicative regulation.' '' [189]

A different commenter claimed that the Commission should not regulate ''[a]ccess to physical electricity markets.'' [190] This commenter argued that the Proposed Order is ''more of a delegation of authority (to FERC and the PUCT) than an exemption,'' which ''establishes a sort of joint regulation going forward with the CFTC setting minimum RTO participation standards, approving new transactions or 'material modifications,' and, through its ability to alter or withdraw the exemption, indirectly regulating RTOs.''[191]

Another commenter recognized the Commission's exemptive authority under section 4(c)(6), but requested that the Commission affirmatively state in any final order that it makes no determination as to whether the transactions included in the final order fall within the Commission's jurisdiction because the absence of such statement ''could actually undermine the very regulatory certainty being requested by Petitioners, and potentially

(A) pursuant to a tariff or rate schedule approved or permitted to take effect by the Federal Energy Regulatory Commission;

(B) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality; or

(C) between entities described in section 201(f) of the Federal Power Act (16 U.S.C. 824(f)).

[182] *Id.* (emphasis added).

[183] CEA section 4(c)(6) explicitly directs the Commission to consider any exemption proposed under 4(c)(6) ''in accordance with [CEA sections 4(c)(1) and (2)].''

[184] Section 4(c)(1), 7 U.S.C. 6(c)(1), states:

(c)(1) In order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person, including any board of trade designated or registered as a contract market or derivatives transaction execution facility for transactions for future delivery in any commodity under section 5 of this Act) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) (including any person or class of persons offering, entering into, rendering advice or rendering other services with respect to, the agreement, contract, or transaction), either unconditionally or on stated terms or conditions or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a), or from any other provision of this Act (except subparagraphs (C)(ii) and (D) of section 2(a)(1), except that—

(A) unless the Commission is expressly authorized by any provision described in this subparagraph to grant exemptions, with respect to amendments made by subtitle A of the Wall Street Transparency and Accountability Act of 2010—

(i) with respect to—

(I) paragraphs (2), (3), (4), (5), and (7), paragraph (18)(A)(vii)(III), paragraphs (23), (24), (31), (32), (38), (39), (41), (42), (46), (47), (48), and (49) of section 1a, and sections 2(a)(13), 2(c)(1)(D), 4a(a), 4a(b), 4d(c), 4d(d), 4r, 4s, 5b(a), 5b(b), 5(d), 5(g), 5(h), 5b(c), 5b(i), 8e, and 21; and

(II) section 206(e) of the Gramm-Leach-Bliley Act (Public Law 106–102; 15 U.S.C. 78c note); and

(ii) in sections 721(c) and 742 of the Dodd-Frank Wall Street Reform and Consumer Protection Act; and

(B) the Commission and the Securities and Exchange Commission may by rule, regulation, or order jointly exclude any agreement, contract, or transaction from section 2(a)(1)(D)) if the Commissions determine that the exemption would be consistent with the public interest.

[185] *See* CEA 4(c)(2)(B)(i) and the discussion of CEA section 4(c)(3) in sections I. *supra* and IV.B.1.d. *infra.*

[186] CEA section 4(c)(2)(A) also requires that the exemption would be consistent with the public interest and the purposes of the CEA, but that requirement duplicates the requirement of section 4(c)(6).

[187] *See* discussion regarding CEA section 4(c)(6) in sections I. *supra* and IV.B.1.a. *infra.*

[188] Joint Trade Associations at 5. *See also id.* at 3, 8; FERC Staff at 4.

[189] Joint Trade Associations at 5 (alterations in original).

[190] COPE at 10.

[191] *Id.* (arguing that the Commission in fact proposed to retain jurisdiction over RTOs and ISOs because it did not propose to issue a blanket exemption and rather proposed to: (1) Refrain from issuing a final order until two preconditions have been met; (2) require information sharing agreements while failing to negotiate a Congressionally-mandated memorandum of understanding with PUCT; (3) require Requesting Parties to change their Tariffs to remove member notification requirements in the event of Commission requests for information; (4) retain the authority to alter or revoke the exemption upon a change of material facts; (5) require Requesting Parties to submit supplemental filings; (6) reject that 'logical extensions'' of exempted transactions also be subject to the order; and (7) impose limitations on participation the Requesting Parties' market through the Commission's application of the appropriate person standard).

give rise to unnecessary jurisdictional disputes.'' [192]

In response to the comments, the Commission notes that the definition of a ''swap'' set forth in Commission regulations is beyond the scope of this Final Order. The Commission further notes that the interpretation of the Dodd-Frank Act proffered by the commenters is contrary to the express language of that statute. The Dodd-Frank Act added a savings clause to the CEA that addresses the roles of the Commission, FERC, and state agencies as they relate to transactions traded pursuant to FERC- or state-approved tariffs or rate schedules. Section 2(a)(1)(I) of the Act repeats the Commission's exclusive jurisdiction and clarifies that the Commission retains its authority over transactions that are within its jurisdiction. Moreover, while, section 4(c)(6) of the CEA, added by the Dodd-Frank Act, empowers the Commission to exempt contracts, agreements or transactions traded pursuant to a Tariff or rate schedule that has been approved or permitted to take effect by FERC or a state regulatory authority, it does not permit the Commission to automatically or mechanically apply the exemption. Instead, section 4(c)(6) mandates that the Commission initially determine that the exemption would be in the public interest and consistent with the purposes of the CEA, that the exemption would be applied only to agreements, contracts, or transactions that are entered into solely between appropriate persons, and that the exemption will not have a material adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory duties under the CEA.

b. Consistent With the Public Interest and the Purposes of the CEA

As required by CEA section 4(c)(2)(A), as well as section 4(c)(6), the Commission determines that the Final Order is consistent with the public interest and the purposes of the CEA. Section 3(a) of the CEA provides that transactions subject to the CEA affect the national public interest by providing a means for managing and assuming price risk, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities.[193] Section 3(b) of the CEA identifies the purposes of the CEA:

It is the purpose of this Act to serve the public interests described in subsection (a) through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals under the oversight of the Commission. To foster these public interests, it is further the purpose of this Act to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants.[194]

Consistent with the proposed determinations set forth in the Proposed Order,[195] the Commission finds that: (a) The Covered Transactions have been, and are, subject to a long-standing, regulatory framework for the offer and sale of the Transactions established by FERC or PUCT; and (b) the Covered Transactions administered by the RTOs, ISOs, or ERCOT are part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to FERC and PUCT regulation and oversight. For example, FERC Order No. 2000 (which, along with FERC Order No. 888, encouraged the formation of RTOs and ISOs to operate the electronic transmission grid and to create organized wholesale electric energy markets) requires an RTO or ISO to demonstrate that it has four minimum characteristics: (1) Independence from any market participant; (2) a scope and regional configuration which enables the RTO or ISO to maintain reliability and effectively perform its required functions; (3) operational authority for its activities, including being the security coordinator for the facilities that it controls; and (4) short-term reliability.[196] In addition, the Requesting Parties stated that an RTO or ISO must demonstrate to FERC that it performs certain self-regulatory and/or market monitoring functions,[197] and analogous requirements are applicable to ERCOT under PUCT and the Public Utility Regulatory Act [198] (''PURA'').[199] Requesting Parties also represented that they are responsible for ''ensur[ing] the development and operation of market mechanisms to manage transmission congestion * * * The market mechanisms must accommodate broad participation by all market participants, and must provide all transmission customers with efficient price signals that show the consequences of their transmission usage decisions.'' [200]

Furthermore, as explained by the Requesting Parties and discussed in the Proposed Order, the Commission notes that the Covered Transactions are entered into primarily by commercial participants that are in the business of generating, transmitting, and distributing electric energy,[201] and the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region.[202] Additionally, the Covered Transactions that take place on the Requesting Parties' markets are overseen by an MMU, required by FERC for each Requesting Party under its jurisdiction and by PUCT in the case of ERCOT, to identify manipulation of electric energy on the Requesting Parties' markets.[203]

Moreover, fundamental to this ''public interest'' and ''purposes of the [Act]'' analysis is the fact that the Covered Transactions are inextricably tied to the Requesting Parties' physical delivery of electric energy.[204] Another

[192] PUCT at 4.

[193] 7 U.S.C. 5(a).

[194] 7 U.S.C. 5(b).

[195] *See* 77 FR 52144–45.

[196] *See id.*

[197] *See id.* (explaining that, according to the Requesting Parties, each RTO and ISO must employ a transmission pricing system that promotes efficient use and expansion of transmission and generation facilities; develop and implement procedures to address parallel path flow issues within its region and with other regions; serve as a provider of last resort of all ancillary services required by FERC Order No. 888 including ensuring that its transmission customers have access to a Real-Time balancing market; be the single OASIS (Open-Access Same-Time Information System) site administrator for all transmission facilities under its control and independently calculate Total Transmission Capacity and Available Transmission Capability; provide reliable, efficient, and not unduly discriminatory transmission service, it must provide for objective monitoring of markets it operates or administers to identify market design flaws, market power abuses and opportunities for efficiency improvements; be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades; and ensure the integration of reliability practices within an interconnection and market interface practices among regions). *See also* Petition at 13–14.

[198] TEX. UTIL. CODE ANN. 11.001 *et seq.* (Vernon 1998 & Supp. 2005).

[199] *See id.;* Petition at 14–15. ERCOT represented that, pursuant to PURA 39.151(a), its roles and duties are to provide access to the transmission and distribution systems for all buyers and sellers of electric energy on nondiscriminatory terms; ensure the reliability and adequacy of the regional electric energy network; ensure that information relating to a customer's choice of retail electric energy provider is conveyed in a timely manner to the persons who need that information; and ensure that electric energy production and delivery are accurately accounted for among the generators and wholesale buyers and sellers in the region. *See* 77 FR 52144–45; Petition at 14–15.

[200] *See* 77 FR 52144 (quoting Petition at 14). *See also* 18 CFR 35.34(k)(2).

[201] *See* 77 FR 52144. *See also generally* Petition at 20.

[202] *See* 77 FR 52144. *See also* Petition at 3–4.

[203] *See* 77 FR 52144. *See also* Petition at 15–18.

[204] *See id. See also* Petition at 6–9 (describing the transactions for which an exemption was requested

important factor is that the Final Order is explicitly limited to Covered Transactions taking place on markets that are monitored by either an independent MMU, a market administrator (the RTO, ISO, or ERCOT), or both, and a government regulator (FERC or PUCT). In contrast, an exemption for transactions that are not so monitored, or not related to the physical capacity of an electric transmission grid, or not directly linked to the physical generation and transmission of electric energy, or not limited to appropriate persons,[205] is unlikely to be in the public interest or consistent with the purposes of the CEA, taking such transactions outside the scope of the Final Order.

Finally, the extent to which the Final Order is consistent with the public interest and the purposes of the Act can, in major part, be assessed by the extent to which the Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and sufficiently accomplish, the regulatory objectives of the relevant Core Principles set forth in the CEA for DCOs and SEFs. Specifically, providing a means for managing or assuming price risk and discovering prices, as well as prevention of price manipulation and other disruptions to market integrity, are addressed by the Core Principles for SEFs. Ensuring the financial integrity of the Covered Transactions and the avoidance of systemic risk, as well as protection from the misuse of participant assets, are addressed by the Core Principles for DCOs. Deterrence of price manipulation (or other disruptions to market integrity) and protection of market participants from fraudulent sales practices is achieved by the Commission retaining and exercising its jurisdiction over these matters. Therefore, the Commission has incorporated its DCO and SEF Core Principle analyses, set forth in the Proposed Order, into its consideration of the Final Order's consistency with the public interest and the purposes of the Act.[206] In the same way, the Commission has considered how the public interest and the purposes of the CEA are also addressed by the manner in which the Requesting Parties comply with FERC's credit reform policy.[207]

The Commission specifically requested comment on whether it used the appropriate standard in making its section 4(c) determination. The Commission received comments with respect to compliance with FERC's credit reform policy as a precondition to the issuance of a Final Order, which are discussed in sections IV.A.3.a.i. and IV.B.2.e.i., and on the Commission's use of the DCO and SEF Core Principles, which are discussed in sections IV.B.2.e.i.–ii. below.

The Commission received a number of comments regarding the appropriateness of the public interest and purposes of the CEA standard outlined above.[208] One commenter stated that the standard set forth in the Proposed Order, and in particular compliance with FERC regulation 35.47, ''sufficiently demonstrates that the proposed exemption is consistent with the public interest and the purposes of the Act.'' [209] However, another commenter argued that the Commission did not use the appropriate standard in analyzing whether the exemption is in the public interest and consistent with the purposes of the Act, because the Requesting Parties are ''physical electricity transmission and market operators pervasively regulated by either FERC or the PUCT,'' and ''[t]he existence of such regulation should be the premise upon which an exemption is granted.'' [210]

The Commission has considered the comments, and believes that it has used the appropriate standard in making its public interest and purpose of the CEA determination for purposes of this Final Order. The Commission disagrees that the existence of pervasive FERC and PUCT regulations is, by itself, a sufficient standard to analyze that the requested exemptive relief is consistent with the public interest and the purposes of the CEA, because, as set forth above,[211] section 4(c)(6) of the CEA, added by the Dodd-Frank Act, does not permit the Commission to automatically or mechanically apply an exemption.

After consideration of the comments received and for the reasons set forth in this Final Order, the Commission has determined that the exemption set forth in this Final Order is consistent with the public interest and the purposes of the CEA.

c. CEA Section 4(a) Should Not Apply to the Transactions or Entities Eligible for the Exemption

CEA section 4(c)(2)(A) requires, in part, that the Commission determine that the Covered Transactions described in the Final Order should not be subject to CEA section 4(a)—generally, the Commission's exchange trading requirement for a contract for the purchase or sale of a commodity for future delivery. As set forth in the Proposed Order, the Commission has examined the Covered Transactions, the Requesting Parties, and their markets using the CEA Core Principle requirements applicable to a DCO and to a SEF as a framework for its public interest and purposes of the CEA determination.[212] As further support for this determination, the Commission also is relying on the public interest and the purposes of the Act analysis in subsection IV.B.2.f. below. In so doing, the Commission has determined that, due to the FERC or PUCT regulatory scheme and the RTO or ISO market structure already applicable to the Covered Transactions, the linkage between the Covered Transactions and those regulatory schemes, and the unique nature of the market participants that would be eligible to rely on the exemption,[213] CEA section 4(a) should not apply to the Covered Transactions under the Final Order.

d. Appropriate Persons

Section 4(c)(2)(B)(i) of the CEA [214] requires, for an exemption to be granted, that the Commission make a determination that the exemption is restricted to Covered Transactions entered into solely between ''appropriate persons,'' as that term is defined in section 4(c)(3) of the Act.[215] Section 4(c)(3) defines the term ''appropriate person'' to include: (1) Any person that falls within one of the ten categories of persons delineated in sections 4(c)(3)(A) through (J) of the Act or (2) such other persons that the Commission determines to be appropriate pursuant to the limited authority provided by section 4(c)(3)(K).[216] The Commission may determine that persons that do not meet the requirements of sections 4(c)(3)(A) through (J) are ''appropriate persons'' for

and noting that each of them ''is part of, and inextricably linked to, the organized wholesale electricity markets that are subject to FERC and PUCT regulation and oversight'').

[205] *See* 77 FR 52145–47.

[206] *See* sections IV.B.2.e.ii.–iii. *infra;* 77 FR at 52149–62. The Commission received several comments regarding the use of the DCO and SEF Core Principles as a measure for the Commission's public interest and purposes of the CEA determination. These comments are addressed in sections IV.B.2.e.ii.–iii. *infra.*

[207] *See* sections IV.A.3.a.i. *infra* and IV B.2.e.ii. *infra;* 77 FR at 52147–48.

[208] *See, e.g.,* COPE at 6; Commercial Working Group at 4.

[209] Commercial Working Group at 4.

[210] COPE at 6.

[211] *See* sections I. and IV.B.1.a. *supra.*

[212] *See* sections IV.B.2.e.i.–ii. *infra;* 77 FR at 52149–62.

[213] *See* appropriate persons analysis, section IV.B.2.d. *infra;* 77 FR at 52147–48.

[214] 7 U.S.C. 6(c)(2)(B)(i).

[215] 7 U.S.C. 6(c)(3).

[216] *Id.*

purposes of section 4(c) only if it determines that such persons ''are appropriate in light of their financial or other qualifications, or the applicability of regulatory protections.'' [217]

The Commission proposed to limit the exemption to transactions where all parties thereto either (a) satisfy the appropriate persons criteria set forth in sections 4(c)(3)(A) through (J) or, (using its authority under section 4(c)(3)(K)) (b) qualify as ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m).[218] The Commission requested comment as to whether ECPs should be considered appropriate persons for purposes of the Final Order.[219] The Commission recognized, however, that ''the market participant eligibility standards of an individual RTO or ISO may not be coextensive with the criteria required by sections 4(c)(3)(A) through (J) or section 1a(18) of the Act'' [220] and that, therefore, there may be certain RTO or ISO market participants engaging in the transactions proposed for exemption that would not qualify for the exemption as set forth in the Proposed Order. Accordingly, the Commission requested comment as to whether there are any entities currently engaging in the transactions delineated in the Proposed Order, and in the markets administered by the Requesting Parties that are neither appropriate persons under sections 4(c)(3)(A)–(J) of the CEA nor ECPs, and on what basis the Commission should exercise its authority under section 4(c)(3)(K) with respect to such entities to conclude that such parties should be appropriate persons for purposes of the Final Order.[221] The Commission also requested descriptions of the additional parties that should be included in the scope of the term appropriate persons for these purposes,[222] and expressed particular interest in considering the inclusion of market participants who actively participate in the generation, transmission, or distribution of electric energy.[223] Finally, the Commission requested that any comments seeking to include additional parties within the scope of the appropriate person definition for purposes of the Final Order be accompanied by an explanation of the financial or other qualifications of such persons or the available regulatory protections that would render such persons appropriate persons and the bases for determining that (1) such parties could bear the financial risks of the transactions,[224] (2) the inclusion of such parties would not have any adverse effect on the relevant RTO or ISO, and (3) failing to include such parties would have an adverse effect on the relevant RTO or ISO.[225]

The Commission did not receive any comment objecting to its proposed determination, pursuant to section 4(c)(3)(K) of the Act, that ECPs be included within the definition of appropriate persons for purposes of the Final Order. Accordingly, and pursuant to the authority set forth in section 4(c)(3)(K) of the CEA, the Commission has determined that ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), are appropriate persons for purposes of the Final Order in light of their financial or other qualifications, or the applicability of regulatory protections. In addition, in response to confusion regarding whether market participants are required to establish compliance with section 4(c)(3)(F) or demonstrate their ECP status for purposes of this Final Order through the use of audited financial statements, the Commission also is clarifying that market participants that qualify as appropriate persons under section 4(c)(3)(F) of the CEA or on the grounds that they are ECPs as defined in section 1a(18)(A) of the Act and Commission regulation 1.3(m), are not required to prove such qualification through the use of audited financial statements.

The Commission also received several comments requesting that it exercise its statutory authority under section 4(c)(3)(K) to expand further the definition of appropriate person for purposes of the Final Order. These comments generally fell into three categories: requests to extend the definition to specific subsets of market participants; requests to expand the definition more broadly to include, for example, all market participants that satisfy the participant eligibility criteria established by the Requesting Parties; and requests to clarify that certain market participants are included in the definition of appropriate person set forth in CEA sections 4(c)(3)(F) and (H). Several commenters also requested that all market participants who engage in particular types of transactions (such as virtual and demand response transactions) be included in the definition of appropriate person for the purpose of the Final Order.

i. Determinations Regarding the Inclusion of Specifically Identified Market Participants as Appropriate Persons for Purposes of the Final Order

The Commission received multiple requests to include various categories of market participants within the scope of appropriate person for purposes of the Final Order. One commenter urged the Commission to expand the definition to include all persons who actively participate in the generation, transmission, or distribution of electric energy, noting that the proposed definition of appropriate person could exclude traditionally active market participants whose participation facilitates demand response activities, and reduces costs.[226] Other commenters requested the inclusion of specifically identifiable groups of market participants such as electric cooperatives,[227] retail electric providers (''REPs''),[228] load serving entities (''LSEs''),[229] curtailment service providers (''CSPs''),[230] and persons who engage in virtual and convergence bids and offers.[231]

Multiple commenters requested that electric cooperatives be deemed appropriate persons for purposes of the Final Order.[232] One commenter asserted that electric cooperatives, by their nature, ''actively participate in the generation, transmission or distribution of electricity.'' [233] Certain commenters asserted that electric cooperatives may be required to obtain transmission and other services from RTOs and ISOs and that the participation of electric cooperatives in the RTO and ISO markets assists in ensuring the availability of electric energy, transmission, or capacity to their consumers.[234] One commenter additionally noted the operational qualifications and non-profit status of electric cooperatives in support of their

[217] *Id.*

[218] 77 FR 52166. *See also id.* at 52145–46, 52163–64.

[219] *See generally id.* at 52146. The Commission proposed to deem ECPs as ''appropriate persons'' pursuant to the authority set forth in section 4(c)(3)(K) of the CEA.

[220] *Id.* at 52163–64.

[221] *See id.* at 52146, 52166, 52172.

[222] *See id.* at 52172.

[223] *See id.* at 52164, 52172.

[224] *See id.*

[225] *See id.* at 52172.

[226] *See generally* Industrial Coalitions at 4–5.

[227] *See, e.g.,* APPA at 3; FERC Staff at 6; Joint Trade Associations at 11–13; PUCT at 11. The Joint Trade Associations also requested, in the alternative, that the Commission determine that electric cooperatives are ECPs. *See generally* Joint Trade Associations at 3.

[228] *See, e.g.,* TEAM/ARM at 2–3; PUCT at 10.

[229] *See, e.g.,* Industrial Coalitions at 4; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6–7.

[230] *See, e.g.,* Industrial Coalitions at 4.

[231] *See, e.g.,* Financial Marketers Coalition at 2–13; NYISO at 2–10.

[232] *See, e.g.,* APPA at 3, FERC Staff at 6; Joint Trade Associations at 11–13; PUCT at 11.

[233] *See generally* Joint Trade Associations at 11–12.

[234] *See generally* APPA at 3; Joint Trade Association at 12.

consideration as appropriate persons.[235] Some commenters requested that the Commission designate all REPs that have been certified by PUCT as appropriate persons for purposes of the Final Order.[236] One commenter asserted that REP transactions ''are generally conducted for the narrow purposes of purchasing electricity for provision to retail customers and for hedging the dynamic risks of purchasing supply to meet demand'' and that ''the relatively small scale'' of these transactions makes it ''unlikely that the transactions will result in market harm.'' [237] This commenter also noted that REPs are subject to certification requirements in addition to the capital requirements set forth in applicable market protocols.[238] Another commenter argued that the inclusion of REPs would further the public interest in a ''vibrant, diverse market.'' [239] Multiple commenters also requested the inclusion of LSEs.[240] One of the Requesting Parties stated that at least ten percent of the LSEs in its market may not qualify as appropriate persons under the proposed standard and maintained that the loss of these market participants could undermine a program through which the LSEs compete to offer end-use customers competitive energy prices and services.[241] Another commenter suggested that certain LSEs and CSPs could participate in the market in a manner that facilitates demand response and reduces costs.[242] Certain commenters requested that market participants who engage in virtual and convergence bids and offers be deemed appropriate persons for purposes of the exemption.[243] Finally, one commenter requested confirmation that market participants ''do not have to own physical assets, such as transmission lines or generating facilities,'' in order to qualify for the exemption set forth in the Proposed Order.[244]

After consideration of the comments described above, the Commission is using the authority provided by section 4(c)(3)(K) of the CEA to determine that a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined within the Final Order, is an appropriate person for purposes of the exemption provided therein.[245] The Final Order defines a ''person who actively participates in the generation, transmission, or distribution of electric energy'' as ''a person that is in the business of: (1) Generating, transmitting or distributing electric energy or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.'' The Commission has determined that the inclusion of transactions entered into by such persons is proper because such persons' active participation in the physical markets provide them with the requisite ''qualifications'' necessary to be deemed an ''appropriate person'' under section 4(c)(3)(K) for purposes of the Final Order.

Although the Commission expects that the definition of a ''person who actively participates in the generation, transmission, or distribution of electric energy'' will capture many of the market participants referenced in the comments that the Commission received,[246] the Commission has chosen to define the phrase generally by reference to the relevant person's business activities, rather than referencing or delineating particular market participant labels or terms that may have different meanings in different markets and that may be subject to change over time. By way of example, however, the Commission notes that the definition would include an entity that is in the business of providing demand response services in the markets as they are currently operated by the Requesting Parties. In response to the request for clarification of this issue, the Commission confirms that, to be eligible for the exemption set forth in this Final Order, a transaction (including a virtual or convergence bid or offer) need not be entered into by market participants who own physical transmission or generation assets, as long as the transaction is entered into by persons who satisfy the criteria set forth in the Final Order. The Final Order would not, however, extend to agreements, contracts, or transactions that are entered into by individuals and entities that are engaged in the business of entering into or facilitating financial transactions (such as virtual and convergence bids and offers), and that (1) do not actively participate in the generation, distribution and transmission of electric energy, (2) are not ECPs, or (3) do not satisfy any of the criteria set forth in sections 4(c)(3)(A) through (J) of the CEA. The Commission is concerned that a person or entity that is engaged in purely financial transactions in the RTO or ISO markets, but that does not meet either the ECP or the CEA sections 4(c)(3)(A) through (J) appropriate person criteria may be operating on inadequate resources and may pose inappropriate risks to itself and other market participants.

ii. Determinations Regarding the Inclusion of All RTO and ISO Market Participants as Appropriate Persons for Purposes of the Final Order

Several commenters advocated that the Commission use the authority provided by section 4(c)(3)(K) of the CEA to expand the definition of appropriate persons for purposes of the Final Order to include all entities that satisfy the market participant eligibility requirements established by the RTOs and ISOs.[247] Commenters generally supported their positions by: (1) Citing to the capitalization, financial security and/or other requirements that RTO and ISO market participants must satisfy; [248] (2) alleging potential adverse effects of the exit from the RTO and ISO markets of current participants that would be unable to meet the proposed appropriate person criteria; [249] and/or (3) asserting a perceived lack of risk to the overall

[235] *See generally* Joint Trade Associations at 12.

[236] *See, e.g.,* TEAM/ARM at 2–3; PUCT at 10.

[237] *See, e.g.,* TEAM/ARM at 2–3.

[238] *Id.*

[239] PUCT at 10.

[240] *See, e.g.,* Industrial Coalitions at 4; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6–7.

[241] *See generally* NYISO Supplement to Requesting Parties' Comment, Attachment B at 6–7.

[242] *See generally* Industrial Coalitions at 4–5.

[243] *See, e.g.,* Financial Marketers Coalition at 2–13; NYISO at 2–10.

[244] *See generally* Financial Marketers Coalition at 2–10.

[245] Accordingly, the exemption provided by the Final Order will apply to agreements, contracts or transactions where (1) each party thereto is an ''appropriate person,'' as defined in sections 4(c)(3)(A) through (J) of the CEA; an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in Final Order and (2) that satisfy the additional parameters for inclusion in the exemption set forth in the Final Order.

[246] *See generally* CAISO/ISO NE January at 4 (noting that ''the Petitioners' wholesale electricity markets mainly cater to Load Serving Entities, their suppliers, and others whose primary business is the physical generation of electricity and most transactions on the market involve the actual supply and demand of electricity''). *See also* Petition at 27.

[247] *See, e.g.,* AB Energy at 1; Commercial Working Group at 2–4; COPE at 7; ERCOT October at 1–11; ERCOT December at 2, 10; FERC Staff at 6; Financial Marketers Coalition at 2, 11–16; Industrial Coalitions at 1, 3–5; Joint Trade Associations at 11–13; NEPOOL at 2–3; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1; NYTOs at 3–4; NYPSC at 2; Requesting Parties at 2–5; PJM at 1, 4; PUCT at 9; Tarachand at 1–2.

[248] *See, e.g.,* AB Energy at 1; ERCOT October at 2–11; Industrial Coalitions at 5; NEPOOL at 2; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1–4; NYPSC at 2; NYTOs at 4; PUCT at 10; Requesting Parties at 2–5; Tarachand at 1–2; TEAM/ARM at 2.

[249] *See, e.g.,* Commercial Working Group at 3; ERCOT December at 7; FERC Staff at 6; Financial Marketers Coalition at 11–12; Industrial Coalitions at 5; NYPSC at 3; PJM at 4; PUCT at 11; Tarachand at 2.

economy from a default in an RTO or ISO market.[250]

Multiple commenters asserted that the Commission should deem all RTO and ISO market participants as appropriate persons for purposes of the Final Order by referencing specific types of participation standards established by the RTOs and ISOs.[251] Certain of those commenters claimed that such requirements minimize the risks in the applicable markets [252] and help to ensure that only sophisticated players enter the markets.[253] Commenters cited, for example, the RTO and ISO market participant obligations to either satisfy a baseline capitalization requirement and/or to post participation-based financial security [254] as well as credit,[255] disclosure,[256] training,[257] risk management,[258] personnel,[259] and/or technical capability requirements [260] that may apply to market participants. Multiple commenters noted that RTO- and ISO-established market participation criteria have been approved by FERC or PUCT, as applicable.[261] Other commenters cited the regulatory oversight and/or market monitoring to which the RTOs and ISOs are subject [262] and/or certain mechanisms employed by RTOs and ISOs to support the financial integrity of the market.[263] Multiple commenters also expressed concern with potential conflicts between the appropriate persons determinations being made by the Commission and the determinations made by an RTO or ISO and its regulator with respect to market participation eligibility.[264] One commenter questioned whether, through the appropriate persons limitations, the Commission intended to regulate minimum RTO participation standards [265] and another asserted that it is ''unnecessary'' and ''burdensome'' for the Commission to duplicate the efforts of the RTOs and ISOs and their regulators in establishing market participation requirements.[266]

Certain commenters claimed that some entities that currently participate in the RTO and ISO markets might not be able to satisfy the appropriate person standard set forth in the Proposed Order and would exit the market.[267] While some commenters did not name the specific types of entities that they believed would be excluded,[268] others identified particular groups of market participants that could be eliminated, including municipalities and electric cooperatives,[269] REPs,[270] emergency load providers,[271] LSEs,[272] special case resources,[273] demand response providers,[274] marketers,[275] and generators.[276] One commenter asserted that exempting some market participants, but not others, would create an artificial distinction between market participants that conflicts with the Federal Power Act and would create an unfairly discriminatory regulatory scheme.[277] Commenters also expressed concern that market participants who fall outside the exemption would be subject to duplicative regulation,[278] with some questioning the efficiency or operational workability of a dual regulatory structure.[279]

Several commenters alleged that the exit of existing market participants would have a negative impact on the functioning of the RTO and ISO markets.[280] Certain commenters claimed that reduced participation would result in volatility [281] or reduced liquidity,[282] including one commenter that noted the effect of liquidity on the price discovery process.[283] In addition, certain commenters asserted that decreased participation would result in increased market concentration and diminished competition,[284] including one commenter who alleged that the increased market concentration that could result from the forced exit of small market participants is ''at cross-purposes to the legislative spirit'' of the Dodd-Frank Act, which was intended to end ''too-big-to-fail.'' [285] One commenter also noted that the high barriers to entry and high concentration of ownership in the RTO and ISO markets make such markets more susceptible to abuse when smaller entities are forced out,[286] while another commenter stated that reduced competition would result in higher electric energy prices, causing harm to rate payers.[287] One commenter claimed

[250] *See, e.g.,* AB Energy at 1–2; FERC Staff at 6; Financial Marketers Coalition at 15; NYTOs at 4; PUCT at 11; Requesting Parties at 4; Tarachand at 2.

[251] *See, e.g.,* AB Energy at 2; CAISO/ISO NE January at 6; ERCOT October at 4–11; ERCOT December at 7; Financial Marketers Coalition at 13–14; Industrial Coalitions at 5; NEPOOL at 2; NYISO Supplement to Requesting Parties' Comment, Attachment B at 1–4; NYPSC at 2; NYTOs at 4; Requesting Parties at 3–6, 8; PJM at 4; PUCT at 9; Tarachand at 2.

[252] *See, e.g.,* AB Energy at 2; CAISO/ISO NE January at 6–7; Financial Markets Coalition at 13–15; PUCT at 10.

[253] *See generally* CAISO/ISO NE January at 7.

[254] *See, e.g.,* ERCOT October at 2–5; Financial Marketers Coalition at 14, 15; NYPSC at 3; PUCT at 10; Requesting Parties at 3–5, 8.

[255] *See, e.g.,* ERCOT October at 2–3, 6–9; ERCOT December at 7; Financial Marketers Coalition at 15; NYISO Supplement to Requesting Parties' Comment, Attachment B at 2–4; NYPSC at 2; PUCT at 10; Requesting Parties at 4; TEAM/ARM at 2.

[256] *See, e.g.,* Financial Marketers Coalition at 15–16; NYPSC at 2.

[257] *See, e.g.,* CAISO/ISO NE January at 7; Requesting Parties at 4.

[258] *See, e.g.,* Commercial Working Group at 4; ERCOT October at 5–6; NYPSC at 2; Requesting Parties at 4.

[259] *See generally* Requesting Parties at 4.

[260] *See generally id.*

[261] *See, e.g.,* AB Energy at 1; CAISO/ISO NE January at 3; Commercial Working Group at 3; Financial Marketers Coalition at 4; COPE at 10; Joint Trade Associations at 11; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Tarachand at 1; TEAM/ARM at 2.

[262] *See, e.g.,* CAISO/ISO NE January at 3, 8; ERCOT October at 2; Financial Marketers Coalition at 11–12; Joint Trade Associations at 11–13; NYISO Supplement to Requesting Parties' Comment, Attachment B at 5–6; NYPSC at 2; NYTOs at 4; Requesting Parties at 2–5.

[263] NYISO Supplement to Requesting Parties' Comment, Attachment B at 4–5; Requesting Parties at 5.

[264] *See, e.g.,* NEPOOL at 2–3; PJM at 4; PUCT at 9; Requesting Parties at 2–5.

[265] *See generally* COPE at 5.

[266] *See generally* AB Energy at 2.

[267] *See, e.g.,* AB Energy at 2; Commercial Working Group at 3–4; Financial Marketers Coalition at 11–12, 13–16; NYPSC at 3; NYTOs at 4.

[268] *See, e.g.,* Commercial Working Group at 4; NYPSC at 2.

[269] *See, e.g.,* FERC Staff at 6; Joint Trade Associations at 11–13; NEPOOL at 2–3; PUCT at 11. *But see* ERCOT December at 6 (''The proposed 'Appropriate Persons' limitation would not affect any * * * electric cooperatives.'').

[270] *See, e.g.,* PUCT at 9; TEAM/ARM at 2–3.

[271] *See, e.g.,* PJM at 2.

[272] *See, e.g.,* Financial Marketers Coalition at 14; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6; PJM at 2.

[273] *See, e.g.,* Requesting Parties at 6; Tarachand at 2.

[274] *See, e.g.,* PJM at 2; Requesting Parties at 6; Tarachand at 2.

[275] *See, e.g.,* Financial Marketers Coalition at 14; NYISO at 2–10; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6.

[276] *See, e.g.,* Financial Marketers Coalition at 14; NYISO Supplement to Requesting Parties' Comment, Attachment B at 6; Requesting Parties at 6; PJM at 2.

[277] *See, e.g.,* Financial Marketers Coalition at 10–11 (alleging that ''[t]he Federal Power Act states that '[n]o public utility shall, with respect to any transmission or sale subject to the jurisdiction of [FERC], make or grant any undue preference or advantage of any person or subject any person to any undue prejudice or disadvantage * * *.' '') (citing 16 U.S.C. 824d(b)); NYISO at 9–10.

[278] *See, e.g.,* NYPSC at 3.

[279] *See, e.g.,* CAISO/ISO NE January at 3; Financial Marketers Coalition at 3, 11, 16–18.

[280] *See, e.g.,* CAISO/ISO NE January at 3; Commercial Working Group at 3–4; FERC Staff at 6; Tarachand at 2.

[281] *See generally* Commercial Working Group at 3.

[282] *See, e.g.,* CAISO/ISO NE January at 3, 6, 8; Commercial Working Group at 3-; Financial Marketers Coalition at 11–12; NYPSC at 2–3; Tarachand at 2. *But see* ERCOT December at 6 (''[I]t does not appear that the proposed Appropriate Person limitation would have a significant impact on market liquidity in ERCOT.'').

[283] *See generally* Tarachand at 2.

[284] *See, e.g.,* Commercial Working Group at 4; Financial Marketers Coalition at 11–12, 14, 16; Industrial Coalitions at 5; NYPSC at 3; Tarachand at 2.

[285] Tarachand at 2.

[286] Industrial Coalitions at 4–5.

[287] *See generally* Financial Marketers Coalition at 12.

that the departure of market participants would cause remaining participants who serve the load of the withdrawing participants to face higher prices to procure the additional electric energy and would cause existing load forecasts to be inaccurate as new customers would not factor into the remaining participants' forecast models and would limit the available electric energy in instances of unplanned outages, thereby increasing the risks posed to remaining providers, the RTOs and ISOs, and the marketplace as a whole.[288] Another commenter alleged that a ''chilling effect on the development of technologies to provide renewable energies and the systems that complement the integration of renewable resources'' would result if certain small market participants that are the ''vanguard of innovation'' are removed.[289] Some commenters also stated that reduced market participation would eliminate jobs and reduce tax revenue.[290] Certain commenters asserted that the exclusion of certain market participants would create regulatory uncertainty.[291] Others claimed that the exclusion of participants would violate the Congressional intent behind section 4(c)(3)(K) of the CEA [292] or the competitive principles underlying the administration of electric energy competition in the relevant area.[293]

Certain commenters supported the inclusion of all RTO and ISO market participants in the appropriate persons definition for purposes of the Final Order by claiming that recently increased collateral requirements have reduced the default risks of particular RTOs [294] and/or that the mutualized risk of market participants for participant defaults has reduced the risk of a financial default in an RTO or ISO market spreading to the rest of the economy.[295] Some of those commenters specifically noted that market participant failures have not posed a significant threat to the health of the RTO or ISO or other market participants.[296]

However, certain commenters who contended that the Commission should invoke the authority provide by section 4(c)(3)(K) of the CEA to include all RTO and ISO market participants in the definition of appropriate persons for purposes of the Final Order nonetheless suggested that the market impact of the participation limitations imposed by the proposed appropriate persons definition could be minimal.[297]

As set forth above, the Commission considered requests from the commenters to categorize particular types of entities as appropriate persons for purposes of the Final Order and, pursuant to the authority provided by section 4(c)(3)(K) of the CEA, is expanding the definition to include a ''person who actively participates in the generation, transmission, or distribution of electric energy.'' [298] The Commission believes that this expansion, when combined with the ''appropriate persons'' definition delineated in sections 4(c)(3)(A) through (J) of the CEA and the determination, as proposed, to include ECPs, as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m), would appear to strike the appropriate balance. It would not exempt only those RTO and ISO market participants that can demonstrate neither the financial wherewithal nor the requisite business activities and congruent expertise to qualify as appropriate persons under section 4(c)(3)(K) of the CEA.

The Commission declines to generally and broadly extend the exemption contained in the Final Order to transactions involving all persons that satisfy the market participant eligibility criteria established by the RTOs and ISOs. The Commission notes that the definition of appropriate person set forth in sections 4(c)(3)(A) through (J) of the CEA explicitly defines the types of qualified entities that Congress intended to be eligible for an exemption under section 4(c).[299] Certain of these categories reflect an intention to limit a section 4(c) exemption to entities of reasonably significant financial means, while others apply to entities that have regulatory status that implies functional expertise. For example, section 4(c)(3)(F) defines ''appropriate person'' to include ''a corporation, partnership, proprietorship, organization, trust, or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000 or the obligations of which under the agreement, contract or transaction is guaranteed by or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to in subparagraphs (A), (B), (C), (H), (I), or (K) of [section 4(c)(3)].'' [300] Moreover, section 4(c)(3)(K) of the CEA expressly restricts the Commission's authority to expand the definition of appropriate person beyond persons whom the Commission determines are ''appropriate in light of [such persons'] financial or other qualifications, or the applicability of appropriate regulatory protections.'' As noted by one of the commenters, the RTO and ISO ''markets are complex and not geared to unsophisticated traders * * * . [T]hey are designed as wholesale * * * markets.'' [301] The Commission believes that the ability of persons who fail to satisfy an RTO's or ISO's capitalization criteria to nonetheless participate in the RTO's or ISO's market by providing financial security in an amount below the standard established in section 4(c)(3)(F), as indicated in the Petition,[302] would render the section 4(c)(3)(K) determination difficult to make on a wholesale basis. While the Commission understands that the Requesting Parties, with the oversight of FERC or PUCT, as applicable, have established participation standards that they believe are sufficient to protect their own markets, the Commission notes that those participation standards are not directed to meeting the language of section 4(c)(3)(K), which is focused on protecting market participants. As set forth in the Proposed Order, the Commission's preliminary

[288] *See generally* Commercial Working Group at 3–4.

[289] Tarachand at 2.

[290] *See, e.g.,* AB Energy at 2; Tarachand at 2.

[291] *See, e.g.,* FERC Staff at 6; PUCT at 9; Requesting Parties at 3, 8.

[292] *See, e.g.,* CAISO/ISO NE January at 7–8; Requesting Parties at 3.

[293] *See generally* ERCOT December at 8–9.

[294] *See generally* Tarachand at 2.

[295] *See, e.g.,* AB Energy at 2; Commercial Working Group at 3; Tarachand at 2.

[296] *See, e.g.,* AB Energy at 2; Tarachand at 2; PUCT at 11.

[297] For example, one Requesting Party stated that ''past experience has shown that many market participants, when faced with modestly higher capitalization requirements, will meet these requirements in order to remain active market participants.'' *See generally* PJM at 3. The commenter further noted that, although the number of entities potentially affected by the proposed appropriate person limitations ''appear[s] to compromise a very large percentage of the Petitioners' market participants,'' such entities ''account for minimal transactional activity'' in comparison to the Requesting Party's ''market transactions as a whole'' and, thus, the appropriate persons limitation ''would likely not have a significant impact on Petitioners' market liquidity.'' *Id.* Similarly, another Requesting Party stated that, if the Commission were to add LSEs to the definition of appropriate persons pursuant to section 4(c)(3)(K) of the Act, only three financial traders would be excluded from its markets when taking into account its own revised market participant eligibility requirements, which ''is arguably insignificant when viewed solely from the impact to the number of eligible market participants.'' ERCOT December at 4–5. According to this Requesting Party, the appropriate persons limitation ''would appear to have an immaterial incremental liquidity impact'' above that associated with the effects of its own eligibility standards and ''no impact on the competitive retail market.'' *Id.* at 5.

[298] Paragraph 5(g) of the Order.

[299] 7 U.S.C. 6(c)(A)–(J).

[300] 7 U.S.C. 6(c)(F).

[301] CAISO/ISO NE January at 7.

[302] *See, e.g.,* Petition at 27–28.

determination that the exemption would not have a material adverse effect on the ability of the Commission or any contract market to discharge its duties under the CEA was based on the reasoning that ''the limitation of the exemption to Transactions between certain 'appropriate persons' * * * avoids potential issues regarding financial integrity and customer protection. That is, this approach would appear to ensure that Transactions subject to the Final Order would be limited to sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with such Transactions.'' [303] Notwithstanding the comments received, the Commission has determined to limit the exemption set forth in the Final Order to Covered Transactions in which each party to the Covered Transaction is: (1) An ''appropriate person'' as defined in sections 4(c)(3)(A) through (J) of the CEA; (2) an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as that term is defined in the Final Order.

iii. Determinations Regarding the Inclusion of Public Power Systems and Tribal Governments as Appropriate Persons Pursuant to Section 4(c)(3)(H) of the CEA

One commenter asked that the Commission affirm that public power systems, and that units or instrumentalities of tribal governments are ''appropriate persons'' under section 4(c)(3)(H) of the CEA.[304] This commenter asserted that, because public power systems are ''units of state or local governments, or agencies or instrumentalities of the foregoing,'' they properly are within the scope of ''appropriate persons,'' as defined by section 4(c)(3)(H).[305] In addition, the commenter argued that because units or instrumentalities of tribal governments are governmental entities, they too fall within the definition of ''appropriate persons'' set forth in section 4(c)(3)(H).[306]

The Commission interprets section 4(c)(3)(H) to include public power systems and the units or instrumentalities of tribal governments within the meaning of ''governmental entities.'' This interpretation is consistent with both the Commission's approach to public power entities, which are operated by local governments for the benefit of its citizens [307] and Indian tribes in the exemption for 201(f) entities.[308]

iv. Clarifications with Respect to Certain Language in Section 4(c)(3)(F) of the CEA for Purposes of the Final Order

Section 4(c)(3)(F) of the CEA defines ''appropriate person'' to include ''[a] corporation, partnership, proprietorship, organization, trust or other business entity with a net worth exceeding $1,000,000 or total assets exceeding $5,000,000, *or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement by any such entity or by an entity referred to [in sections 4(c)(3)(A), (B),(C), (H), (I) or (K)] of the CEA].''* [309] One commenter argued that the language *''or the obligations of which under the agreement, contract or transaction are guaranteed or otherwise supported by a letter of credit or keepwell, support, or other agreement''* can be interpreted to mean that a market participant that provides an RTO or ISO with a letter of credit that has been issued by an appropriate person [310] in the amount of the RTO or ISO-specific credit requirements (*i.e.,* the amount of its estimated obligations to the RTO or ISO) satisfies the ''appropriate person'' standard set forth in section 4(c)(3)(F) of the CEA.[311] This commenter also interpreted the quoted language to mean that a market participant that provides to the RTO or ISO an unlimited guaranty that has been issued by an appropriate person [312] thereby supports its obligation to the RTO or ISO and, thus, satisfies the section 4(c)(3)(F) criteria.[313]

In addition, one commenter requested that the Commission provide guidance as to what would be acceptable as a ''keepwell, support, or other agreement'' for purposes of section 4(c)(3)(F),[314] and specifically asked whether a parental guaranty would be sufficient and whether audited financial statements would be required. This commenter also asked how the Commission would quantify the obligations of a business entity for purposes of this provision.[315]

The Commission clarifies that a market participant that provides to the RTO or ISO an unlimited guaranty or other support in the form of a ''letter of credit or keepwell, support, or other agreement,'' which guarantee or other support has been issued by an appropriate person, thereby supports its obligation to the RTO or ISO and, thus, satisfies the section 4(c)(3)(F) criteria. The guaranteeing or supporting entity will not be required by the Final Order to demonstrate its status as an ''appropriate person'' [316] through the use of audited financial statements.

e. Public Interest and Purposes of the CEA

i. FERC Credit Reform Policy

As discussed in greater detail above,[317] the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles, and substantial compliance with such requirements is key to the Commission's determination that the Tariffs and activities of the Requesting

[303] 77 FR 52146.

[304] APPA at 3.

[305] *Id.* In support of this position, APPA noted that, in the preamble to the Proposed Order, the Commission observed that ''municipal entities * * * appear to qualify as 'appropriate persons' pursuant to CEA section 4(c)(3)(H)'' and that the definition would cover ''municipalities and other government owned market participants.'' *Id.* at 2 (citing 77 FR 52145 n.99).

[306] *Id.*

[307] *E.g.,* municipal utilities such as the Los Angeles Department of Water and Power and the Sacramento Municipal Utility District, or a PUD (''public utility district'') organized under state law and operated by a city, county, state, or regional agency. ''Proposal to Exempt Certain Transactions Involving Not-For-Profit Electric Utilities,'' 77 FR 50998 at 51004 nn.43–44, Aug. 23, 2012.

[308] *Id.* at 51004–05 (Commission determination that electric utilities owned by federally-recognized Indian tribes are no different substantively than government-owned electric utilities for purposes of the relief provided). The Commission's interpretation is also informed by CEA section 4s(h)(2), which directs the Commission (albeit in another context) to look to section 3 of ERISA (29 U.S.C. 1002) for the purposes of defining ''special entity,'' including ''any governmental plan.'' ERISA includes Indian tribes within the meaning of ''governmental plan.'' Further, the Commission incorporates by reference the list of Indian tribes recognized by the Department of Interior's Bureau of Indian Affairs (BIA) as set forth in, ''Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs,'' 77 FR 47868, Aug. 10, 2012, or any successor to that document issued by the BIA.

[309] 7 U.S.C. 6(c)(3)(F) (emphasis added).

[310] As described by Requesting Parties, ''appropriate person'' in this context would include only those market participants that are defined under the Commission's regulations as ''appropriate persons'' or ''eligible contract participants.'' Requesting Parties at 7–8.

[311] *Id.*

[312] As described by Requesting Parties, ''appropriate person'' in this context would include only those market participants that are defined under the Commission's regulations as ''appropriate persons'' or ''eligible contract participants.'' *Id.*

[313] *Id.*

[314] Financial Marketers Coalition at 15–16.

[315] *Id.*

[316] As described by the Requesting Parties, ''appropriate person'' in this context would include only those market participants that are defined under the Commission's regulations as ''appropriate person'' or ''eligible contract participants.'' Requesting Parties at 7–8.

[317] *See* section IV.A.3.i. *infra.*

Parties and supervision by FERC and PUCT are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of each DCO Core Principle.

ii. Use of the DCO Core Principles in the Public Interest and Purposes of the CEA Analysis

In the Proposed Order, in determining whether an exemption for the transactions defined therein was consistent with the public interest and the purposes of CEA, the Commission preliminarily determined, based upon the Requesting Parties' representations and in the context of the Requesting Parties' activities with respect to the transactions within the scope of the Proposed Order, that the Requesting Parties' practices or Tariffs and supervision by FERC and PUCT appeared to be congruent with, and sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for DCOs.[318] Following the analysis of each DCO Core Principle, the Commission expressly sought comment with respect to its preliminary conclusions.[319]

The Commission received several comments regarding the use of the DCO Core Principles as part of the public interest and purposes of the CEA analysis.[320] One commenter expressly ''support[ed] the Commission's determination that the Petitioners' tariffs and market rules are consistent with the spirit of the DCO Core Principles[.]'' [321] However, this commenter requested clarification that the Commission's DCO Core Principle analysis ''does not equate to a finding on Petitioners' status as a * * * DCO or the transactions executed on or through the Petitioners' markets as swaps.'' [322] Another commenter stated that the DCO Core Principle analysis is not an appropriate standard in analyzing whether the exemption is in the public interest because ''RTOs are physical electricity transmission and market operators pervasively regulated by either FERC or the PUCT'' and are not DCOs,[323] while a different commenter asserted that the Commission ''should not require RTOs and ISOs to comply with the'' DCO Core Principles.[324]

The Commission believes that the analysis drawing from the DCO Core Principles contained in the Proposed Order should be used to determine whether the exemption is consistent with the public interest and the purposes of the CEA. The Commission is not using the analysis to determine whether the Requesting Parties are DCOs. The Commission is not holding the Requesting Parties to the same standards as DCOs, and is not concluding that the Requesting Parties would meet the standards set forth in section 5b(c)(2) of the CEA and part 39 of the Commission's regulations. Nonetheless, the Commission believes that the DCO Core Principles provide a useful framework by which to measure the extent to which the Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of the CEA. As discussed herein, particularly in sections IV.A.3.a.i. and IV.B.2.e.i., the Commission believes that the standards set forth in FERC regulation 35.47 appear to achieve goals similar to the regulatory objectives of the Commission's DCO Core Principles. Moreover, as set forth in the Commission's DCO Core Principle analysis in the Proposed Order,[325] the Commission determines that the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of this Final Order, the regulatory objectives of the DCO Core Principles in the context of the Covered Transactions.

iii. Use of the SEF Core Principles in the Public Interest and Purposes of the CEA Analysis

In the Proposed Order, in determining whether the proposed exemption was consistent with the public interest and the purposes of CEA, the Commission preliminarily determined, based upon the Requesting Parties' representations and in the context of the Requesting Parties' activities with respect to the transactions within the scope of the Proposed Order, that the Requesting Parties' practices or Tariffs, and supervision by FERC and PUCT, appeared to be congruent with, and sufficiently accomplish, the regulatory objectives of the Core Principles set forth in the CEA for SEFs.[326] Following the analysis of each SEF Core Principle, the Commission expressly sought comment with respect to its preliminary conclusions.[327]

One commenter implored the Commission to allow the RTO and ISO markets to continue to exist largely as they currently do by not requiring compliance with the SEF Core Principles.[328] Similarly, another commenter contended that, because the Requesting Parties are neither DCMs nor SEFs, ''the application of [DCM or SEF] core principles to such markets provides little value,'' and the existence of [FERC or PUCT] regulation should be the premise upon which an exemption is granted.[329]

Regarding the Commission's 4(c) public interest analysis, one commenter agreed ''that rules and regulations under the Petitioners' [Open Access Transmission Tariffs] in general satisfy the Core Principles and regulatory requirements that would apply to entities seeking designation as a SEF.'' [330] Notwithstanding this agreement, however, the commenter also requested that the Commission clarify that its public interest analysis and determinations regarding SEF Core Principles does not constitute a finding that the Requesting Parties are SEFs or that the transactions executed on their markets constitute swaps.[331]

Similar to its view of the DCO Core Principles analysis and comment received thereon, the Commission believes its analysis drawing from the SEF Core Principles contained in the Proposed Order should be used to determine whether the exemption is consistent with the public interest and purposes of the Act—not as a determination that the Requesting Parties are SEFs themselves, or that the products traded in their markets are swaps. To the contrary, and consistent with the legislative history behind CEA section 4(c), the Commission takes no position as to the jurisdictional status of any Requesting Party or Covered Transaction in the Final Order. Furthermore, in making its public interest and purposes of the CEA determination based upon, in part, the SEF Core Principle analysis, the Commission is not holding the Requesting Parties to the same standards as SEFs, nor is it concluding that the

[318] *See* 77 FR 52148–57.

[319] *See id.*

[320] *See, e.g.,* Joint Trade Associations at 4, 6; COPE at 6, 9; Commercial Working Group at 4.

[321] Joint Trade Associations at 6 (noting in particular Requesting Parties' credit-worthiness provisions and financial integrity rules).

[322] *Id.* at 4.

[323] COPE at 6, 9.

[324] Commercial Working Group at 4.

[325] *See* 77 FR 524149–57.

[326] *See* 77 FR 52157–62.

[327] *See id.*

[328] Commercial Working Group at 4.

[329] COPE at 6. Additionally, in response to the Commission asking whether ''the procedures and principles in place allow the Requesting Parties to meet the requirements of SEF core principles 10–15,'' 77 FR 52173, COPE questioned why FERC and PUCT regulation in those areas would not be sufficient. *Id.* at 10.

[330] Joint Trade Associations at 6.

[331] *Id.* at 7.

Requesting Parties would meet the standards set forth in section 5h(f) of the CEA.

Nonetheless, the Commission views the SEF Core Principles as a useful way of measuring the extent to which the Tariffs and activities of the Requesting Parties, and supervision by FERC and PUCT, are congruent with, and—in the context of the Covered Transactions—sufficiently accomplish, the regulatory objectives of the CEA. As set forth in the Commission's SEF Core Principles analysis in the Proposed Order,[332] the Commission has determined that the Requesting Parties' policies and procedures appear to be consistent with, and to accomplish sufficiently for purposes of the Final Order, the regulatory objectives of the SEF Core Principles in the context of the Covered Transactions.

iv. Imposition of Position Limits

In the Proposed Order, the Commission requested comment as to whether ''the lack of position limits or position accountability thresholds for speculators in Petitioners' markets, given the nature of their markets and market participants, and the other regulatory protections applicable to these markets as described [in the Proposed Exemption], would prevent the Commission from determining that the Proposed Exemption is consistent with the public interest and the purposes of the CEA.'' [333] The Commission also specifically requested comment on the basis for concluding that market participants should or should not have to satisfy position limit requirements, particularly with respect to FTRs or virtual bids.[334]

Generally, commenters responded that the Commission should not impose position limits on the Covered Transactions. Several commenters objected on the ground that, because the Commission had not determined that the transactions subject to the Proposed Order were subject to the jurisdiction of the Commission, the imposition of an existing regulatory regime on such transactions would be unreasonable.[335] Another commenter argued that the transactions set forth in the Proposed Order are not based on any reference contract within the Requesting Parties' markets, and that imposition of position limits would be impractical and unnecessary because the Federal Power Act already requires rates to be just and reasonable.[336] Commenters also posited that the application of position limits would be a duplication of the currently applicable financial assurance requirements in FERC-approved RTO and ISO Tariffs [337] and, similarly, that FERC and PUCT regulation should be the only factor considered in issuing the exemption, even assuming position limits were relevant to RTO and ISO electric energy markets.[338]

Commenters also highlighted that the Requesting Parties' markets are administrated so that the total amount of energy represented by instruments created on the markets is related to the deliverable capacity of the physical transmission systems, making them a more effective limitation than position limits since, as currently constructed under the Commission's rules, position limits do not cap overall open interest.[339] Finally, the Requesting Parties pointed out the fact that the Commission developed speculative position limits on cash-settled contracts to ensure that no single trader can exert enough market power to influence the cash settlement price of that contract, whereas generators and LSEs are required to use the Requesting Parties' electric energy markets for the purpose of delivering electric energy, which effectively ensures the same result.[340]

Without making any determinations regarding the merits of the commenters' concerns regarding position limits, the Commission's Final Order does not impose position limits on the Covered Transactions. The Commission accepts the Requesting Parties' representations that the physical capability of their transmission grids limits the size of positions that any single market participant can take at a given time. Moreover, based upon the representations made in the Petition, the Proposed Order provided that each category of exempted transaction, including FTRs, would be limited by the physical capability of the electric energy transmission system. Accordingly, as the Final Order continues to limit each Covered Transaction category to the physical capability of the transmission grid,[341] the Commission believes that imposing position limits on the Covered Transactions is not necessary at this time in order to make the requisite public interest and purposes of the CEA determinations.

v. Ability To Re-Create the Day-Ahead Market and Real-Time Prices

The Proposed Exemption specifically sought public comment as to whether the Requesting Parties ''should [be] capable of re-creating the Day-Ahead Market and Real-Time prices.'' [342]

Some commenters contested the underlying utility of being able to re-create the market. The Requesting Parties argued that it is impossible to predict how other market participants would have reacted to a hypothetical situation.[343] One commenter argued that claiming an ability to re-create market prices would ''create the misimpression that such recreations can be done accurately,'' and thus would negatively affect market certainty.[344] Similarly, another commenter opposed any requirement that the RTO and ISOs be able to ''re-create, re-state or in any way change prices,'' believing that it would negatively affect confidence in the integrity of markets if prices could be altered after-the-fact.[345] Another commenter argued that the ability to re-create the Day-Ahead Market and Real-Time prices was unnecessary because MMUs already have substantial tools and broad authority to obtain and analyze market data in order ''to address potential market flaws, as well as instances of potential fraudulent market activity.'' [346] Finally, one commenter questioned the relevance of such a requirement for transactions that are being exempted.[347]

Regardless of underlying utility, necessity, or relevance, the Requesting Parties noted that building the capability to re-run a market (other than a straight reproduction of what occurred) would be extremely expensive in all cases, and in some cases, impossible to do.[348]

[332] 77 FR 52157–62.

[333] 77 FR 52159.

[334] 77 FR 52173.

[335] Requesting Parties at 17; Joint Trade Associations at 8; FIEG at 3.

[336] Joint Trade Associations at 8.

[337] FIEG at 3.

[338] COPE at 10.

[339] Requesting Parties at 17; *see* DC Energy at 3 (noting in particular that FTRs and virtual bids are constrained by the natural physical limits of RTO and ISO market design, due to the products' relation to the deliverable capacity of each RTO and ISO system).

[340] Requesting Parties at 17–18.

[341] The Final Order explicitly includes ''Virtual and Convergence Bids and Offers'' as a type of Energy Transaction. Consistent with DC Energy's comments, such transactions are also limited to the physical capabilities of the physical transmission grid, as required by the definition in the Final Order. *See* section IV.A.1.c. *supra*.

[342] 77 FR 52173.

[343] Requesting Parties at 18 (citing several FERC decisions and related RTO and ISO filings that ''unequivocally reject the market re-run concept'').

[344] PUCT at 13.

[345] DC Energy at 3.

[346] *See* PUCT at 13–14. PUCT also noted that its enforcement approach, as implemented by ERCOT, ''makes remediation a matter of enforcement rather than of disrupting markets by using post-hoc resettlement tools.'' PUCT at 14.

[347] COPE at 8.

[348] Requesting Parties at 18–19 (listing such costs as entailing development of a user interface to vary price inputs that kept track of changes in market rules and data formats over time, as well as the

Generally, the Commission notes that the ability to re-create market prices entails simulating what price outcomes in a market auction would have occurred, but for certain bids and offers being placed. This ability is required of Commission-regulated DCMs [349] in order to allow the Commission's Division of Enforcement to determine the magnitude of loss caused by any fraudulent or manipulative trading scheme that may have occurred, as opposed to providing an initial means of detecting fraud or manipulation, or enabling third parties to contest market outcomes through private rights of action. Therefore, the Commission disagrees with the assertions that it is impossible to retroactively predict market outcomes based upon hypothetical price inputs, or that the ability to re-create prices would result in market uncertainty or loss of confidence in the integrity of prices.

Nevertheless, due to the potentially significant costs for the Requesting Parties that could be associated with building the capability to re-run their markets, the Commission is not requiring such a capability as a condition of the Final Order. While the Commission encourages FERC and PUCT to continue contemplating requiring the Requesting Parties to implement the ability to re-run their markets, the Commission does not believe that such a capability is necessary at this time to its determination that the Final Order is consistent with the public interest and purposes of the Act.[350]

f. Effect on the Commission's or Any Contract Market's Ability To Discharge Its Regulatory or Self-Regulatory Duties Under the CEA

CEA section 4(c)(2)(B)(ii) requires the Commission to make a determination regarding whether exempting the Covered Transactions will have a material adverse effect on the ability of the Commission or any contract markets to perform regulatory or self-regulatory duties.[351] In making this determination, the Commission should consider such regulatory concerns as ''market surveillance, financial integrity of participants, protection of customers and trade practice enforcement.'' [352] These considerations are similar to the purposes of the CEA as defined in section 3, initially addressed in the public interest and purposes of the CEA discussion.

The Commission proposed to determine that the exemption would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function. In the Proposed Order, the Commission noted the following assertion by the Requesting Parties as support for its determination:

> Under Section 4(d) of the Act, the Commission will retain authority to conduct investigations to determine whether Petitioners are in compliance with any exemption granted in response to this request. * * * [T]he requested exemptions would also preserve the Commission's existing enforcement jurisdiction over fraud and manipulation. This is consistent with section 722 of the Dodd-Frank Act, the existing MOU between the FERC and the Commission and other protocols for inter-agency cooperation. The Petitioners will continue to retain records related to the Transactions, consistent with existing obligations under FERC and PUCT regulations.
>
> The regulation of exchange-traded futures contracts and significant price discovery contracts (''SPDCs'') will be unaffected by the requested exemptions. Futures contracts based on electricity prices set in Petitioners' markets that are traded on a designated contract market and SPDCs will continue to be regulated by and subject to the requirements of the Commission. No current requirement or practice of the ISOs/RTOs or of a contract market will be affected by the Commission's granting the requested exemptions.[353]

In addition, the Commission stated that the limitation of the exemption to transactions delineated in the Proposed Order between certain appropriate persons avoids potential issues regarding financial integrity and customer protection.[354]

Moreover, the Commission did not propose to exempt the Requesting Parties from certain CEA provisions, including, but not limited to, sections 2(a)(1)(B), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 or and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180, to the extent that those sections prohibit fraud or manipulation of the price of any swap, contract for the sale of a commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market.[355] As such, the Commission proposed to expressly retain authority to pursue fraudulent or manipulative conduct.[356]

In addition, the Commission proposed that granting the exemption for the transactions delineated in the Proposed Order would not have a material adverse effect on the ability of any contract market to discharge its self-regulatory duties under the Act.[357] Specifically, with respect to FTRs, Forward Capacity Transactions, and Reserve or Regulation Transactions, the Commission found that the exemption would not have a material adverse effect on any contract market carrying out its self-regulatory function because these transactions did not appear to be used for price discovery or as settlement prices for other transactions in Commission regulated markets.[358] With respect to Energy Transactions, the Commission proposed that, while these transactions did have a relationship to Commission regulated markets because they can serve as a source of settlement prices for other transactions within Commission jurisdiction, they should not pose regulatory burdens on a contract market because the Requesting Parties have market monitoring systems in place to detect and deter manipulation that takes place on their markets.[359] In addition, the Commission noted that, as a condition to the exemption, the Commission would be able to obtain data from FERC and PUCT with respect to activity on the Requesting Parties' markets that may impact trading on Commission regulated markets.[360]

Finally, the Commission noted that if the transactions described in the Proposed Order could ever be used in combination with trading activity or in a position in a DCM contract to conduct market abuse, both the Commission and DCMs have sufficient independent authority over DCM market participants to monitor for such activity.

While the Commission did not receive any comments on its proposed determination that the exemption would not have a material adverse effect on the Commission's ability to discharge its

physical maintenance of the hardware and software involved with all trading and clearing over time).

[349] *See* 17 CFR 38.552(c). The SEF proposed rules contained a similar requirement in section 37.406. *See* ''Core Principles and Other Requirements for Swap Execution Facilities,'' 76 FR 1214 at 1247, Jan. 7, 2011.

[350] *See* 77 FR 52158–59.

[351] 7 U.S.C. 6(c)(2)(B).

[352] *See* H.R. Rep. No. 102–978, 102d Cong. 2d Sess. at 79 (1992).

[353] 77 FR at 52146 (quoting Petition at 28).

[354] *See id.*

[355] *See id.* at 52143.

[356] Nor did the Requesting Parties seek an exemption from these provisions. *See* 77 FR at 52146; Petition at 2–3. *See* section IV.D. *infra* for a detailed discussion regarding the comments the Commission received regarding this reservation of authority.

[357] *See* 77 FR at 52147.

[358] *See id.* at 52146.

[359] *See id.* at 52148, 52151, 52157–58.

[360] *See id.* at 52146–47.

regulatory duties, important caveats should be made. With regard to the SEF Core Principle 3 analysis and general statements regarding the Requesting Parties' MMUs' ability to detect and deter manipulation,[361] the Commission notes that such statements were not meant to be construed as a final and irrevocable approval of the integrity of reference prices derived from the Requesting Parties' markets. The Commission retains the authority to question and obtain additional information in a timely manner regarding the underlying prices to which FTRs and other electric energy contracts, which are subject to the Commission's jurisdiction, settle. As previously discussed, the Commission maintains the responsibility of ensuring that exchange-traded and cleared financial electric energy contracts are constructed such that the settlement mechanism produces prices that accurately reflect the underlying supply and demand fundamentals of the RTO and ISO markets and are not readily susceptible to manipulation. For this reason, the Commission has conditioned the Final Order upon access to related transactional and positional data from the Requesting Parties' markets.[362]

For the reasons set forth herein and in the Proposed Order, the Commission determines that the exemption for the Covered Transactions in this Final Order would not have a material adverse effect on the Commission's or any contract market's ability to discharge its regulatory function.

C. Issuance of Separate or a Collective Order

The Commission proposed to issue a single exemptive order for all Requesting Parties in lieu of the six separate exemptive orders requested by the Requesting Parties because, as explained in the Proposed Order, there are " '[congruents] in [the Petitioners'] markets and operations,' "[363] and "it would appear that issuing six separate but identical * * * [e]xemptions that raise the same issues and questions is unnecessary, could result in needlessly duplicative comments, and would be an inefficient use of Commission resources."[364] The Commission further "disagree[d] with the Requesting Parties' assertion that separate orders are necessary because a solitary order would require each Requesting Party to submit an individual application to obtain supplemental relief or to amend the relief provided thereby."[365]

Several commenters urged the Commission to adopt separate final orders for particular Requesting Parties because of concerns surrounding the delays and regulatory uncertainty that may be caused by requiring compliance by all Requesting Parties with the proposed conditions precedent.[366] One commenter specifically asked the Commission to grant ERCOT's exemption pursuant to a separate order that recognizes the differences between the ERCOT regulatory regime and the regime applicable to the other RTOs and ISOs.[367]

Another commenter requested that the Commission clarify that any supplemental relief requested by one Requesting Party would not, if granted, apply to any other Requesting Party, unless specifically requested by that Requesting Party.[368] The commenter claimed that the Requesting Parties' respective operations are not identical and that "[i]t is necessary for each Petitioner to have the ability to evaluate whether any supplemental relief requested by another Petitioner should apply to its market and whether the Petitioner is willing to be bound by conditions, if any, set forth in such supplemental relief."[369]

After careful consideration of these comments, the Commission has determined, for the same reasons set forth in the Proposed Order,[370] to issue a single final order on the basis of administrative economy. The Commission notes that the issuance of a single final order should not delay any particular Requesting Party's relief as the relief will become effective for any particular Requesting Party upon that party's compliance with the conditions in the Final Order.[371]

The Commission also confirms that individual Requesting Parties may file individual requests for supplemental exemptions. Future requests for supplemental relief will be dealt with as expeditiously as practicable based upon the petition submitted, the facts and circumstances at the time of the submission, and the Commission's resources at the time. The Requesting Parties have noted the importance of quick action, and the Commission notes that certain efficiencies may stem from coordinated action for relief.

D. Additional Limitations

As described in detail above,[372] the Commission expressly noted in the Proposed Order[373] that the proposed exemption was based upon the representations made in the Petition and in the supporting materials provided by the Requesting Parties and their counsel, and that any material change or omission in the facts and circumstances that alter the grounds for the Proposed Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or in the public interest and consistent with the purposes of the CEA. The Commission did not receive any comments on this proposal. As such, the Final Order is based on the representations made by the Requesting Parties and their counsel in the Petition, the supplemental information, and supporting materials filed with the Commission. In particular, the Commission notes that the following representations are of particular importance and integral to the Commission's decision to grant the exemption set forth in this Final Order: (1) The exemption requested by the Requesting Parties relate to Covered Transactions that are primarily entered into by commercial participants that are in the business of generating, transmitting and distributing electric energy;[374] (2) the Requesting Parties were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region;[375] (3) the Covered Transactions are an essential means, designed by FERC and PUCT as an integral part of their statutory responsibilities, to enable the reliable delivery of affordable electric energy;[376] (4) each of the Covered Transactions taking place on the Requesting Parties' markets is monitored by MMUs responsible to either FERC or, in the case of ERCOT, PUCT;[377] and (5) each Covered Transaction is directly tied to the physical capabilities of the Requesting Parties' electric energy grids.[378] Therefore, the Commission affirms that any material change or omission in the facts and circumstances that alter the grounds for the Final

[361] *See* note 359 and accompanying text *supra.*

[362] *See* section IV.A.3.b.ii. *supra.*

[363] 77 FR 52164 (alterations in original).

[364] *Id. C.f.* section IV.B.2.a. *supra.*

[365] 77 FR 52164.

[366] *See, e.g.,* Requesting Parties at 14–15; Joint Trade Associations at 14–15.

[367] *See, e.g.,* PUCT at 4.

[368] *See, e.g.,* Requesting Parties at 15.

[369] *Id.* at 15–16.

[370] *See* 77 FR 52164.

[371] *See* discussion regarding effectiveness of the exemption, section IV.E. *infra.*

[372] *See* section II.B.3. *supra.*

[373] *See* 77 FR at 52142, 52165.

[374] *See id.* at 52142. *See also* Petition at 20.

[375] *See* 77 FR 52142.

[376] *See id. See also generally* FERC Order No. 888; FERC Order No. 2000; 18 CFR 35.34(k)(2); TAC 25.1; Petition at 11, 13–14.

[377] *See* 77 FR 52142. *See also* Petition at 15–18.

[378] *See* 77 FR 52142.

Order might require the Commission to reconsider its finding that the exemption contained therein is appropriate and consistent with the public interest and purposes of the CEA. The Commission reiterates that Covered Transactions must be tied to the allocation of the physical capabilities of an electric energy transmission grid in order to be suitable for exemption because such activity would be inextricably linked to the physical delivery of electric energy.

In addition, the Commission proposed to exclude from the exemptive relief its general anti-fraud, anti-manipulation, and enforcement authority over the Requesting Parties and the transactions described in the Proposed Order under the CEA, including, but not limited to, sections 2(a)(1)(B), 4b, 4c(b), 4o, 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 of the CEA and any implementing regulations promulgated thereunder including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.[379] The Commission received several comments regarding this reservation of authority.[380]

One commenter expressed full support for this reservation of authority because ''the Commission's continued oversight in these vital areas protects the markets, market participants, and the customers they serve.'' [381] Another commenter noted that CEA section 4c(b) and regulation 32.4 are not part of the Commission's anti-fraud and anti-manipulation enforcement authority, but rather ''articulate the Commission's jurisdiction over option transaction[s]'' and requested that section 4c(b) and regulation 32.4 be removed from the carve-out in the final order.[382] Additionally, one commenter stated that it had no issue with the Commission's retention of anti-manipulation jurisdiction generally, but cautioned that the Commission cannot use an exemption order to extend the CFTC's anti-manipulation jurisdiction beyond that which the Dodd-Frank Act provides.[383]

After consideration of the comments, the Commission believes it prudent to reserve in the Final Order its anti-fraud and anti-manipulation authority, as well as those scienter-based prohibitions in the specified provisions of the Act and Commission regulations (without finding it necessary in this particular context to preserve other enforcement authority). The Commission notes that reservation of enforcement authority is standard practice with exemptive orders issued pursuant to CEA section 4(c). While the commenter is correct that section 4c(b) and regulation 32.4 do not articulate the Commission's general anti-fraud, anti-manipulation, and enforcement authority directly, these provisions exemplify a possible statutory basis for bringing an enforcement action, should there be a need for the Commission to do so, and notes that the inclusion of these provisions is not intended to bring any transactions under CFTC jurisdiction for purposes other than enforcement. In addition, these carve-outs are consistent with past exemptive orders and do not expand the Commission's jurisdiction.

The Commission also is adding CEA section 4(d) to the non-exclusive list of reserved enforcement authority. The Commission believes it is important to highlight that, as with all exemptions issued pursuant to CEA section 4(c), the exemption ''shall not affect the authority of the Commission under any other provision of [the CEA] to conduct investigations in order to determine compliance with the requirements or conditions of such exemption or to take enforcement action for any violation of any provision of [the CEA] or any rule, regulation or order thereunder caused by the failure to comply with or satisfy such conditions or requirements.'' [384]

E. Effectiveness of the Exemption

The Commission proposed to make the exemption effective immediately.[385] In response to the Commission's general request for comments, the Commission received two types of comments with respect to the effectiveness of the exemption: (1) Comments requesting that the Commission issue a final order rapidly, and (2) one comment asking for clarification as to when the exemption will become effective with respect to individual Requesting Parties in light of the conditions precedent.

Several commenters requested that the Commission issue a final order as quickly as possible or practical, respectively.[386] Of these, one commenter also requested that the Commission issue an interim or temporary order to make it clear that the RTO and ISO transactions are ''temporarily exempt'' and not subject to the Commission's jurisdiction until a final order is issued.[387]

Another commenter stated that, if the Commission determines not to issue separate exemption orders, it should specify how and when a single order will take effect for each Requesting Party.[388] This commenter noted that ''[e]ach Petitioner's ability to satisfy the proposed conditions precedent depends on the terms of the final exemption and the individual Petitioner's stakeholder process for amending its tariff or protocol.'' [389] As a result, each Requesting Party is likely to satisfy the proposed conditions precedent at a different time.[390] This commenter also asserted that it would be unreasonable for the Commission to delay the effectiveness of a final order until all of the Requesting Parties have satisfied all of the conditions precedent.[391]

The Commission notes that it is not anticipated that any individual Requesting Party will be in need of a final order to continue its present business until the date by which all Requesting Parties have satisfied the conditions precedent described in the Proposed Order. Indeed, the Commission also notes that the Commission's Divisions of Clearing and Risk, Market Oversight, and Swap and Intermediary Oversight issued a no-action letter preserving the regulatory status quo of the transactions that are the subject of the Proposed Order until the earlier of March 31, 2013, or such earlier date as the Commission may establish in taking final action on the Proposed Order.[392] Nonetheless, the Commission recognizes the concerns raised by the commenters with respect to the market uncertainty that may be caused if publication of a final order is delayed until all Requesting Parties have satisfied the conditions precedent. Moreover, with one exception, all Requesting Parties have represented that all of the necessary Tariffs and other documents have been submitted to, and have either already been approved or permitted to take effect or are currently being reviewed by, FERC or PUCT, as applicable.[393] Accordingly, the Commission has decided to publish this Final Order in advance of the full satisfaction by each Requesting Party of the prerequisites to the exemption set forth therein, so as to provide market participant with sufficient notice of the

[379] *See id.* at 52163, 52166.

[380] *See, e.g.,* Industrial Coalitions at 3; Joint Trade Associations at 10–11; FERC Staff at 5.

[381] *See, e.g.,* Industrial Coalitions at 3.

[382] *See, e.g.,* Joint Trade Associations at 10–11.

[383] *See, e.g.,* FERC Staff at 5.

[384] *See* 7 U.S.C. 6(d).

[385] *See* 77 FR at 52167.

[386] Commercial Working Group at 2; DC Energy at 2.

[387] DC Energy at 2.

[388] Requesting Parties at 15.

[389] *Id.*

[390] *Id.*

[391] *Id.*

[392] CFTC Staff Letter 12–11.

[393] *See* Revised FERC Order No. 741 Implementation Chart.

prerequisites and conditions attendant to the Final Order. The Commission notes, however, that the exemption provided under the Final Order will not become effective with respect to a particular Requesting Party until that Requesting Party has complied with all of the specified prerequisites provided in the Final Order. That is, the conditions precedent are now prerequisites to the effectiveness of the exemption contained in the Final Order and not to the issuance of the Final Order. Specifically, a Requesting Party and its participants will not benefit from the exemption described in the Final Order unless and until: (1) Submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by the particular Requesting Party to satisfy the standards set forth in FERC regulation 35.47(d) (or in the case of ERCOT, standards that are the same as those set forth in FERC regulation 35.47(d)) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code [394] in the event of the bankruptcy of the market participant,[395] and (2) in the case of Requesting Parties that are subject to regulation by FERC, the Requesting Party is in full compliance with FERC regulation 35.47 [396] or, in the case of ERCOT, which is subject to regulation by PUCT, ERCOT is in substantial compliance with standards that are the same as those set forth in FERC regulation 35.47.[397]

With respect to the required legal memorandum or opinion of counsel, the Commission is delegating to the Director of the Division of Clearing and Risk and to his designees, in consultation with the General Counsel or the General Counsel's designees, the authority to accept or reject the legal memorandum or opinion. The Director of Clearing and Risk will affirmatively communicate to the Requesting Party when the Requesting Party's legal memorandum or opinion has been accepted or rejected.

With respect to the condition requiring compliance with the standards set forth in FERC regulation 35.47, Requesting Parties governed by FERC will be deemed to have satisfied this condition upon FERC's acceptance and approval of all of the Requesting Parties' Tariffs that are necessary to implement such standards.[398] ERCOT will be deemed to have satisfied this condition upon PUCT permitting all of the necessary ERCOT protocol revisions to take effect, except that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing standards set forth in FERC regulation 35.47(b).[399]

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires that agencies consider whether the exemption set forth in the Final Order will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[400] In the Proposed Order, the Commission found that the Requesting Parties should not be considered small entities based on the central role they play in the operation of the electronic transmission grid and the creation of organized wholesale electric markets that are subject to FERC and PUCT regulatory oversight,[401] analogous to functions performed by DCMs and DCOs, which the Commission has previously determined not to be small entities.[402] The Proposed Order included entities that qualify as ''appropriate persons'' pursuant to CEA sections 4(c)(3)(A) through (J), or 4(c)(3)(K) that otherwise qualify as ECPs, as defined in CEA section 1a(18)(A) and Commission regulation 1.3 (m).[403] The Commission previously determined that ECPs are not ''small entities'' for purposes of the RFA.[404] As a result, the Commission certified that the Proposed Order would not have a significant economic impact on a substantial number of small entities for purposes of the RFA, and requested written comments regarding this certification.[405] After further consideration of the comments received, the Commission has again determined that the Final Order would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.

In response to its request for comments on the Proposed Order, the Commission received comment letters relevant to the RFA that primarily focused on the scope of the term ''appropriate persons.'' [406] Specifically, the Commission requested comments on whether to expand the list of appropriate persons to include those entities that ''actively participate in the generation, transmission or distribution of electricity,'' but that are not ECPs and do not fall within CEA sections 4(c)(3)(A) through (J).[407] Multiple commenters urged the Commission to expand the definition to include all persons who actively participate in the generation, transmission, or distribution of electric energy or specified types of entities that do so, noting that the proposed definition of an appropriate person was not sufficiently inclusive and could exclude traditionally active market participants whose participation facilitates demand response activities and reduces costs.[408] The Commission

[394] *See* 11 U.S.C. 553.

[395] *See* section IV.A.3.a.ii. *supra.*

[396] *See* section IV.A.3.a.i. *supra.*

[397] *See id.*

[398] *See* sections IV.A.3.a.i. and IV.B.2.e.i. *supra.*

[399] *See id.*

[400] 5 U.S.C. 601 *et seq.*

[401] *See* RFA analysis as conducted by FERC regarding five of the Requesting Parties, CAISO, NYISO, PJM, MISO, and ISO NE., *https://www.federalregister.gov/articles/2011/10/26/2011-27626/enhancement-of-electricity-market-surveillance-and-analysis-through-ongoing-electronic-delivery-of#h-17.*

Commission staff also performed an independent RFA analysis based on Subsector 221 of sector 22 (utilities companies), which defines any small utility corporation as one that does not generate more than 4 million of megawatts of electric energy per year, and Subsector 523 of Sector 52 (Securities Commodity Contracts, and Other Financial Investments and Related Activities) of the SBA standards, 13 CFR 121.201 (1–1–11 Edition), which identifies a small business size standard of $7 million or less in annual receipts. Staff concluded that none of the Requesting Parties is a small entity, based on the following information:

MISO reports 594 million megawatt hours per year, *https://www.midwestiso.org/Library/Repository/Communication%20Material/Corporate/Corporate%20Fact%20Sheet.pdf.*

ERCOT reports 335 million megawatt hours per year, *http://www.ercot.com/content/news/presentations/2012/ERCOT_Quick_Facts_June_%202012.pdf.*

CAISO reports 200 million megawatts per year, *http://www.caiso.com/Documents/Company Information_Facts.pdf.*

NYISO reports 17 million megawatts per month, which calculates to 204 megawatts per year, *http://www.nyiso.com/public/about_nyiso/nyisoataglance/index.jsp.*

PJM reports $35.9 billion billed in 2011, *http://pjm.com/markets-and-operations.aspx.*

ISO NE reports 32,798 gigawatt hours in the first quarter of 2011, which translates into almost 33 million megawatts for the first quarter of 2011, *http://www.iso-ne.com/markets/mkt_anlys_rpts/qtrly_mktops_rpts/2012/imm_q1_2012_qmr_final.pdf.*

[402] *See* A New Regulatory Framework for Clearing Organizations, 66 FR 45604 at 45609, Aug. 29, 2001 (DCOs); Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618 at 18618–19, April 30, 1982 (DCMs).

[403] *See* 77 FR at 52145. Under CEA section 2(e), only ECPs are permitted to participate in a swap, subject to the end-user clearing exception.

[404] *See* Opting Out of Segregation, 66 FR 20740 at 20743, April 25, 2001.

[405] *See* 77 FR at 52168.

[406] *See* discussion in section IV.b.2.d. *supra.*

[407] *See* 77 FR at 52164, 52172.

[408] *See, e.g.,* Industrial Coalitions at 4–5. *See* section IV.B.2.d.ii. *supra.*

has carefully considered the comments and, using the authority provided by section 4(c)(3)(K) of the CEA, has determined that a ''person who actively participates in the generation, transmission, or distribution of electric energy'' as defined in the Final Order, is an appropriate person for purposes of the exemption provided therein.[409] The Commission has based its determination, in part, on the view that the Covered Transactions ''subject to the Final Order would be limited to sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with such Transactions.'' [410] The relief provided in the Final Order to a person who actively participates in the generation, transmission, or distribution of electric energy may impact some small entities to the extent they may fall within standards established by the Small Business Administration (''SBA'') regulations defining entities with electric energy output of less than 4,000,000 megawatt hours per year as a ''small entity.'' [411] However, based on the Commission's existing information about the RTO and ISO markets and the comments received, market participants consist mostly of entities exceeding the thresholds defining ''small entities'' set out above. [412] Therefore, based on the comments received and industry feedback, the Commission is of the view that the Final Order would not affect a substantial number of small entities.[413]

The Commission is further of the view that the Final Order relieves the economic impact that the exempt entities, including any small entities that may opt to take advantage of the exemption set forth in the Final Order otherwise would be subjected to by exempting certain of their transactions from the application of substantive regulatory compliance requirements of the CEA and Commission regulations thereunder. Indeed, pursuant to section 4(c)(3)(K) of the CEA, the Final Order expands the category of persons that are ''appropriate persons'' that may avail themselves of the exemption. Accordingly, the Commission does not expect the Final Order to have a significant impact on a substantial number of small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the exemption set forth in the Final Order would not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. (''PRA'') are, among other things, to minimize the paperwork burden to the private sector, ensure that any collection of information by a government agency is put to the greatest possible uses, and minimize duplicative information collections across the government. The PRA applies to all information, ''regardless of form or format,'' whenever the government is ''obtaining, causing to be obtained [or] soliciting'' information, and includes and requires ''disclosure to third parties or the public, of facts or opinions,'' when the information collection calls for ''answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.'' The Proposed Order provided that the exemption would be expressly conditioned upon information sharing: ''With respect to ERCOT, information sharing arrangements between the Commission and PUCT that are acceptable to the Commission are executed and continue to be in effect. With respect to all other Requesting Parties, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect.'' [414] The Commission determined that the Proposed Order did not impose any new recordkeeping or information requirements, or other collections of information on ten or more persons that require approval of the Office of Management and Budget (''OMB''), and did not receive any comments regarding this determination.

The Final Order has amended the information sharing conditions to provide that the exemption is expressly conditioned upon information sharing:

(1) With respect to all Requesting Parties subject to the jurisdiction of FERC, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and those Requesting Parties' compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within the Requesting Parties' possession for products in the Requesting Parties' markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.

(2) With respect to ERCOT, the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance with such requests by sharing the requested information.[415]

Nevertheless, the PRA would not apply in this case, given that the information sharing conditions in the Final Order would not impose any new recordkeeping or information collection requirements, or other collections of

[409] Accordingly, the exemption provided by the Final Order will apply to agreements, contracts, and transactions where (1) each party thereto is an ''appropriate person,'' as defined in sections 4(c)(3)(A) through (J) of the CEA; an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in Final Order and (2) that satisfy the additional parameters for inclusion in the exemption set forth in the Final Order. *See* paragraph 2 of the Order.

[410] *See* section IV.B.2.d.ii. *supra* (citing 77 FR at 52146).

[411] *See* note 401 *supra* (citing 13 CFR 121.201).

[412] PJM indicates that 55 of its 588 market participants may not be appropriate persons because they might not meet the requirements in CEA sections 4(c)(3)(A) through (J). However, PJM states that this number accounts for less than 10% of the total number of participants and thus is not considered significant. *See* PJM at 2. Similarly, in the CAISO market, 74 participants are authorized to purchase or hold FTRs. Of those, 13 are estimated to be market participants that actively participate in the generation, transmission, or distribution of electric energy, but that may not be appropriate persons because they might not meet the requirements in CEA sections 4(c)(3)(A) through (J) or qualify as ECPs (''Additional Participants''). In terms of total dollar volume, approximately 6.5% of the FTR payments and charges are with Additional Participants. *See* CAISO/ISO NE January at 5. With respect to ISO NE., as of September 20, 2012, there were 392 market participants that actively participated in the generation, transmission, or distribution of electric energy. However, while ISO NE did not provide financials on which to make a determination as to whether 169 of the 392 active market participants would be Additional Participants, in each instance, such active market participants are required to post sufficient collateral to cover the risk of their positions. Among the participants that have filed financial statements with ISO NE., 23 would be active market participants. These active market participants constitute 3.2% of the gross invoices billed to the 392 active market participants across all ISO NE markets in 2011. Of these 23 participants, ten (10) representing 2.8% of the total invoices billed to the 392 market participants in 2011 have met their participation qualification by posting supplemental collateral. *Id.*

[413] The Commission notes that to the extent that market participants are required to meet capitalization requirement totaling $1 million net worth or $10 million total assets and are sophisticated entities that are able to, from a financial standpoint, understand and manage the risks associated with the exempted transactions, they are not considered ''small entities'' for RFA purposes. *See, e.g.,* Industrial Coalitions at 4 n.12 (citing FERC regulation 35.47 and stating that ''all market participants are required to meet a baseline capitalization requirement totaling $1 million net worth or $10 million total assets'').

[414] 77 FR at 52166.

[415] Paragraph 4(a) of the Order.

information on ten or more persons that require OMB approval.

C. Consideration of Costs and Benefits

1. Background

As discussed in section I. above, the Dodd-Frank Act amended CEA section 4(c) to add sections 4(c)(6)(A) and (B), which permit exemptions for certain transactions entered into (a) pursuant to a tariff or rate schedule approved or permitted to take effect by FERC, or (b) pursuant to a tariff or rate schedule establishing rates or charges for, or protocols governing, the sale of electric energy approved or permitted to take effect by the regulatory authority of the State or municipality having jurisdiction to regulate rates and charges for the sale of electric energy within the State or municipality pursuant to the Commission's 4(c) exemptive authority. However, the Commission must act ''in accordance with'' sections 4(c)(1) and (2) of the CEA.[416]

On February 7, 2012, the Requesting Parties filed a joint Petition[417] with the Commission requesting that the Commission exercise its authority under section 4(c)(6) of the CEA and section 712(f) of the Dodd-Frank Act to exempt certain contracts, agreements and transactions for the purchase or sale of specified electric energy products, that are offered pursuant to a FERC- or PUCT-approved Tariff, from most provisions of the Act.[418] The Requesting Parties asserted that each of the transactions for which an exemption is requested is (a) subject to a long-standing, comprehensive regulatory framework for the offer and sale of such transactions established by FERC, or in the case of ERCOT, PUCT, and (b) part of, and inextricably linked to, the organized wholesale electric energy markets that are subject to regulation and oversight of FERC or PUCT, as applicable. The Requesting Parties expressly excluded from the Petition a request for relief from sections 4b, 4*o,* 6(c), and 9(a)(2) of the Act,[419] and such provisions, among others, explicitly have been carved out of the Final Order.[420]

The Requesting Parties requested that, due to the commonalities in their markets, the exemption apply to all Requesting Parties and their respective market participants with respect to each category of electricity energy transactions described in the Petition, regardless of whether such transactions are offered or entered into at the current time pursuant to an individual RTO or ISO's Tariff. The Requesting Parties asserted that this uniformity would avoid an individual RTO or ISO being required to seek future amendments to the exemption in order to offer or enter into the same type of transactions currently offered by another RTO or ISO.[421]

2. The Statutory Mandate To Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a) of the CEA[422] requires the Commission to ''consider the costs and benefits'' of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

3. Proposed Order and Request for Comment on the Commission's Proposed Consideration of Costs and Benefits

Upon consideration of the Petition, the Commission issued the Proposed Order which proposed to exempt certain transactions pursuant to section 4(c)(6) of the CEA.[423] The Commission proposed to limit the exemption set forth in the Proposed Order to entities that meet one of the appropriate persons categories in CEA sections 4(c)(3)(A) through (J), or, pursuant to CEA section 4(c)(3)(K), that otherwise qualify as an ECP.[424] Furthermore, under the Proposed Order, ''the covered agreements, contracts or transactions must be offered or sold pursuant to a Petitioner's tariff, which has been approved or permitted to take effect by: (1) In the case of ERCOT, the PUCT or (2) In the case of all other Petitioners, FERC.''[425]

In the Proposed Order, the Commission clarified that financial transactions that are not tied to the allocation of the physical capabilities of an electric energy transmission grid would not be suitable for exemption, and were therefore not covered by the Proposed Order because such activity would not be inextricably linked to the physical delivery of electric energy.[426]

The Proposed Order expressly requested public comment on the Commission's proposed cost-benefit consideration, including with respect to reasonable alternatives; the magnitude of specific costs and benefits, and data or other information to estimate a dollar valuation; and any impact on the public interest factors specified in CEA section 15(a).[427]

4. Summary of Comments on the Costs and Benefits of the Proposed Order

The Commission requested, but received no comments providing data or other information to enable the Commission to better quantify the expected costs and benefits attributable to the Final Order. In terms of qualitative cost and benefit comments, COPE stated that the Commission's Proposed Order creates confusion and inefficient, duplicative regulation, thus, imposing unnecessary costs.[428] COPE also stated that the Commission should recognize the regulation of FERC and the PUCT and limit to the degree possible any regulatory burden imposed on RTOs, ISOs, and their members.[429] The Joint Trade Associations stated that any additional regulation by the Commission would be duplicative and would lead to increased costs passed on to consumers.[430]

Another commenter, NYSIO, asserted that the benefit of Commission

[416] *See* more detailed discussion in section I. *supra.*

[417] As noted above, the Requesting Parties amended their Petition on June 11, 2012 and citations to Petition herein are to the amended Petition. *See* note 22 *supra.*

[418] *See* 77 FR 52139. *See also* Petition at 2–3, 6.

[419] *See* 77 FR 52139. *See also* Petition at 3.

[420] *See* paragraph 1 of the Order.

[421] *See* 77 FR 52139. *See also* Petition at 6.

[422] 7 U.S.C. 19(a).

[423] 77 FR 52166–67. *See also* section II.B.1. *supra.*

[424] For those ECPs engaging in the transactions delineated in the Proposed Order in markets administered by a Requesting Party that do not fit within the categories of ''appropriate persons'' set forth in sections 4(c)(3)(A) through (J), the Commission proposed to determine that they are appropriate persons pursuant to section 4(c)(3)(K), ''in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.'' The Commission also noted that CEA section 2(e) permits all ECPs to engage in swaps transactions other than on a DCM and that such entities should similarly be appropriate persons for the purpose of the Proposed Order. *See* 77 FR 52145–46.

[425] *Id.*

[426] *See id.* at 52143.

[427] *See id.* at 52172. As a general matter, in considering the costs and benefits of its actions, the Commission endeavors to quantify estimated costs and benefits where reasonably feasible. Here, however, the Commission considers the costs and benefits of this Final Order mostly in qualitative terms because the commenters, including the Requesting Parties, provided no such data or information to assist the Commission in doing so despite the Proposed Order's request.

[428] COPE at 2, 5.

[429] *Id.* at 11.

[430] Joint Trade Associations at 5.

regulation of smaller NYSIO market participants was unclear, but stated that costs of such regulation were certain.[431] NYSIO noted that consequence of the Commission's possible conclusion that all authorized participants in NYSIO's markets were not ''appropriate persons'' would result in regulatory uncertainty and would result in potential exclusion of significant number of market participants from the NYSIO's markets. NYSIO also noted that, as a result, NYSIO would have to increase its resources to respond to the new regulatory and compliance requirements. NYSIO pointed out that this increase in their operating costs would be passed on to New York electricity consumers. More specifically, NYISO noted that the decision not to expand the scope of the Final Order to encompass all current market participants that otherwise qualify to participate in NYISO's markets would result in one of two consequences: ''(1) NYISO would be subject to Commission regulation by virtue of the ongoing participation by market participants that do not qualify as Appropriate Persons; or (2) NYISO would have to seek to amend its tariffs with FERC to change its participation criteria to effectively exclude these market participants.'' [432] Under the first scenario, ''[t]he potential for inconsistent regulatory requirements would significantly weaken the regulatory certainty that is the intended benefit of the Exemption,'' and ''[s]uch additional and potentially conflicting regulation would be certain to lead to increased costs to the NYISO, its market participants, and ultimately electric ratepayers.'' [433] Under the second scenario, NYISO would have ''to seek approval to amend its tariffs to make its minimum participation criteria consistent with the Commission's definition of Appropriate Persons,'' which requires showing ''that the proposed tariff amendments are 'just and reasonable' and do not 'grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage.' '' [434]

The Financial Marketers Coalition stated that excluding one set of market participants (*i.e.,* those that do not own physical assets) from the exemption delineated in the Proposed Order would cause many market participants to exit the market because they could not operate based on the requirements of a dual regulatory structure.[435] Such an outcome, according the Financial Marketers Coalition, would decrease competition, harm liquidity in the markets and allow the continued exercise of market power.[436] The PUCT stated that excluding persons currently authorized to participate in ERCOT would introduce significant negative implications on the competitive (wholesale and retail) electric energy markets.[437] Similarly, Tarachand commented that the exit of small market participants could adversely affect liquidity and the price discovery process.[438] The Requesting Parties expressed similar concerns regarding the potential detrimental impact on the robustness of their markets.[439]

The Industrial Coalitions generally supported the Proposed Order, stating that the Commission's continued jurisdiction over fraud and manipulation in the ISO and RTO markets provides crucial ongoing market oversight necessary for market transparency and customer protection.[440] The Commercial Working Group stated that the Commission's Proposed Order offers legal certainty, and it commended the Commission for eliminating an unnecessary layer of regulation in an area that is highly complex and highly regulated.[441] The Requesting Parties commented that regulatory certainty is the primary benefit of the exemption set forth in the Proposed Order.[442]

Regarding whether the Commission should extend the definitions of the transactions set forth in the Proposed Order to include ''logical outgrowths'' of the same, NEPOOL stated that absent such an inclusion, market participants and Requesting Parties would be required to seek additional exemptions from the Commission for relatively minor modifications to existing Tariffs and/or transactions, which in turn could dramatically increase the Commission's workload.[443]

Regarding the proposed requirement related to the memorandum of counsel stating that their netting arrangements satisfy FERC regulation 35.47(d), the Requesting Parties stated that the Commission should forego that requirement as redundant with their existing obligations to FERC.[444]

In response to a request for comment, the Requesting Parties stated that the Commission should not require RTOs and ISOs to have the ability to recreate Day-Ahead and RTM prices.[445]

5. Summary of Final Order—Determinations and Conditions

As discussed above, the Final Order makes certain determinations with respect to the scope of relief, including the scope of the Covered Transactions [446] and the process for expanding the Covered Transactions.[447] The Commission determined that any products that are offered by a Requesting Party, presently or in the future, pursuant to a Tariff that has been approved or permitted to take effect by FERC or PUCT and that fall within the provided definitions of the Covered Transactions, as well as any modifications to existing products that are offered by a Requesting Party pursuant to a Tariff that has been approved or permitted to take effect by FERC and PUCT and that do not alter the characteristics of the Covered Transactions in a way that would cause such products to fall outside these definitions are intended to be included within the Final Order. In this way, the Commission's Final Order provides beneficial flexibility and efficiency in that, if the product qualifies as one of the four Covered Transactions in the Final Order, the Requesting Party would not be required to request or to obtain future supplemental relief for a modified product. At the same time, however, the Commission declined to include phrases such as ''logical outgrowth,'' ''natural outgrowth,'' and ''economically comparable'' in the definitions of the Covered Transactions because such phrases are too vague and too potentially far reaching to permit meaningful analysis under the Commission's statutory standard of review.

The Final Order also sets forth certain conditions subsequent and conditions to the effectiveness of the exemption set forth therein. More specifically, two conditions subsequent relate to information requests by the Commission. First, the Commission must be able to obtain, either directly from ERCOT, or through FERC with respect to the other Requesting Parties, positional and transactional data within the Requesting Parties' possession for products in the Requesting Parties' markets that are related to markets subject to the Commission's

[431] NYISO Supplement to Requesting Parties' Comment, Attachment B at 7.

[432] NYISO at 9.

[433] *Id.*

[434] *Id.* (citing 16 U.S.C. 824d).

[435] Financial Marketers Coalition at 11–12.

[436] *Id.*

[437] PUCT at 9.

[438] Tarachand at 2.

[439] Requesting Parties at 8.

[440] Industrial Coalitions at 3.

[441] Commercial Working Group at 2.

[442] Requesting Parties at 3.

[443] NEPOOL at 4.

[444] Requesting Parties at 16.

[445] *Id.* at 18.

[446] *See* sections II.A.1.a.–c. *supra.*

[447] *See* section II.A.1.d. *supra.*

jurisdiction, including any pertinent information concerning such data. Second, the exemption is expressly conditioned upon the requirement, that with respect to each Requesting Party, neither the Tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose Tariff the agreement, contract or transaction is to be offered or sold, shall include any requirement that the RTO or ISO notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.[448]

There are also two conditions to the effectiveness of the exemption set forth in the Final Order. For a Requesting Party subject to the jurisdiction of FERC, the exemption set forth in the Final Order is effective upon satisfaction of all of the following: (1) Submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by that Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and (2) demonstration that the Requesting Party has fully complied with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of the Requesting Party's submissions that are necessary to implement the requirements of FERC regulation 35.47.[449] For ERCOT, which is subject to the jurisdiction of PUCT, the exemption set forth in the Final Order is effective upon satisfaction of all of the following: (1) submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by ERCOT to satisfy standards that are the same as those contained in FERC regulation 35.47(d) will, in fact, provide the ERCOT with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and (2) demonstration that ERCOT has fully complied with standards that are the same as those set forth in FERC regulation 35.47, as measured by PUCT permitting all of the necessary ERCOT protocol revisions to take effect; provided that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing period standards set forth in FERC regulation 35.47(b).[450]

In the discussion that follows, the Commission considers the costs and benefits of the Final Order to the public and market participants generally, and to the Requesting Parties specifically. It also considers the costs and benefits of the exemption described in the Final Order, in light of the public interest factors enumerated in CEA section 15(a).

6. Costs of the Final Order

The Final Order is exemptive and provides ''appropriate persons'' engaging in Covered Transactions relief from certain of the requirements of the CEA and attendant Commission regulations. As with any exemptive rule or order, the exemption in the Final Order is permissive, meaning that the Requesting Parties were not required to request it and are not required to rely on it. Accordingly, the Commission assumes that the Requesting Parties would rely on the exemption only if the anticipated benefits warrant the costs of the exemption.

In response to the comments of NYISO and others, the Commission is of the view that the Requesting Parties will experience minimal, if any, ongoing costs as a result of the determinations and conditions set forth in the Final Order because, as the Requesting Parties certify pursuant to Commission regulation 140.99(c)(3)(ii), the attendant conditions are substantially similar to requirements that the Requesting Parties and their market participants already incur in complying with FERC or PUCT regulations.

The requirement that all parties to the agreements, contracts, or transactions that are covered by the exemption in the Final Order must be (1) an ''appropriate person,'' as defined sections 4(c)(3)(A) through (J) of the CEA; (2) an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or (3) a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in paragraph 5(g) of the Order—is not likely to impose any significant, incremental costs on the Requesting Parties because their existing legal and regulatory obligations under the FPA and FERC or PUCT regulations mandate that only eligible market participants may engage in the Covered Transactions, as explained above.[451] To the comments of NYISO and others, the Commission recognizes that this requirement will mean that certain entities that currently operate in RTOs and ISOs but that do not satisfy the minimum financial criteria described above will not be able to avail themselves of the exemption. Such a result could cause those market participants wishing to avail themselves of the exemption to incur costs to satisfy the Final Order's minimum criteria or exit the market. The Commission considered these costs but has determined that these market participants must be excluded because they lack the minimum financial wherewithal the Commission believes is necessary to make the requisite finding under CEA section 4(c)(3)(K) that they meet the statutory requirements of CEA section 4(c)(3)(K). In response to the comments of the Financial Marketers Coalition, the Commission has clarified that if an entity meets the minimum criteria set forth in the Final Order, they may continue to operate in these markets even if they do not own or operate physical assets.

The requirement that the Covered Transactions must be offered or sold pursuant to a Requesting Party's Tariff—which has been approved or permitted to take effect by: (1) In the case of ERCOT, the PUCT or; (2) in the case of all other Requesting Parties, FERC—is a statutory requirement for the exemption set forth in CEA section 4(c)(6) and therefore is not a cost attributable to an act of discretion by the Commission.[452] Moreover, requiring that the Requesting Parties not operate outside their approved Tariffs derives from existing

[448] Paragraph 4(b) of the Order.

[449] Paragraph 6(a) of the Order.

[450] Paragraph 6(b) of the Order.

[451] *See* section IV.B.2.d. *supra*. While not compelled to, if a Requesting Party decided to amend its Tariff to conform with the Final Order's participant criteria for purposes of securing regulatory certainty—and assuming FERC would approve such an amendment—the Commission believes that a minimal cost would be imposed, mitigated to the extent that the Requesting Party already is required to amend its Tariff to comply with other terms of the Final Order. Alternatively, the Commission does not believe it is likely that the Requesting Parties themselves would become dually regulated by virtue of market participants not qualifying under the scope of the Final Order continuing to transact in the Requesting Parties' markets. To the extent that any Covered Transaction would be subject to the Commission's jurisdiction, the potential dual-regulatory requirements resulting from other Dodd-Frank rulemakings would be most likely to affect the market participants that do not qualify for the exemption set forth in the Final Order.

[452] *See* 7 U.S.C. 6(c)(6)(A), (B).

legal requirements and is not a cost attributable to this Final Order.

As described above, FERC and PUCT impose on the Requesting Parties, and their MMUs, various information management requirements. These existing requirements are not materially different from the condition that none of a Requesting Party's Tariffs or other governing documents may include any requirement that the Requesting Party notify a member prior to providing information to the Commission in response to a subpoena, special call, or other request for information or documentation. While the Commission is mindful that the process of changing Tariffs will cause the Requesting Parties to incur costs, those costs are necessary for the Commission to find that the exemption is in the public interest and consistent with the purposes of the CEA.

Requiring that an information sharing arrangement between the Commission and FERC be in full force and effect is not a cost to the Requesting Parties or to other members of the public because it has been an inter-agency norm since 2005. The requirement that the Requesting Parties comply with the Commission's requests on an as-needed basis for related transactional and positional market data will impose only minimal costs on the Requesting Parties to respond because the Commission contemplates that any information requested will already be in the possession of the Requesting Parties.[453]

The legal opinion or memorandum of counsel requirement[454] will require the Requesting Parties to incur costs to acquire. Based on the Laffey Matrix for 2012, assuming the opinion or memorandum is prepared by an experienced attorney (with 20 plus years of legal practice), his/her hourly rate ($734 per hour) multiplied by the amount of hours taken to prepare the opinion, will be the basic cost of such an opinion.[455] The Commission estimates that the cost of such memoranda will range between $15,000 and $30,000, part of which depends on the complexity of the analysis necessary to support the conclusion that the Requesting Party's set off rights are enforceable, and assuming that the opinion will take 20–40 hours to prepare.[456] While important, these costs are mitigated by the Commission determination, in response to comments, not to require that the opinions or memoranda be signed on behalf of the law firm that is issuing the opinion.

7. Benefits

The Commission's comprehensive action in this Final Order benefits the public and market participants in several substantial if unquantifiable ways, as discussed below. First, by considering a single application from all Requesting Parties at the same time, and deciding to allow all provisions of the exemption set forth in the Final Order to apply to all Requesting Parties and their respective market participants, the Final Order provides a cost-mitigating, procedural efficiency.

By cabining the Covered Transactions to the definitions provided in this Final Order, the Commission limits the potential that purely financial risk can accumulate outside the comprehensive regime for swaps regulation established by Congress in the Dodd-Frank Act and implemented by the Commission. The mitigation of such risk inures to the benefit of the Requesting Parties, market participants, and the public, especially electric energy ratepayers.

The condition that only appropriate persons may enter the Covered Transactions benefits the public, and the excluded market participants themselves, by ensuring that only persons with resources sufficient to understand and manage the risks of the transactions are permitted to engage in the same. Further, the condition requiring that the Covered Transactions only be offered or sold pursuant to a FERC- or PUCT-approved Tariff benefits the public by, for example, ensuring that the Covered Transactions are subject to a regulatory regime that is focused on the physical provision of reliable electric energy, and also has credit requirements that are designed to achieve risk management goals congruent with the regulatory objectives of the Commission's DCO and SEF Core Principles. Absent these and other similar limitations on participant- and financial-eligibility, the integrity of the markets at issue could be compromised, and members and ratepayers left unprotected from potentially significant losses resulting from purely financial, speculative activity. Moreover, the Commission's requirement that the Requesting Parties file an opinion of counsel regarding the right of set off in bankruptcy provides a benefit in that the analytical process necessary to formulate such an opinion would highlight risks faced by the Requesting Parties, and permit them to adapt their structure and procedures in a manner best calculated to mitigate such risks, and thus helps ensure the orderly handling of financial affairs in the event a participant defaults as a result of the Covered Transactions. Further, ensuring that the Requesting Parties have enforceable rights of set off against any of its market participants in the event of a bankruptcy of a market participant also provides a benefit in reducing costs to the Requesting Party that arise from a bankruptcy proceeding.

The Commission's retention of its authority to redress any fraud or manipulation in connection with the Covered Transactions protects market participants and the public generally, as well as the financial markets for electric energy products. For example, the Final Order is conditioned upon the Commission's ability to obtain certain positional and transactional data within the Requesting Parties' possession from the Requesting Parties. Through this condition, the Commission expects that it will be able to continue discharging its regulatory duties under the CEA. Further, the condition that the Requesting Parties remove any Tariff provisions that would require a Requesting Party to notify members prior to providing the Commission with information will help maximize the effectiveness of the Commission's enforcement program.

8. Consideration of Alternatives

The chief alternatives to this Final Order relate to the scope of RTO and ISO market participants that are eligible for the exemption set forth therein, and the scope of Covered Transactions.

As discussed above in section IV.B.2.d.i., the Commission received several requests to include various subsets of market participants in the definition of ''appropriate person'' pursuant to 4(c)(3)(K) of the CEA for purposes of the exemption described in the Proposed Order, including requests to extend the exemption to (1) any persons who qualify under market participant standards set forth in FERC- or PUCT-approved Tariffs, (2) persons who actively participate in the generation, transmission, or distribution of electric energy, and (3) more specific requests to include particular market participants, such as CSPs, LSEs, and

[453] *See* section IV.A.3.b.ii. *supra.*

[454] *See* section IV.A.3.a.ii. *supra.*

[455] The Court in *Laffey v. Northwest Airlines, Inc.,* 572 F.Supp. 354, 371 (D.D.C. 1983) ruled that hourly rates for attorneys practicing civil law in the Washington, DC metropolitan area could be categorized by years in practice and adjusted yearly for inflation. For 2012 Laffey Matrix rates, *see http://www.justice.gov/usao/dc/divisions/civil_Laffey_Matrix_2003-2012.pdf.*

[456] There are possibilities of economies of scale if multiple Requesting Parties share the same counsel in preparing these memoranda or opinions.

REPs.[457] The exemption set forth in the Final Order includes those entities described in (2) and (3), but does not include other entities who are not ''appropriate persons'' as defined in sections 4(c)(3)(A) through (J) of the Act, are not ECPs, and are not in the business of (i) generating, transmitting, or distributing electric energy or (ii) providing electric energy services that are necessary to support the reliable operation of the transmission system.[458] For those excluded entities, the exemption in the Final Order would impose costs relative to a definition that would allow all current market participants to avail themselves of the exemption. These affected market participants are excluded because, in the Commission's opinion, they lack the minimum financial wherewithal and therefore pose a risk to themselves and the physical electric energy market.[459]

Regarding the scope of Covered Transactions, the Commission considered the costs and benefits of various alternatives posed by commenters, including whether to expand the definition of Covered Transactions to include future products that are the ''logical outgrowth'' of existing products.[460] The Commission declined this approach, in part, because of the concern that such an open-ended definition could present risks beyond those contemplated. At the same time, the Commission made clear that any new transactions that fall within the Covered Transactions, which are explicitly defined in the Final Order, and any modifications to existing transactions that do not alter the Covered Transactions' characteristics in a way that would cause them to fall outside those definitions, that are offered by a Requesting Party pursuant to a FERC- or PUCT-approved Tariff, are intended to be included within the exemption in the Final Order.[461] This provides a benefit in that no supplemental relief for such products would be required, which is a cost-mitigating efficiency gain for the Requesting Parties.

9. Consideration of CEA Section 15(a) Factors

a. Protection of Market Participants and the Public

As explained above, the Commission does not foresee that the Final Order will have any negative effect on the protection of market participants and the public. More specifically, the Covered Transactions, in light of the representations of the Petitioners and in the context of their regulation by FERC and PUCT, do not appear to generate significant risks of the nature of those addressed by the CEA. The Commission has attempted to delineate the definitional boundaries for the Covered Transactions in a manner that appropriately ring-fences against the possibility that they could generate such risks, either now or as they may evolve in the future. In addition, the Commission has limited the exemption set forth in the Final Order to persons with resources sufficient to understand and manage the risks of the Covered Transactions. This requirement serves to protect excluded market participants and it minimizes the risk of potential misuse of the exempt transactions.

b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission foresees little, if any, negative impact from the Final Order on the efficiency, competitiveness, and financial integrity of markets regulated under the CEA. Further, as an exercise of the Commission's CEA section 4(c) authority to provide legal certainty for novel instruments as Congress intended, the Final Order affords entities who partake of the exemption delineated therein transactional flexibility that the Commission understands to be valuable to their ability to efficiently deploy their limited resources.

c. Price Discovery

The Commission does not believe that the Final Order will materially impair price discovery in non-exempt markets subject to the Commission's jurisdiction. As discussed above, the Covered Transactions are used to manage unique electric industry operational risks, which appears to make them ill-suited for exchange trading and/or to serve a useful price discovery function.

d. Sound Risk Management Practices

The Commission believes that the Final Order will promote the ability of RTOs, ISOs, and their market participants to manage the operational risks posed by unique electric energy market characteristics, including the non-storable nature of electric energy and demand that can and frequently does fluctuate dramatically within a short time-span. As discussed above, the Commission understands that the Covered Transactions are an important tool facilitating the ability of the Requesting Parties to efficiently manage operational risk in fulfillment of their public service mission to provide affordable, reliable electric energy.

e. Other Public Interest Considerations

In exercising its sections 4(c)(1) and 4(c)(6)(C) exemptive authority in the Final Order, the Commission is acting to promote the broader public interest by facilitating the supply of affordable, reliable electric energy, as contemplated by Congress.[462]

VI. Order

Upon due consideration and consistent with the determinations set forth above, the Commission hereby issues the following Order:

Pursuant to its authority under section 4(c)(6) of the Commodity Exchange Act (''CEA'' or ''Act'') and in accordance with sections 4(c)(1) and (2) of the Act, the Commodity Futures Trading Commission (''Commission'')

1. Exempts, subject to the conditions and limitations specified herein, the execution of the electric energy-related agreements, contracts, and transactions that are specified in paragraph 2 of this Order and any person or class of persons offering, entering into, rendering advice, or rendering other services with respect thereto, from all provisions of the CEA, except, in each case, the Commission's general anti-fraud and anti-manipulation authority, and scienter-based prohibitions, under CEA sections 2(a)(1)(B), 4(d), 4b, 4c(b), 4*o,* 4s(h)(1)(A), 4s(h)(4)(A), 6(c), 6(d), 6(e), 6c, 6d, 8, 9, and 13 and any implementing regulations promulgated under these sections including, but not limited to, Commission regulations 23.410(a) and (b), 32.4, and part 180.

2. *Scope.* This exemption applies only to agreements, contracts, and transactions that satisfy each of the following requirements:

a. The agreement, contract, or transaction is for the purchase and sale of one of the following electric energy-related products:

(1) ''Financial Transmission Rights'' defined in paragraph 5(a) of this Order, except that the exemption shall only apply to such Financial Transmission Rights where:

(a) Each Financial Transmission Right is linked to, and the aggregate volume of Financial Transmission Rights for any period of time is limited by, the physical capability (after accounting for counterflow) of the electric energy transmission system operated by a Requesting Party, as defined in paragraph 5(h) of this Order, offering the contract, for such period;

[457] *See* section IV.B.2.d.i. *supra.*

[458] *See* paragraph 2(b) of the Order.

[459] *See* section IV.B.2.d.i. *supra.*

[460] *See* section IV.A.1.d. *supra.*

[461] *See id.*

[462] See related discussion in section I. *supra.*

(b) The Requesting Party serves as the market administrator for the market on which the Financial Transmission Rights are transacted;

(c) Each party to the transaction is a member of the Requesting Party (or is the Requesting Party itself) and the transaction is executed on a market administered by that Requesting Party; and

(d) The transaction does not require any party to make or take physical delivery of electric energy.

(2) ''Energy Transactions'' as defined in paragraph 5(b) of this Order.

(3) ''Forward Capacity Transactions,'' as defined in paragraph 5(c) of this Order.

(4) ''Reserve or Regulation Transactions'' as defined in paragraph 5(d) of this Order.

b. Each party to the agreement, contract or transaction is:

(1) an ''appropriate person,'' as defined sections 4(c)(3)(A) through (J) of the CEA;

(2) an ''eligible contract participant,'' as defined in section 1a(18)(A) of the CEA and in Commission regulation 1.3(m); or

(3) a ''person who actively participates in the generation, transmission, or distribution of electric energy,'' as defined in paragraph 5(g) of this Order.

c. The agreement, contract, or transaction is offered or sold pursuant to a Requesting Party's Tariff and that Tariff has been approved or permitted to take effect by:

(1) In the case of the Electricity Reliability Council of Texas (''ERCOT''), the Public Utility Commission of Texas (''PUCT''), or

(2) In the case of all other Requesting Parties, the Federal Energy Regulatory Commission (''FERC'').

3. *Applicability to particular regional transmission organizations (''RTOs'') and independent system operators (''ISOs).* Subject to the conditions contained in the Order, the Order applies to all Requesting Parties with respect to the transactions described in paragraph 2 of this Order.

4. *Conditions.* The exemption provided by this Order is expressly conditioned upon the following:

a. Information sharing:

(1) With respect to all Requesting Parties subject to the jurisdiction of FERC, information sharing arrangements between the Commission and FERC that are acceptable to the Commission continue to be in effect, and those Requesting Parties' compliance with the Commission's requests through FERC to share, on an as-needed basis and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within the Requesting Parties' possession for products in the Requesting Parties' markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data.

(2) With respect to ERCOT, the Commission's ability to request, and obtain, on an as-needed basis from ERCOT, concurrently with the provision of written notice to PUCT and in connection with an inquiry consistent with the CEA and Commission regulations, positional and transactional data within ERCOT's possession for products in ERCOT's markets that are related to markets that are subject to the Commission's jurisdiction, including any pertinent information concerning such data, and ERCOT's compliance with such requests by sharing the requested information.

b. Notification of requests for information: With respect to each Requesting Party, neither the Tariffs nor any other governing documents of the particular RTO or ISO pursuant to whose Tariff the agreement, contract or transaction is to be offered or sold, shall include any requirement that the RTO or ISO notify its members prior to providing information to the Commission in response to a subpoena or other request for information or documentation.

5. *Definitions.* The following definitions shall apply for purposes of this Order:

a. A ''Financial Transmission Right'' is a transaction, however named, that entitles one party to receive, and obligates another party to pay, an amount based solely on the difference between the price for electric energy, established on an electric energy market administered by a Requesting Party, at a specified source (*i.e.,* where electric energy is deemed injected into the grid of a Requesting Party) and a specified sink (*i.e.,* where electric energy is deemed withdrawn from the grid of a Requesting Party). The term ''Financial Transmission Rights'' includes Financial Transmission Rights and Financial Transmission Rights in the form of options (*i.e.,* where one party has only the obligation to pay, and the other party only the right to receive, an amount as described above).

b. ''Energy Transactions'' are transactions in a ''Day-Ahead Market'' or ''Real-Time Market,'' as those terms are defined in paragraphs 5(e) and 5(f) of this Order, for the purchase or sale of a specified quantity of electric energy at a specified location (including virtual and convergence bids and offers), where:

(1) The price of the electric energy is established at the time the transaction is executed;

(2) Performance occurs in the Real-Time Market by either

(a) Delivery or receipt of the specified electric energy, or

(b) A cash payment or receipt at the price established in the Day-Ahead Market or Real-Time Market (as permitted by each Requesting Party in its Tariff); and

(3) The aggregate cleared volume of both physical and cash-settled energy transactions for any period of time is limited by the physical capability of the electric energy transmission system operated by a Requesting Party for that period of time.

c. ''Forward Capacity Transactions'' are transactions in which a Requesting Party, for the benefit of load-serving entities, purchases any of the rights described in subparagraphs (1), (2), and (3) below. In each case, to be eligible for the exemption, the aggregate cleared volume of all such transactions for any period of time shall be limited to the physical capability of the electric energy transmission system operated by a Requesting Party for that period of time.

(1) ''Generation Capacity,'' meaning the right of a Requesting Party to:

(a) Require certain sellers to maintain the interconnection of electric generation facilities to specific physical locations in the electric-energy transmission system during a future period of time as specified in the Requesting Party's Tariff;

(b) Require such sellers to offer specified amounts of electric energy into the Day-Ahead or Real-Time Markets for electric energy transactions; and

(c) Require, subject to the terms and conditions of a Requesting Party's Tariff, such sellers to inject electric energy into the electric energy transmission system operated by the Requesting Party;

(2) ''Demand Response,'' meaning the right of a Requesting Party to require that certain sellers of such rights curtail consumption of electric energy from the electric energy transmission system operated by a Requesting Party during a future period of time as specified in the Requesting Party's Tariff; or

(3) ''Energy Efficiency,'' meaning the right of a Requesting Party to require specific performance of an action or actions that will reduce the need for Generation Capacity or Demand Response Capacity over the duration of a future period of time as specified in the Requesting Party's Tariff.

d. ''Reserve or Regulation Transactions'' are transactions:

(1) In which a Requesting Party, for the benefit of load-serving entities and resources, purchases, through auction, the right, during a period of time as specified in the Requesting Party's Tariff, to require the seller of such right to operate electric facilities in a physical state such that the facilities can increase or decrease the rate of injection or withdrawal of a specified quantity of electric energy into or from the electric energy transmission system operated by the Requesting Party with:

(a) physical performance by the seller's facilities within a response time interval specified in a Requesting Party's Tariff (Reserve Transaction); or

(b) prompt physical performance by the seller's facilities (Area Control Error Regulation Transaction);

(2) For which the seller receives, in consideration, one or more of the following:

(a) Payment at the price established in the Requesting Party's Day-Ahead or Real-Time Market, as those terms are defined in paragraphs 5(e) and 5(f) of this Order, price for electric energy applicable whenever the Requesting Party exercises its right that electric energy be delivered (including Demand Response,'' as defined in paragraph 5(c)(2) of this Order);

(b) Compensation for the opportunity cost of not supplying or consuming electric energy or other services during any period during which the Requesting Party requires that the seller not supply energy or other services;

(c) An upfront payment determined through the auction administered by the Requesting Party for this service;

(d) An additional amount indexed to the frequency, duration, or other attributes of physical performance as specified in the Requesting Party's Tariff; and

(3) In which the value, quantity, and specifications of such transactions for a Requesting Party for any period of time shall be limited to the physical capability of the electric energy transmission system operated by the Requesting Party for that period of time.

e. ''Day-Ahead Market'' means an electric energy market administered by a Requesting Party on which the price of electric energy at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods, none of which is later than the second operating day following the day on which the Day-Ahead Market clears.

f. ''Real-Time Market'' means an electric energy market administered by a Requesting Party on which the price of electric energy at a specified location is determined, in accordance with the Requesting Party's Tariff, for specified time periods within the same 24-hour period.

g. ''Person who actively participates in the generation, transmission, or distribution of electric energy'' means a person that is in the business of: (1) Generating, transmitting, or distributing electric energy or (2) providing electric energy services that are necessary to support the reliable operation of the transmission system.

h. ''Requesting Party'' means California Independent Service Operator Corporation (''CAISO''); ERCOT; ISO New England Inc. (''ISO NE''); Midwest Independent Transmission System Operator, Inc. (''MISO''); New York Independent System Operator, Inc. (''NYISO'') or PJM Interconnection, L.L.C. (''PJM''), or any successor in interest to any of the foregoing.

i. ''Tariff.'' Reference to a Requesting Party's ''Tariff'' includes a tariff, rate schedule or protocol.

j. ''Petition'' means the consolidated petition for an exemptive order under 4(c)(6) of the CEA filed by CAISO, ERCOT, ISO NE, MISO, NYISO, and PJM on February 7, 2012, as amended June 11, 2012.

6. *Effectiveness of the Exemption.*

a. For a Requesting Party subject to the jurisdiction of FERC, the exemption set forth in this Order is effective upon satisfaction of all of the following:

(1) Submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by that Requesting Party to satisfy the obligations contained in FERC regulation 35.47(d) will, in fact, provide the Requesting Party with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and

(2) Demonstration that the Requesting Party has fully complied with FERC regulation 35.47, as measured by FERC's acceptance and approval of all of the Requesting Party's submissions that are necessary to implement the requirements of FERC regulation 35.47.

b. For ERCOT, which is subject to the jurisdiction of PUCT, the exemption set forth in this Order is effective upon satisfaction of all of the following:

(1) Submission and acceptance of a legal opinion or memorandum of outside counsel that is satisfactory to the Commission, in the Commission's sole discretion, and that provides the Commission with assurance that the netting arrangements contained in the approach selected by ERCOT to satisfy standards that are the same as those contained in FERC regulation 35.47(d) will, in fact, provide the ERCOT with enforceable rights of set off against any of its market participants under title 11 of the United States Code in the event of the bankruptcy of the market participant; and

(2) Demonstration that ERCOT has fully complied with standards that are the same as those set forth in FERC regulation 35.47, as measured by PUCT permitting all of the necessary ERCOT protocol revisions to take effect; provided that the Commission will accept a demonstration that ERCOT has protocols in effect that substantially meet the settlement and billing period standards set forth in FERC regulation 35.47(b).

7. *Delegation of Authority.* The Commission hereby delegates, until such time as the Commission orders otherwise, to the Director of the Division of Clearing and Risk and to such members of the Division's staff acting under his or her direction as he or she may designate, in consultation with the General Counsel or such members of the General Counsel's staff acting under his or her direction as he or she may designate, the authority to accept or reject any legal memorandum or opinion that is required by sections 6(a)(1) and 6(b)(1) of this Order. Further, The Commission hereby delegates to the Director of the Division of Market Oversight and to such members of the Division's staff acting under his or her direction as he or she may designate, in consultation with the General Counsel or such members of the General Counsel's staff acting under his or her direction as he or she may designate, the authority to request information from Requesting Parties pursuant to sections 4(a)(1) and 4(a)(2) of this Order.

This Order is based upon the representations made in the consolidated petition for an exemptive order under 4(c) of the CEA filed by the Requesting Parties [463] and supporting

[463] In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by California Independent Service Operator Corporation; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by the Electric Reliability Council of Texas, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by ISO New England Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by Midwest Independent Transmission System Operator, Inc.; In the Matter of the Petition for an Exemptive Order Under Section 4(c) of the Commodity Exchange Act by New York Independent System Operator, Inc.; and In the Matter of the Petition for an Exemptive Order

materials provided to the Commission by the Requesting Parties and their counsel. Any material change or omission in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its finding that the exemption contained therein is appropriate and/or consistent with the public interest and purposes of the CEA. Further, the Commission reserves the right, in its discretion, to revisit any of the terms and conditions of the relief provided herein, including but not limited to, making a determination that certain entities and transactions described herein should be subject to the Commission's full jurisdiction, and to condition, suspend, terminate or otherwise modify or restrict the exemption granted in this Order, as appropriate, upon its own motion.

Issued in Washington, DC, on March 28, 2013, by the Commission.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

Appendices to Final Order in Response to a Petition From Certain Independent System Operators and Regional Transmission Organizations To Exempt Specified Transactions Authorized by a Tariff or Protocol Approved by the Federal Energy Regulatory Commission or the Public Utility Commission of Texas From Certain Provisions of the Commodity Exchange Act Pursuant to the Authority Provided in Section 4(c)(6) of the Act—Commission Voting Summary and Statement of the Chairman

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final order regarding specified electric energy-related transactions entered into on markets administered by regional transmission organizations (RTOs) or independent system operators (ISOs).

Congress authorized that these transactions be exempt from certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act as they are subject to extensive regulatory oversight by the Federal Energy Regulatory Commission (FERC) or, in one instance, the Public Utility Commission of Texas (PUCT).

This final order responds to a petition filed by a group of RTOs and ISOs and has benefitted from public input.

These entities were established for the purpose of providing affordable, reliable electric energy to consumers within their geographic region. In addition, these markets administered by RTOs and ISOs are central to FERC and PUCT's regulatory missions to oversee wholesale sales and transmission of electric energy.

The scope of the final order is carefully tailored to four categories of transactions—financial transmission rights; energy transactions; forward capacity transactions; and reserve or regulation transactions, which are offered or entered into a market administered by one of the requesting RTOs or ISOs. This exemption is conditioned on, among other things, each of these transactions being inextricably linked to the physical delivery of electric energy.

[FR Doc. 2013–07634 Filed 4–1–13; 8:45 am]

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Under Section 4(c) of the Commodity Exchange Act by PJM Interconnection, L.L.C. (Feb. 7, 2012, as amended June 11, 2012).

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Part IV

Department of Health and Human Services

Centers for Medicare & Medicaid Services
42 CFR Part 433
Medicaid Program; Increased Federal Medical Assistance Percentage Changes Under the Affordable Care Act of 2010; Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 433

[CMS–2327–FC]

RIN 0938–AR38

Medicaid Program; Increased Federal Medical Assistance Percentage Changes Under the Affordable Care Act of 2010

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule with request for comments.

SUMMARY: This final rule implements the provisions of the Patient Protection and Affordable Care Act of 2010 and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act) relating to the availability of increased Federal Medical Assistance Percentage (FMAP) rates for certain adult populations under states' Medicaid programs. This final rule implements and interprets the increased FMAP rates that will be applicable beginning January 1, 2014 and sets forth conditions for states to claim these increased FMAP rates.

DATES: *Effective Date:* These regulations are effective June 3, 2013.

Comment Date: To be assured of consideration, comments on § 433.10(c)(8), § 433.206(c)(4), § 433.206(d), § 433.206(e), § 433.206(f), and § 433.206(g) must be received at one of the addresses provided below, no later than 5 p.m. on June 3, 2013.

ADDRESSES: In commenting, please refer to file code CMS–2327–FC. Because of staff and resource limitations, we 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 on this regulation 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–2327–FC, P.O. Box 8016, Baltimore, MD 21244–8016.

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–2327–FC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* Alternatively, you may deliver (by hand or courier) your written comments ONLY to the following addresses prior to the close of the comment period:

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 CMS 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 telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments erroneously mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019.

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. We 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: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 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 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

We are providing additional opportunity for comment on the threshold methodology. In order to operationalize the methodology, the final rule contains significantly more detail about various aspects of the threshold methodology than originally included in the August 17, 2011 proposed rule. For example, the proposed rule included basic language regarding the treatment of disability status, resource (or asset) criteria, enrollment caps in states with section 1115 demonstrations, and spend-down eligibility provisions and we solicited public comments on how to account for these factors in assigning the appropriate FMAP. This increased detail in this final rule resulted in large part from our consideration of comments received from the public, including requests for additional clarity with respect to some of these matters. While we believe that this additional detail will assist states in implementing the threshold methodology, we recognize the complexity surrounding these issues. We are seeking additional comment on these provisions so that we can determine whether additional clarification would assist states to implement these aspects of the threshold methodology more effectively.

Although this final rule is effective 60 days from publication, the increased FMAPs authorized by the Affordable Care Act and codified here do not become effective until January 1, 2014. We are proceeding with the issuance of a final rule in light of the time constraints for states to implement system changes to implement the FMAP claiming methodology described in this rule. To the extent that any revisions to the final rule are warranted by new public comment, we will make necessary revisions well before the effective date.

In summary, while we are issuing these rules as final, we are providing the opportunity for further comment on parts of this rule to ensure transparency and allow for further clarifications that might be necessary. We are thus issuing certain provisions as final but are soliciting comments. These provisions

are specifically listed in the ''Comment Date'' section of this final rule.

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I. Executive Summary

This final rule implements sections 2001(a)(3)(B) and 10201(c) of the Patient Protection and Affordable Care Act (Pub. L. 111–148, enacted on March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152, enacted on March 30, 2010), and together referred to as the Affordable Care Act of 2010 (Affordable Care Act).

Specifically, this final rule implements the provisions of the Affordable Care Act related to the availability of increased FMAP rates under the Medicaid program with respect to the new adult eligibility group. The rule also describes a temporary general increase in FMAP rates for certain expansion states that meet required statutory criteria.

Although this rule is being issued in final, we remain interested in considering comments from the public on the following provisions:

§ 433.10(c)(8)—Expansion State FMAP
§ 433.206(c)(4)—Components of Threshold Methodology; Treatment of Disability
§ 433.206(d)—Optional Resource Criteria Proxy Adjustment
§ 433.206(e)—Enrollment Caps Adjustment
§ 433.206(f)—Application of Spend-down Income Eligibility Criteria
§ 433.206(g)—Special Circumstances

II. Background

In the August 17, 2011 **Federal Register** (76 FR 51148), we published a proposed rule entitled ''Medicaid Program; Eligibility Changes under the Affordable Care Act of 2010'' (Medicaid Eligibility proposed rule). After considering public comments, we finalized many provisions of the proposed rule in the March 23, 2012 **Federal Register** (77 FR 17144). That final rule, in conjunction with other proposed and final rules published by the Department of Health and Human Services implemented provisions of the Affordable Care Act that expand access to health coverage through improvements in Medicaid and the Children's Health Insurance Program (CHIP) and the establishment of the new Affordable Insurance Exchanges (also called Health Insurance Marketplaces). In addition, those rules simplified and streamlined the enrollment and renewal processes for Medicaid and CHIP and created alignment and coordination across insurance affordability programs.

This final rule addresses certain provisions that were included in the August 17, 2011 Medicaid Eligibility proposed rule but not included in the March 23, 2012 final rule. These provisions include implementation of statutory increases in the FMAP rates for state medical assistance expenditures relating to certain individuals described in the new adult eligibility group (new adult group) set forth at section 1902(a)(10)(A)(i)(VIII) of the Social Security Act (the Act), as amended by the Affordable Care Act, and a temporary general increase in FMAP rates in certain states that meet the definition of ''expansion states.''

In particular, amendments made by section 2001(a)(3) of the Affordable Care Act added section 1905(y) to the Act effective January 1, 2014 to provide for an increased FMAP rate for expenditures for medical assistance for individuals who are defined as ''newly eligible.'' The statutory definition of newly eligible individuals at section 1905(y)(2) of the Act requires that such individuals be: (1) described in the new adult eligibility group at section 1902(a)(10)(A)(i)(VIII) of the Act and not under age 19 or such higher age as the state may have elected; (2) not eligible for full benefits, benchmark coverage described in subparagraphs (A), (B) or (C) of section 1937(b)(1) or benchmark-equivalent coverage under section 1937(b)(2) under the provisions of the state plan or under a waiver of the plan as of December 1, 2009; or (3) eligible but not enrolled (or on a waiting list) for such benefits or coverage under a waiver under the plan that has capped or limited enrollment that is full. Therefore, not all individuals enrolled in the eligibility group described in section 1902(a)(10)(A)(i)(VIII) of the Act (and in our corresponding regulation at § 435.119) will be ''newly eligible'' for FMAP purposes. Note that the newly eligible FMAP is available only for the 50 states and the District of Columbia; the United States territories are not included in the scope of the newly eligible FMAP under section 1905(y)(1) of the Act, which provides that the increased FMAP is at 100 percent for calendar years (CYs 2014, 2015, and 2016) and gradually declines to 90 percent by 2020, where it remains permanently.

Furthermore, amendments made by section 10201(b) of the Affordable Care Act added section 1905(z) to the Act effective January 1, 2014 to provide for an increased FMAP for expenditures for childless nonpregnant individuals in the new adult eligibility group in a defined ''expansion state.'' The expansion state FMAP is initially lower than the newly eligible FMAP; however it increases to be the same as the newly eligible FMAP effective January 1, 2019. Section 1905(z) also provides for certain expansion states to receive a 2.2 percentage point increase in FMAP rates for the medical assistance expenditures of all individuals who are not considered newly eligible (under the definition at section 1905(y) as summarized above) during the period January 1, 2014 through December 31, 2015. The August 17, 2011 proposed rule included provisions to implement these increased FMAP rates, and set forth options for states to quantify expenditures that would qualify for the increased FMAP rate.

The August 17, 2011 proposed rule included three possible methodologies for states to use in documenting claims for the increased FMAP for medical assistance expenditures for newly eligible individuals. The purpose of these proposed methodologies was to ensure that states would not need to operate dual eligibility determination systems, one to determine Modified Adjusted Gross Income (MAGI)-based financial eligibility, and the other to determine the appropriate FMAP based on the pre-2014 eligibility rules. Each of these three methods was intended to capture the expenditures that would be claimed in accordance with the requirements of the statute. We also solicited comment on whether other methods would accomplish these goals.

In this issuance, we discuss our consideration of public comments on the FMAP calculation issues included in the August 17, 2011 proposed rule, and set forth final rules to define the increased FMAP rates and set out the threshold methodology which states will be required to use to document claims for the increased FMAP rates. As described in more detail below, the threshold methodology begins with a simplified method for determining the individuals who are and are not newly eligible, comparing their MAGI-based income (as calculated for purposes of eligibility determination) to the effective income thresholds for relevant eligibility categories in effect in December 2009, converted to a MAGI-based equivalent. It then describes, and in some cases, offers states options, regarding the treatment of other factors

that may be relevant for purposes of claiming the appropriate FMAP. To complete the transition to the MAGI-based methodology, CMS is also working with states to develop MAGI-based income eligibility standards for the applicable eligibility groups that are not less than the effective income levels that were used to determine Medicaid and CHIP income eligibility as of the enactment of the Affordable Care Act, and as of December 1, 2009 for Medicaid for FMAP determination purposes for the new adult eligibility group. The conversion of income eligibility standards to equivalent MAGI-based income eligibility standards should take into account income disregards that factor into the effective income eligibility standard.

III. Summary of Proposed Provisions and Analysis of and Responses to Public Comments

The following summarizes the FMAP-related provisions that were discussed in more detail in the Medicaid Eligibility proposed rule (76 FR 51172 through 51178):

- *Newly Eligible Increased FMAP § 433.10(c)(6).* Indicated the increased FMAP rates applicable for states' medical assistance expenditures in their Medicaid program for individuals in the new adult group who meet the definition of ''newly eligible'' individual for the period beginning January 1, 2014.
- *Temporary Increase to FMAP § 433.10(c)(7).* Indicated the conditions applicable for a state to be eligible for a 2.2 percentage point increase in its FMAP rates for the medical assistance expenditures of individuals who are not newly eligible during the period January 1, 2014 through December 31, 2015.
- *Increased Expansion State FMAP § 433.10(c)(8).* Indicated the conditions, requirements, rate calculation formula, and the applicable ''expansion state'' definition for states to be eligible for an increase in their FMAP rates for certain childless adults in the new adult group who do not meet the definition of newly eligible individual for the period beginning January 1, 2014.
- *Definition of Newly Eligible Individual § 433.204.* Indicated the definition of newly eligible individual for purposes of the availability of the newly eligible FMAP referenced in § 433.10(c)(6) for the medical assistance expenditures of such individuals.
- *Methodology § 433.206.* Described three possible approaches in § 433.208, § 433.210, or § 433.212 for states to use for purposes of claiming federal funding for the expenditures for individuals in the new adult eligibility group at the appropriate FMAPs. The rule proposed that a state could choose one of the three indicated alternative methods and indicated that in the final rule we might modify, narrow, or combine these approaches based on comments received and the results of a feasibility study.
- *Threshold Methodology § 433.208.* Described the ''threshold methodology'' under which there would be a determination of ''newly eligible'' and not ''newly eligible'' on an individual specific basis through the application of simplified eligibility criteria, including income eligibility standards for each eligibility group in effect in each state's December 1, 2009 Medicaid program, and as appropriate, proxies for disability and resources, if applicable to such eligibility groups.
- *Statistically Valid Sampling Methodology § 433.210.* Described an alternative methodology under which states would use sampling to extrapolate the amount of expenditures to be claimed at the applicable FMAPs for newly and not newly eligible individuals in the new adult group.
- *CMS Established FMAP Proportion § 433.212.* Described an alternative methodology under which states would develop appropriate applicable proportions based on reliable data sources; this would provide a basis for determining the amount of expenditures for the adult group to be claimed at the applicable FMAPs for newly and not newly eligible individuals.

Responses to General Comments

We received 813 comments from state Medicaid and CHIP agencies, policy and advocacy organizations, health care providers and associations, Tribes, Tribal organizations, and individual citizens regarding the August 17, 2011 eligibility proposed rule, including 87 comments on the FMAP provisions. In addition, to support the goal of transparency, we conducted a number of webinar and other consultation sessions with states and interested parties in which we presented the FMAP provisions of the proposed rule and participants were afforded an opportunity to ask questions and make comments. At these consultation sessions, the public was reminded to submit written comments before the close of the public comment period that was announced in the August 2011 Medicaid Eligibility proposed rule. In addition, we worked more intensively with 10 pilot states to discuss and test different elements of the proposed regulation, with a particular emphasis on income conversion and application of appropriate FMAP claiming methodologies. Because of the technical aspects of the FMAP provisions related to the new adult group, in addition to evaluating the comments received on the proposed rule, we performed additional research on this topic to better understand which approaches would maximize the accuracy of the increased FMAP and further the simplification goals of the Affordable Care Act. We have revised the proposed regulation to respond to public comments and reflect our final policies.

We received a number of comments concerning the proposed FMAP methodologies for newly eligible individuals and for the expansion state provisions. The majority of comments on the three methodologies described in the proposed rule supported the ''threshold methodology,'' described in section IV of this final rule, and did not support certain aspects of the other proposed methodologies. Consistent with these comments, as discussed below, this final rule adopts the threshold methodology as the methodology to be used to document claims for the increased FMAPs. Summaries of the public comments that are within the scope of the proposals and our responses to those comments follow; more detailed summaries of the key changes in the final regulation are also included in section IV of this final rule, ''Provisions of the Final Rule.'' Some of the comments received were outside the scope of the FMAP provisions contained in the Medicaid Eligibility proposed rule and, therefore, are not addressed in this final rule. In some instances, commenters raised policy or operational issues that will be addressed through regulatory and subregulatory guidance subsequent to this final rule.

A. Comments on General Issues

Some commenters addressed items of a general nature in their comments, as described below. Numerous commenters requested clarification about whether expenditures for certain categories of individuals will be matched at the increased newly eligible or expansion state FMAP. We reiterate in the preamble and in the provisions of this final rule that under the statute the increased newly eligible and expansion state FMAPs are only available to individuals enrolled in the new adult group described at § 435.119. Therefore, for example, former foster care children enrolled in the new group described in proposed regulation at § 435.150 (78 FR 4687) are not eligible for the newly eligible FMAP because they will not be enrolled under § 435.119. As our proposed regulation explains (78 FR

4604), we proposed that eligibility under the adult group at § 435.119 will not take precedence over coverage under the mandatory group of former foster care children. This position was in accordance with subclause (XVII) in the matter following subparagraph (G) of section 1902(a)(10) of the Act, as added by section 10201(a)(2) of the Affordable Care Act, which states that individuals eligible for both the former foster care group and the adult group should be enrolled in the former foster care group. Similarly, in general individuals who receive Supplemental Security Income benefits based on a determination of a disability would not be enrolled under § 435.119 and would not receive the newly eligible FMAP. Finally, individuals who could have been eligible for an optional Medicaid eligibility category of coverage as of December 1, 2009 may in some cases become eligible for the new adult group at § 435.119, effective January 1, 2014, but they will not be newly eligible (as defined in § 433.204(a)(1)). This is because they were previously eligible for full state plan benefits as of December 1, 2009. These and other scenarios are discussed in more detail below.

Comment: Many commenters endorsed the goal that CMS articulated in the August 17, 2011 proposed rule to avoid creating a shadow eligibility system that states would have to implement to determine who was and who was not newly eligible. Commenters opposed any methodology or system that would require applicants to provide information that is not necessary to determine their eligibility under the new Affordable Care Act eligibility criteria.

Response: As described in more detail below, the threshold methodology which we are adopting in the final rule is designed to provide for a simplified methodology for determining the appropriate FMAP that does not require states to maintain two sets of eligibility rules or to solicit information from applicants that is not necessary to determine eligibility.

Comment: One commenter noted that the proposed definition of ''newly eligible'' at § 433.204 only refers to individuals eligible under the new adult group, even though the Affordable Care Act expanded Medicaid eligibility from 100 percent of the Federal Poverty Level (FPL) to 133 percent of the FPL for children aged 6–18, making some children newly eligible for Medicaid in 2014. As such, the commenter suggested that the increased newly eligible FMAP also should be available to children who may not have been covered by Medicaid before January 1, 2014 (including children previously eligible under CHIP). Another commenter requested clarification with respect to the applicable FMAP for children between 100 and 133 percent FPL who were not eligible for Medicaid prior to 2014.

Response: The commenter is correct that the Affordable Care Act increased the minimum eligibility income standard for children in Medicaid, although in all states these children were already eligible for Medicaid or CHIP. The Affordable Care Act did not provide for the same increased FMAP for the expanded population of children since the newly eligible FMAP is available only for individuals enrolled in the new adult group (as codified at § 435.119), which does not include individuals eligible under mandatory coverage groups previously listed in the statute, including groups for children. For children, the Affordable Care Act revised section 1902(l)(2)(C) of the Act to extend Medicaid coverage of children aged 6–18 from 100 to 133 percent of the FPL, making them eligible for coverage under section 1902(a)(10)(A)(i)(VII) of the Act, a mandatory coverage group. However, states may be able to claim the enhanced FMAP available through CHIP under Title XXI of the Act for expenditures relating to children. The state will be able to claim the CHIP enhanced match, consistent with § 433.11, for children who would not have been covered under Medicaid before July 1, 1997 (including children covered by a separate CHIP before 2014 who will move to Medicaid) to the extent that the state has available CHIP allotment funding.

Comment: One commenter requested clarification as to whether the newly eligible FMAP would be available for childless adults who were eligible for Medicaid prior to 2014 based upon disability but in 2014 choose to apply for Medicaid under the new adult group.

Response: In general, individuals with disabilities who are eligible for Medicaid under a mandatory eligibility category based on receipt of Supplemental Security Income (SSI), are not within the definition of the new adult group, and should not be enrolled in that group. Some states may have covered individuals with disabilities under an optional Medicaid category as of December 1, 2009 but may choose to eliminate such categories after January 1, 2014. In these cases, individuals with disabilities who were enrolled in the optional eligibility group would retain Medicaid eligibility under the new adult group (assuming they met the eligibility standards for the new adult group), but expenditures for their coverage would not be subject to the newly eligible FMAP. Individuals who would have been eligible for full benefits, benchmark benefits, or benchmark equivalent benefits under Title XIX of the Act as of December 1, 2009 are not newly eligible under the definition in 1905(y)(2)(A) of the Act, which is codified in § 433.204(a)(1) (as revised in this final rule). CMS will be providing technical assistance to states to identify relevant disability groups for FMAP claiming purposes, based on states' optional disability categories in effect in 2009.

Comment: Several commenters raised issues related to American Indian and Alaska Native (AI/AN) populations enrolled in Medicaid. First, the commenters requested that the regulation explicitly state that all existing AI/AN specific protections continue to apply (such as for cost sharing). Second, the commenters suggested that the regulation explicitly indicate that services provided through an IHS facility are claimed at 100 percent FMAP, whether or not they are provided as part of an expansion.

Response: The final eligibility rule published on March 23, 2012 as well as a proposed rule published on January 22, 2013 both address beneficiary protections for AI/AN populations and, as they do not relate to FMAP specifically, are outside the scope of this regulation. We understand that the commenters are concerned about the continued availability of the 100 percent FMAP for services provided through an IHS facility for individuals eligible under the new adult eligibility group. We are currently reviewing this issue and intend to issue guidance on this at a later date.

B. Rates of FFP for Program Services (§ 433.10)

The August 17, 2011 proposed rule would have amended part 433 to add new provisions at § 433.10(c) to indicate the increases to the FMAPs available to states under the Affordable Care Act. We received numerous comments on these provisions and are revising the final rule to account for many of the comments.

1. *Newly Eligible FMAP (§ 433.10(c)(6))*

In § 433.10(c)(6), we proposed to add a new paragraph to indicate the increased FMAP rates available to states beginning January 1, 2014 for the medical assistance expenditures of individuals determined eligible under the new adult group who are considered

to be newly eligible as defined in section 1905(y)(2)(A) of the Act.

Comment: Several commenters noted, in their comments on § 433.10(c)(6), that the definition of ''newly eligible'' in proposed § 433.204 did not accurately reflect the language of the Act, omitting key elements of the statutory definition. They urged revisions to resolve ambiguity with respect to the application of the newly eligible FMAP described in § 433.10(c)(6).

Response: We agree with the commenters, as is described below under comments regarding § 433.204, and have made changes to the regulation text accordingly to ensure that the increased FMAP described at § 433.10(c)(6) can be applied properly. Please see the discussion below on the revised § 433.204.

Comment: One commenter noted a typographical error in § 433.10(c)(6)(ii), observing that a reference to § 422.206 should be to § 433.206 (choice of methodology).

Response: We acknowledge the typographical error. Because this final rule is not finalizing all proposed sections of new subpart E of § 433, § 433.206 now describes the threshold methodology and it remains the correct cross-reference.

2. Expansion State FMAP (§ 433.10(c)(7) and § 433.10(c)(8))

CMS proposed new regulatory text to indicate the availability of additional FMAP rates for states that expanded eligibility prior to enactment of the Affordable Care Act. CMS did not receive any comments about the temporary increased FMAP reflected in proposed § 433.10(c)(7), which describes a 2.2 percentage point increase available only to a state that meets very specific criteria established in section 1905(z)(1) of the Act. CMS received numerous comments regarding the definition and methodology to apply the expansion state FMAP set forth in § 433.10(c)(8), which seeks to codify section 1905(z)(2) of the Act. The expansion state FMAP is available for expansion states for the expenditures of certain nonpregnant childless adults who are determined eligible under the adult group, and who are not considered to be newly eligible, as defined in section 1905(y)(2)(A) of the Act. For this purpose, in this final rule, we define a nonpregnant, childless adult as an individual who is not determined eligible for Medicaid on the basis of pregnancy and who does not meet the definition of a parent caretaker relative in § 435.4.

Comment: Several commenters, in noting the aforementioned omissions of statutory language in the proposed newly eligible definition (described in more detail in the discussion of § 433.204, below), also suggest that the proposed definition of ''expansion state'' in § 433.10(c)(8)(iii) be revised to include a reference to enrollment caps and/or freezes.

Response: We are revising the proposed definition at § 433.204(a)(1) to reflect the statutory language regarding both the scope of benefits and enrollment caps and/or freezes. However, we do not agree with the commenters that the definition of expansion states needs to be revised to include similar language regarding enrollment caps. Such language is not included in the statutory definition of expansion states and we do not think it is necessary to revise the proposed definition. We have moved that definition, proposed in § 433.10(c)(8)(iii), to § 433.204(b) in this final rule, so that all definitions are grouped together for ease of reference.

Comment: Several comments urged CMS to strike the phrase ''who are nonpregnant childless adults for whom the state may require enrollment in benchmark coverage under section 1937 of the Act'' from proposed regulation text at § 433.10(c)(8)(i) and (iv). Several commenters noted that language in proposed § 433.10(c)(8)(iv) could be interpreted to permit the expansion state FMAP only in states that provide section 1937 benchmark benefits, and not for non-benchmark medical assistance expenditures. The commenters asserted that this interpretation would improperly limit the availability of the expansion state FMAP to a narrow subset of individuals not deemed newly eligible. They suggest striking the language to align with congressional intent to provide the expansion state FMAP to all individuals in the new adult group (§ 435.119) who are not determined to be newly eligible.

Response: To clarify the availability of the expansion state FMAP, we have restructured § 433.10(c)(8) of the final rule to explicitly reflect section 1905(z) of the Act, including the provisions related to benchmark coverage. With respect to the concern expressed by the commenters, section 1902(k)(1) of the Act provides that benchmark coverage, for individuals in the adult group who would otherwise be considered exempt from the limits on such coverage, is not defined by the requirements of section 1937 of the Act. States will provide state plan benefits or they can allow such individuals to voluntarily enroll in benchmark coverage, consistent with our rules. As a result, the provision in section 1905(z) of the Act relating to individuals for whom the state may require enrollment in benchmark coverage does not limit the availability of the expansion FMAP for the expenditures for such individuals.

C. Definitions (§ 433.204)

In the August 17, 2011 proposed rule, CMS proposed only one new FMAP-related definition, that of ''newly eligible.'' We proposed to define ''newly eligible'' to mean an ''individual eligible for Medicaid in accordance with the requirements of the new adult group and who would not have been eligible for Medicaid under the state's eligibility standards and methodologies for the Medicaid state plan, waiver or demonstration programs in effect in the state as of December 1, 2009.'' Numerous commenters suggested revisions to our proposed definition to more accurately reflect the statutory definition and to avoid improperly denying certain states the increased FMAP. In this final rule, we are revising the proposed definition and providing other related definitions in final § 433.204 as described below.

Comment: Numerous commenters noted correctly that the proposed ''newly eligible'' definition omitted statutory language included in section 1905(y)(2)(A) of the Act. Commenters recommended that the proposed regulatory definition of newly eligible at § 433.204 be revised to correct these omissions and follow the statutory definition found at 1905(y)(2)(A); in particular, they recommended two changes: (1) specify that a newly eligible individual could not have been eligible for full benefits, benchmark, or benchmark-equivalent coverage as of December 1, 2009; and (2) specify that if the state had a cap or limitation on enrollment through a section 1115 demonstration, those who could have been eligible but were not enrolled in coverage as a result of the cap should be considered as newly eligible.

Response: The final rule has been revised to include the statutory language that was omitted in the proposed rule. The definition of newly eligible at § 433.204(a)(1) now includes a reference to eligibility for full benefits, benchmark benefits, or benchmark equivalent benefits, as well as a reference to an individual who may have been ''eligible but not enrolled (or is on a waiting list) for such benefits or coverage through a waiver under the plan that has a capped or limited enrollment that is full.'' Additional information about applying the threshold methodology in states that had capped or limited enrollment is included in § 433.206(e), as revised. In addition, § 433.204(a)(2) now includes a

definition of ''full benefits'' (consistent with section 1905(y)(2)(B) of the Act) and clarifies that individuals who were eligible to receive ''full benefits'' (or benchmark or benchmark equivalent benefits) are not considered to be ''newly eligible.'' Thus, in the event that a state covered an optional Medicaid eligibility category as of December 1, 2009 but eliminates that category after January 1, 2014, individuals previously eligible for the optional category will be eligible for the new adult group described in § 435.119 of this chapter but will not be eligible to receive the newly eligible FMAP because they would previously have been eligible for full state plan benefits. These changes should ensure that the increased newly eligible FMAP is available as set forth in the Affordable Care Act.

Comment: One commenter suggested adding the phrase ''under the provisions of § 435.119'' to the definition of newly eligible proposed in § 433.204. The commenter suggested that this revision would clarify the reference in our proposed definition to the new adult group, as defined in § 435.119 in the March 23, 2012 final rule. Another commenter suggested that the definition should be revised to explicitly reference the age requirements of the new adult group.

Response: We have revised § 433.204(a)(1) to more accurately link the definition of newly eligible to the new adult group created by section 1902(a)(10)(A)(i)(VIII) of the Act and defined in § 435.119. Including this cross-reference also addresses the suggestion that we include age ranges in the definition of ''newly eligible'' since § 435.119 explicitly defines the new adult group as including individuals age 19 or older and under age 65.

Comment: One commenter suggested that CMS should clarify that individuals whose coverage is funded under a Title XXI demonstration project will be considered ''newly eligible'' for Medicaid in 2014. The commenter stated that the fact that a state's CHIP program operates through a Medicaid state plan or demonstration program does not convert CHIP to Medicaid and that, therefore, adults whose coverage is so funded must be considered newly eligible.

Response: Under section 1905(y)(2) of the Act, in general, if through the application of a state's Title XIX Medicaid state plan or demonstration as in effect on December 1, 2009 an individual would be considered eligible under Medicaid, the individual will not be considered to be a newly eligible individual. However, the commenter refers to a situation in which through a state plan or demonstration under Title XXI, certain adults were made eligible and funded under Title XXI as of December 1, 2009. If through the application of such demonstration(s) an individual would not be considered eligible under Title XIX as of December 1, 2009, such individual would be considered to be a newly eligible individual. CMS will work with states for which this may be an issue to address unique circumstances and application of the requirements of the state plans and demonstrations.

Comment: One commenter requested clarification about whether parents and caretaker relatives with income at or below 133 percent of the FPL who are eligible under the mandatory eligibility category for parents and other caretaker relatives at § 435.110 can qualify for the newly eligible FMAP if it is determined that they would not have been eligible as of December 1, 2009.

Response: The newly eligible FMAP described in § 433.10(c)(6) is only available for expenditures of individuals enrolled in the new adult group described in § 435.119 who meet the definition of newly eligible codified in § 433.204(a)(1). Under the related statute at section 1902(a)(10)(A)(i)(VIII) of the Act, and the regulation at § 435.119, individuals such as parents and caretaker relatives who are eligible under § 435.110 are precluded from eligibility under the new adult group.

If effective January 1, 2014 the state lowers the eligibility income standards used to determine eligibility for the parent and caretaker relative group below the levels in effect on December 1, 2009 for that group, resulting in certain individuals who would have been eligible for the group as of December 1, 2009, having income greater than the revised standard, such individuals may become eligible under the new adult group and some could potentially be newly eligible. For example, if the state's eligibility category for parent/caretaker relatives had a resource test in December 2009, and such individuals would have failed that test, the state could factor such individuals into its claim for newly eligible FMAP in accordance with § 433.206(d).

In addition, if the state had raised its income standard for its mandatory eligibility category for parents and other caretaker relatives after December 2009, the individuals now covered in the new adult group whose incomes are above the December 2009 standards would be newly eligible.

D. FMAP Methodology (§ 433.206 through § 433.212)

The August 17, 2011 proposed rule (76 FR 51148) provided for three possible methodologies that could potentially be available to states to claim expenditures at the appropriate FMAP for individuals determined eligible in the new adult group. As proposed, § 433.206 set out principles for these methodologies; enumerated the methodologies described in more detail in proposed § 433.208, § 433.210, and § 433.212; proposed to permit states to select any of these methodologies; and set out a process for states to make their initial and subsequent selections of methodology. The proposed rule indicated the possibility that these three approaches could be modified, narrowed, or combined based on comments received and the results of a feasibility study, including site visits to, and discussions with, 10 pilot states. We requested comment on the methodologies themselves, whether other options should be considered, and whether states should be able to choose from such alternatives or different methods, or whether a single method should be used by all states. We received numerous comments on these issues. After assessment of the comments received, we are continuing to apply the following principles as expressed in the proposed rule:

- Any methodology must provide as accurate and valid application of the applicable FMAPs to actual expenditures as possible in the determination of the appropriate amounts of federal payments for such expenditures. The methodology must not include a systemic bias in favor of either the states or the federal government.
- Any allowable methodology should minimize administrative burdens and costs to states, the federal government, individuals, and the health care system.
- Any methodology must be developed and applied transparently by both the federal government and states.
- Any methodology must take into consideration the practical, programmatic and operational goals of the Medicaid program.
- To ensure that the states claim expenditures at the correct FMAP, any methodologies should include sufficient data to identify, associate and reconcile expenditures with the related eligibility group to which the FMAPs apply. The increased newly eligible and expansion state FMAPs are only available for individuals enrolled under § 435.119 of this chapter.

On the basis of the comments received and the analysis of the feasibility of each of the alternatives, including input from pilot states and analyses of pilot states' information, we believe that the threshold methodology best addresses these principles and is the method identified in this final rule as the one that shall be used by states for purposes of claiming expenditures at the appropriate FMAP for individuals determined eligible in the new adult group.

As described briefly above and in more detail in section IV of this rule, in general, under the threshold methodology, states will compare income levels of individuals eligible for the new adult group to equivalent December 2009 standards to determine if that individual could have qualified for Medicaid under the State's December 2009 income standards. More specifically, the threshold methodology proposed using MAGI-converted income thresholds (as described in CMS' December 28, 2012 letter to State Medicaid Directors and Health Officials (SHO #12–003, available at: *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO12003.pdf*)) across categorical eligibility groups, taking into account the December 2009 eligibility standards under state plans, waivers or demonstrations and applicable disregards and adjustments, to approximate, in the aggregate, the December 2009 standards for each such group. After individuals are determined eligible for the new adult group described in § 435.119 of this chapter, their current income will be compared to these eligibility group or demonstration MAGI-converted standards to determine if such individual could have been income eligible, as of December 1, 2009, for an eligibility group for which they would have otherwise been eligible (for example, mandatory coverage for parents and caretaker relatives, or an optional eligibility category).

Since we are finalizing only one methodology, some of the provisions of the proposed § 433.206 are inapplicable. Below is a summary of the public comments that we received with respect to proposed § 433.206 through § 433.212. The discussion begins with the general comments about the choice of methodology, focusing on the threshold methodology since that is the methodology being finalized and is relevant to our responses to other comments discussed throughout this section.

1. General Comments on Choice of Methodology (§ 433.206)

Comment: Some commenters supported the flexibility offered by the three proposed approaches in the proposed § 433.208, § 433.210, and § 433.212, and, noting that Medicaid programs vary from state to state, urged CMS not to implement only one approach. Other commenters suggested that states should have the flexibility to propose an alternative methodology and that each state should be allowed to establish its best and least biased methodology for application of the appropriate FMAP rates, in collaboration with CMS. Other commenters instead urged CMS to finalize one approach so that a single, consistent approach will be used to determine which adult enrollees qualify as newly eligible. Commenters noted that applying a single methodology would also help ensure that audits and other program integrity activities could assess whether payments were determined accurately.

Response: We have determined that it is more administratively feasible and consistent with the guiding principles to adopt a uniform methodology for applying the applicable FMAP. Although some commenters supported flexibility in concept, the overall position favored in the comments and other analyses and input from states supported the use of the threshold methodology. An essential characteristic of the threshold methodology is that, in general, it allows states to determine the appropriate FMAP on an individual-specific basis. In that regard, the threshold methodology most directly addresses the explicit statutory definition of newly eligible individual and allows for the most accurate application of FMAP as it relies on actual data related to the individual. For example, the FMAP for expenditures for an individual determined during the eligibility process to be a parent or caretaker relative will be assessed relative to the MAGI-converted income level in effect in 2009 for parents and caretaker relatives. We note flexibilities given to states in establishing the threshold under both the MAGI conversion process under § 435.603 and the options given to states in this final rule. As we discuss below, we have modified our proposed threshold methodology to include certain population-based adjustments to reflect factors such as resource limits or enrollment caps in effect on December 1, 2009.

Comment: Numerous commenters wrote to support the threshold methodology. One commenter stated that the threshold methodology could be the most accurate and efficient of the options provided in the proposed rule. The commenter noted that for states that can create clear upper thresholds and proxies for non-income related criteria, the newly eligible adult population could be categorized for the proper FMAP under this methodology.

Response: Based on comments, consultation with states, and other analyses, we agree that the threshold methodology, modified to clarify adjustments to increase accuracy, is the most accurate and efficient method and least burdensome for states to implement. Therefore, we are finalizing the threshold methodology in a revised § 433.206. That methodology begins with a simplified method for determining the individuals who are and are not newly eligible based on MAGI-based income (as already determined for purposes of establishing eligibility under § 435.119) and then offers states options for how they will address other factors. In this final rule, as part of the threshold methodology we include alternatives for states to address criteria that are not directly related to income but that may have an impact on the validity of the threshold results, such as criteria related to resources and section 1115 demonstration enrollment caps that will permit a simplified application of the methodology. We will work with states to facilitate their proper application of the methodology.

Comment: One commenter suggested that, when finalizing a methodology to determine FMAP, CMS consider the potential for each of the alternatives to impose additional burdens on beneficiaries, Medicaid health plans, and states in determining whether these or other alternatives should be included in the final rule.

Response: Our choice to finalize the threshold methodology reflects our assessment, consistent with the comments received, that it is the least burdensome of the proposed options for both states and beneficiaries, for the reasons described throughout this section and in section IV of this rule, which provides more details about the provisions of the final rule.

Comment: One commenter criticized all of the proposed methodologies, noting that the proposed regulations contemplate an apparent estimation of the population and associated expenditures in perpetuity. The commenter suggested that at some point both CMS and states need to move away from using estimates in the FMAP methodologies. The commenter suggested that CMS convene a group of

state stakeholders to develop best practices on this issue.

Response: The threshold methodology is not based on estimates but is instead based on individualized comparisons to December 1, 2009 eligibility standards. Therefore, it best addresses the goals of accuracy and simplicity. We are adopting the threshold methodology in this final rule because it provides a simplified yet largely individualized way to apply the appropriate FMAP to expenditures for those enrolled in the new adult group. While the final threshold methodology includes population-based adjustments that are not the result of individualized determinations, those adjustments are to increase the accuracy of the result.

Comment: One commenter raised concerns about one of the principles that CMS articulated as the basis for any methodology to be used to assign FMAP. The commenter finds the fifth principle, ''sufficient data to identify, associate and reconcile expenditures with the related eligibility group to which the FMAPs apply,'' to be potentially problematic. Instead of retrospective reconciliation of expenditures, the commenter urged that states will need to be held harmless in any reconciliation if subsequently determined FMAP discrepancies are within a reasonable range.

Response: We understand the commenter's concern about financial stability and predictability and we have determined that the threshold methodology will provide states with the most certainty in part because it will generally not require retroactive reconciliations. Moreover, we believe the threshold methodology will best serve the interests of beneficiaries by avoiding dual eligibility rules and the unnecessary questions and procedures that dual rules would entail.

Comment: One commenter expressed concern that states will attempt to shift costs to the federal government by reducing or eliminating optional Medicaid groups. The commenter stated that the three proposed methodologies would not prevent such cost-shifting because there are too many subjective aspects of pre-Affordable Care Act eligibility determinations (including disability determinations) to expect that the proposed methods would result in unbiased identification of the newly eligible. Instead, the commenter suggested that HHS should define a population-based method that compares pre-Affordable Care Act Medicaid take-up rates with post-Affordable Care Act Medicaid take-up rates (excluding the Affordable Care Act adult group).

Response: A key goal of the Affordable Care Act is to simplify eligibility for Medicaid and collapsing various Medicaid coverage categories helps achieve that goal. As described above, the newly eligible FMAP is only available for expenditures for individuals who would not have been eligible for full benefits, benchmark benefits, or benchmark-equivalent benefits (as further described in § 433.204(a)) in either a mandatory or optional Medicaid eligibility category as of December 1, 2009 (or were unable to enroll in such coverage through a demonstration that had capped or limited enrollment that was full). Therefore, we do not share the commenter's concern that this method promotes cost-shifting. As described in more detail in section IV of this final rule, we believe that the threshold methodology will appropriately identify individuals and expenditures that are and are not subject to the newly eligible FMAP.

Comment: As an alternative to the approaches described in the proposed regulation, one commenter asked whether states could use a single ''blended FMAP'' rate across the entire population, similar to the method proposed under § 433.212. Noting the implementation obstacles associated with the three proposed methodologies, the commenter suggested mitigating the associated burdens by permitting a blended FMAP combined with annual floors on any downward adjustments to state rates, and 15 months advance notice of annual changes to the model.

Response: We considered the blended FMAP, and related methodologies, but concluded that the threshold methodology is preferable for the reasons described throughout this preamble.

Comment: One commenter suggested that CMS should allow states to determine their own methodologies and procedures for tracking FMAP for the new adult population, noting that some states already have the capacity to do so.

Response: We believe it is important, and in the interest of efficient administration of the Medicaid program, to promote consistency in FMAP determinations. Therefore, we are finalizing an approach that will minimize the administrative burden on states while also ensuring accuracy and consistency across the country, and permit CMS oversight and review. We note flexibilities given to states in establishing the threshold under both the MAGI conversion process under § 435.603 and the options given to states in this final rule as described below for resources and enrollment caps, for example. As we explain in our December 28, 2012 letter to State Medicaid Directors and Health Officials (SHO #12–003, available at: *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO12003.pdf*) regarding MAGI conversion, states will have flexibility with respect to the methodology they choose to adopt for income conversions.

Comment: A number of identical comments were submitted to urge CMS to adopt, for all states, a hybrid methodology based on the threshold and proportion methods. These commenters suggested that in the initial years of the availability of the increased newly eligible FMAP (CYs 2014–2016), the threshold methodology be used to determine which individuals are newly or not newly eligible. For 2017 and years thereafter, they suggested that the federal government would coordinate a proportion method using data from previous years related to each state's unique experience. The first 3 years' experience would represent and provide ''benchmark'' data for the future and would give states time to develop the administrative structure necessary for implementation. The commenters also suggested that HHS should establish approval criteria including estimated accuracy of the method and limits burdens on enrollees.

Response: To provide for a consistent approach nationally, we are adopting the proposed threshold methodology under which states have certain options that help ensure that it reflects and claims expenditures at the appropriate FMAP. Using the elections available under these options, states will have the ability to amend their threshold methodology to further refine the methodology. As described under the provisions of the regulation, states will need to submit state plan amendments to make such elections.

2. Threshold Methodology (§ 433.208, redesignated § 433.206)

Proposed § 433.208, which is being redesignated as § 433.206 in this final rule, described the first of three proposed approaches to identify newly eligible individuals for purposes of applying the correct enhanced FMAP rate. We sought comment on the methodology as proposed and on the use of proxies of eligibility criteria in place prior to CY 2014 that are not related to income, such as disability status and resource value.

a. Comments Related to Dual Eligibility Systems, Burdens on States and Applicants, and Streamlined Eligibility Procedures

In the proposed rule, CMS articulated several principles that would drive our selection of a methodology (or methodologies) to accurately reflect the appropriate FMAP. One principle was to minimize the administrative burdens and costs to states, the federal government, individuals, and the health care system. We also noted that requiring states to run two distinct eligibility systems—one for purposes of eligibility using new MAGI methodologies and one that would exactly retain all of the eligibility requirements of states' Medicaid programs as in effect on December 1, 2009 for purposes of determining which individuals are newly and not newly eligible—would pose challenges and create unnecessary burdens, inefficiencies, and administrative costs to applicants, states, and the federal government. Because retaining and applying two different sets of eligibility rules is burdensome and costly to states and the federal government, a barrier to enrollment for eligible individuals and families, and would likely lead to inaccurate determinations, we identified possible alternative approaches for determining the appropriate FMAP rate. We proposed not to permit FFP for the costs of maintaining dual eligibility systems for the adult group and instead proposed methodologies to enable states to determine FMAP without needing to run dual eligibility systems. We remain committed to that principle in this final rule, which establishes the threshold methodology as a simplified approach to apply the eligibility criteria effective on December 1, 2009.

Comment: Numerous commenters wrote in support of the principle articulated in the proposed rule that eschewed requiring states to evaluate every applicant under both the pre-and post-Affordable Care Act eligibility criteria for purposes of both identifying individuals as newly eligible and assigning FMAP accordingly. Some commenters, however, expressed concern that the threshold methodology, as proposed in § 433.208, would require dual eligibility screening for every applicant. They therefore recommended that states not be required to evaluate every applicant under both the old and new eligibility rules, nor be permitted to require every applicant to submit information not required to determine the eligibility of the applicant under the new adult category solely for the purpose of determining the appropriate FMAP for that individual. Commenters expressed concern that questions or requests for an individual to provide information related to FMAP that are not needed for the basic eligibility determination would be a burden for the applicant and the case worker and, as such could potentially be a disincentive for the individual in applying for Medicaid. To the extent that CMS permits such actions, however, commenters recommend that CMS require states first to make every effort to gather all supplemental information through electronic data matching or other processes that require no additional input from the applicant. This would require applicants to provide as little information as possible.

Response: We appreciate the support for the principle that dual eligibility systems are neither fair nor efficient. This rule finalizes the threshold methodology to enable states to apply a methodology for purposes of the FMAP application that does not require the application of December 2009 eligibility rules. Rather, the threshold methodology provides for a method for applying the FMAP provisions based on the characteristics associated with each individual that will be determined during the newly designed eligibility process, such as whether an individual is a parent or caretaker relative or a childless adult, and the associated relevant eligibility group. The threshold methodology can be applied by employing the new MAGI-based income rules, rather than the old December 2009 income rules, and comparing MAGI-based income to the converted MAGI eligibility standards. Finally, note that the final rule includes, at § 433.206(b)(1), language (originally proposed at § 433.206(d)) that specifies that the threshold methodology must not impact the timing or approval of an individual's eligibility for Medicaid.

Comment: Numerous commenters urged CMS not to require applicants to submit additional information, beyond what would be required for eligibility determinations, solely for the purpose of FMAP determinations. Commenters noted that this point applied regardless of which method is adopted; one commenter noted that any proposed methodology that asks additional questions of applicants works against the expressed goal of simplification and is not preferable. Other commenters wrote that any additional questions regarding FMAP should not unduly burden applicants. Some commenters urged CMS to require states to inform applicants that failing to answer any such additional questions will not impact eligibility. Other commenters suggested that the threshold methodology regulation text should be revised to explicitly require states first to gather all necessary supplemental information through electronic data matching (as required by § 435.949), or other processes that require no additional information from the applicant. Other commenters recommended adding explicit language to the regulation directing states that they may not ''include a request for information from an individual unless such request is essential to determining that individual's current eligibility.'' Other commenters suggested that the proposed regulation be revised to require CMS to establish standards for additional application questions and approve any additional questions asked during the application process for the purpose of the newly eligible determination.

Response: We remain committed to creating the least burdensome system—for applicants and states—to determine the appropriate FMAP. The threshold methodology generally will not require any supplemental information from applicants, beyond the information that will already be collected for purposes of the eligibility determination. For example, certain information, such as that related to income and categorical eligibility status, may be needed for both eligibility and FMAP determinations both to properly determine eligibility for the new adult group and to assign the applicable FMAP once the individual is determined eligible for the group. As noted above, in the final rule we retained language at § 433.206(b)(1) that was originally included at proposed § 433.206(d), which specifies that the threshold methodology must not impact the timing or approval of an individual's eligibility for Medicaid. We do not think any additional revisions are necessary to § 433.206 because these principles are already reflected in the March 23, 2012 eligibility rule.

As described below, this rule provides states with the option to develop one-time sampling data to help determine the proportion of individuals enrolled under the new adult group who would qualify as newly eligible because they would have been found ineligible for Medicaid in 2009 due to excess resources. To the extent that states take advantage of a time-limited opportunity (described below) to gather sampling data to develop an accurate resource proxy, those questions will not be permissible as part of the application, cannot affect the application, and cannot delay determinations of eligibility. Effective January 1, 2014,

when resources are no longer a relevant eligibility criterion for many categories of eligibility, only a post-eligibility sample (which would be for a period ending no later than December 31, 2014 with respect to states' new adult eligibility groups that are effective on January 1, 2014) would be permissible. States taking this option must notify beneficiaries that a nonresponse would not impact their continuing eligibility.

Comment: Related to concerns that the methodology for claiming FMAP not unduly burden applicants, several commenters suggested that CMS revise the FMAP methodology regulation text to capture the intent that applicants would not be asked to provide additional information for purposes of assigning FMAP. Commenters recommended that the regulations describing the selected FMAP methodology cross-reference those at § 435.907(c), which set out the standards for a streamlined eligibility application. Several commenters suggested strengthening proposed § 433.206(d) by reinforcing the requirements to not unduly burden applicants with a cross-reference to § 435.907 (and to rely on data matching as required by § 435.949).

Response: The final March 23, 2012 eligibility rule contained various provisions regarding a single streamlined application and data matching. We affirm those provisions and the principles they embody.

b. Comments Related to Application of and Refinements to the Threshold Methodology

Comment: Several commenters wrote to support the proposal in § 433.208(c)(2) that determinations under this Part remain in effect for the entire 12-month eligibility period.

Response: Both the proposed rule and the final rule now at § 433.206(c)(7) indicate that for an individual who is eligible under the new adult group, the individual's status as newly or not newly eligible continues to apply until a new determination of MAGI-based income has been made in accordance with § 435.916; in general, this could occur at the next scheduled periodic redetermination, or it could occur at other times related to the availability of other information, for example, as discussed in the provisions related to disability status. Additionally, § 433.206(c)(7) also indicates that changes to an individual's eligibility group would require changes in the status for FMAP purposes. This approach will generally avoid any need to reassign FMAP should an individual's income change within the year.

Comment: Several commenters suggested that the regulation should be explicit in using MAGI-equivalent standards under the threshold methodology. They note that the preamble to the proposed rule suggests this as an option but that the proposed regulatory language does not. They further note that the MAGI-equivalent standards will appropriately take into account disregards and deductions that states use in determining Medicaid eligibility currently, and could therefore be used to implement the threshold methodology.

Response: We agree with the commenters that the converted MAGI-based thresholds will serve as the basis for the threshold methodology. Individuals in the new adult group with MAGI income that is above the relevant converted MAGI-based threshold standard that is determined to apply as of December 1, 2009 would be considered as newly eligible. We do not think it is necessary to further clarify the regulation text now included at § 433.206.

Comment: One commenter notes that the threshold methodology requires that many income standards would have to be applied to each eligibility category that was in effect on December 1, 2009 for purposes of determining the availability of the newly eligible FMAP rate. Therefore, the commenter asks whether the upper income standard is a blended rate or will the state be required to maintain many classes of newly eligible categories.

Response: The commenter is observing that the threshold methodology will require states to compare the income of individuals found eligible for the new adult group to the converted MAGI income levels for relevant eligibility groups for which the individual could have been eligible as of December 1, 2009. CMS has worked and continues to work extensively with states to establish converted MAGI income thresholds. We published a letter to State Medicaid Directors and Health Officials on December 28, 2012 (SHO #12–003, available at *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO12003.pdf*) to provide guidance about the conversion of net income standards to MAGI equivalent income standards. As described in this regulation, in addition to income conversion required for eligibility for certain eligibility groups, these converted standards will be used as a reference point for the income eligibility levels that were applicable for eligibility groups in effect as of December 1, 2009 explicitly for the purposes of the FMAP determination. The converted standards will be applied, by eligibility group, to make FMAP determinations.

Comment: One commenter wrote to request clarification as to whether eligibility under the threshold methodology is based on the current income and household size composition, regardless of changes since December 1, 2009.

Response: Under the statute, for purposes of determining the availability of the appropriate FMAP for the expenditures of newly and not newly eligible individuals, the issue is whether the individual who is found to be eligible for the new adult group would have been eligible for full benefits, benchmark benefits, or benchmark equivalent benefits under the state's eligibility standards as of December 1, 2009. Therefore, under the threshold methodology the individual's current (that is, post-December 31, 2013) MAGI-based income would be compared to the state's applicable converted December 1, 2009 MAGI-based eligibility standards. An individual's income and household composition from December 2009 is not relevant for FMAP determinations.

Comment: In setting income thresholds for 2009, one commenter urged CMS to adjust the 2009 levels to adjust for cost of living increases, inflation, and other factors.

Response: We are currently working with states to convert December 1, 2009 income standards to the applicable MAGI-based income standards and these converted income standards will be used to determine whether individuals in the adult group qualify as newly eligible. Under the threshold methodology those MAGI-based income standards, as applicable for the relevant eligibility groups in effect in 2009 when expressed as a percentage of the FPL, will be adjusted annually as the FPL adjusts annually for inflation. Income eligibility standards in effect on December 1, 2009 that were expressed as fixed dollar amounts will continue to be expressed in fixed dollar amounts after being converted.

Comment: One commenter suggested that the final regulation should strike the proposed paragraph § 433.208(b)(2)(i), which permits states to claim the enhanced federal matching funds based on ''self-declaration'' from an applicant.

Response: As proposed, § 433.208(b) included a number of criteria to establish thresholds. As a result of public comments and our additional research to better understand which approaches will ensure an accurate

method for assigning the FMAP and further the simplification goals of the Affordable Care Act, we significantly revised the original § 433.208(b)(2), now redesignated as § 433.206(b), ''General Principles,'' to revise several of the criteria included in the proposed rule. The final rule affirms that FMAP determinations will rely on information derived from the regular eligibility determination process, consistent with regulations finalized in our March 2012 final rule; in that regard, we struck the language regarding the reliance on self-declaration data in this regulation.

c. Application of Disability Criteria

In the proposed rule (76 FR 51148, 51175), we indicated we were considering using either a disability proxy methodology or using only actual disability determinations under the threshold methodology to determine if an individual may have been eligible under the state's December 1, 2009 standards based on disability. The disability status of an individual may be relevant in two ways. First, a disabled individual may be eligible under section 1902(a)(10)(A)(i)(II) of the Act for Medicaid based on receipt of supplemental security income (SSI) or such more stringent standards that a state may have under the election at section 1902(f) of the Act (the ''209(b)'' option), in which case the individual would not be eligible under the new adult group and should be excluded from the universe to which the threshold methodology applies. Second, a disabled individual may have been eligible in an optional eligibility category in effect under a state's December 1, 2009 Medicaid program at higher income levels than adults without disabilities, which would mean that they would not be considered newly eligible.

We received numerous comments in response to our request for feedback on this issue. In general, commenters encouraged CMS to avoid asking applicants additional questions and urged CMS to clarify expectations in the regulation. Based on comments received, we are not finalizing a disability proxy. Rather, only an actual disability determination will be used for purposes of determining whether an individual enrolled in the new adult group will be newly eligible. This approach is described in more detail in section IV and is reflected in § 433.206(c)(4).

Comment: One commenter suggested that the initial question for disability should be whether an individual has actually been determined to be disabled. The commenter asserted that the other proxies suggested in the proposed rule will disadvantage the state by counting as ''disabled'' individuals who never would have qualified for Medicaid but for the new adult eligibility group. Another commenter affirmed the reasonableness of using actual disability determinations to ascertain the appropriate FMAP. Numerous commenters suggested that the regulations should indicate that no additional information should be required from individuals with respect to disability status for purposes of an FMAP determination. Rather, they suggested that the state could draw from existing data. Other commenters specifically asked whether individuals would be permitted to opt not to answer such questions.

Response: We are finalizing this rule to specify that for purposes of applying the appropriate FMAP under the threshold methodology, as well as for determining whether an individual could be considered eligible under another eligibility category for which disability is a criteria, only an actual disability determination will be used to establish whether an individual is disabled. For individuals actually determined disabled, the state would need to apply the status for such individuals for any December 1, 2009 eligibility category for which such status is applicable for purposes of determining if the individual is newly eligible; under the threshold methodology, the state would also need to apply the income test specific for such disability related eligibility categories. If the individual's income exceeds such December 1, 2009 income eligibility level for the applicable eligibility category, the individual would be considered newly eligible with respect to such eligibility category. The revised approach is described in more detail in section IV of this rule and in regulation text at § 433.206(c)(4).

d. Population Adjustments to the Threshold Methodology; Application of Resource Criteria and Section 1115 Demonstration Enrollment Caps

In general, the threshold methodology is designed to properly assign the applicable FMAP to the expenditures of individuals eligible in the new adult group under § 435.119. The threshold methodology provides for states to use the applicable state plan or demonstration eligibility income standard converted to a MAGI-equivalent for each eligibility group as in effect in the state on December 1, 2009 to determine whether an individual is considered to be newly eligible for purposes of assigning a federal matching rate. Although the threshold methodology is individualized, we are finalizing this rule to include certain population-based adjustments, or proxies, to account for resource standards and, as applicable, enrollment caps or limits.

In the proposed eligibility rule, we proposed several ways in which the threshold methodology could account for a resource (or asset) test that was applied to the applicants' coverage category as of December 2009, since resources will no longer be part of the eligibility determination for populations whose income will be determined using MAGI rules. We solicited comments on these various alternatives, as well as on the feasibility of using the Asset Verification System (AVS) as a tool to obtain resource information, as necessary. We received a variety of comments on these varied approaches.

Comment: Several commenters noted that, when comparing individuals' eligibility against the December 2009 criteria, only income eligibility and not resource information should be considered. One commenter stated that resources should not be considered since verification would be confusing and burdensome to applicants, particularly since a significant proportion of low-income individuals do not have resources in excess of 2009 Medicaid resource standards. Thus, they stated that the threshold method should not include a resource test. Another commenter stated that the final regulation should clearly state that individuals who were ineligible on the basis of resources under rules in effect as of December 1, 2009 are considered to be newly eligible.

Response: As described in more detail in section IV of this rule and § 433.206(d), we are giving states a choice whether or not to consider resources; for states that elect to consider resources, this rule directs the use of a proxy methodology that minimizes the need to seek information about resources from applicants. Further, to the extent that information is requested the response (or lack of a response) is not a basis for denying eligibility.

Comment: Another commenter suggested that since resources may make an individual ineligible (based on December 2009 rules), the threshold method must include a question regarding resources; otherwise the threshold methodology will not provide accurate results.

Response: As explained above, the existence of a resource test in 2009 may have made individuals ineligible for coverage, even if they met Medicaid

income criteria, so these individuals should be characterized as newly eligible in 2014. To determine whether such newly eligible individuals qualify for the newly eligible FMAP, states may apply the resource methodology as described in § 433.206(d) and in more detail below. However, a state may forego the application of a resource proxy test as part of the threshold methodology as some states have advised CMS that very small numbers of individuals were determined ineligible due to resources. States that choose to consider their December 2009 resource tests may apply the resource proxy methodology described in § 433.206(d) and in more detail below.

Comment: We received numerous comments in response to our request for feedback about using the Asset Verification System (AVS). Multiple commenters suggested using the AVS for electronic resource verification and one commenter suggested that the regulation be revised to explicitly require use of the AVS. Other commenters suggested that the threshold methodology regulation should be revised to indicate that resources will be determined using the AVS. One commenter noted that using the AVS for electronic verification would help permit a resource test while maintaining the Affordable Care Act goal of a simplified streamlined process.

Response: We agree that the AVS can be a good tool to verify resources but we are not requiring its use for individuals enrolled in the new adult group under § 435.119. The approach we outline in this rule provides states with greater flexibility and is consistent with MAGI-based income determinations that will be in effect starting January 1, 2014. States may continue to use AVS for non-MAGI populations.

Comment: One commenter requested clarification about how to account for the current resource tests in Medicaid eligibility determinations. The commenter noted that states will need to adjust the threshold methodology to reflect relative resource values and recommended freezing resource levels at the 2009 threshold.

Response: Subject to the requirements of § 433.206(d) of this final rule with comment period, to the extent a state elects to incorporate a resource proxy methodology under its applied threshold methodology, the resource criteria should reflect the states' December 1, 2009 resource eligibility levels. Referencing resource levels at the 2009 value will most accurately reflect eligibility as of December 1, 2009, which is the relevant criterion for determining whether or not an applicant shall be considered newly eligible.

e. Application of Spend-down Income Eligibility Criteria

The August 17, 2011 proposed rule stated that CMS does not believe that, for FMAP determination purposes, states need to consider whether an individual enrolled in the new adult group would have been eligible under a spend-down for a medically needy category under section 1902(a)(10)(C) of the Act in considering whether someone would have been eligible under standards in effect in December 1, 2009. We explained that this is because we believe there is an inherent uncertainty in determining whether and when a spend-down would have been met. An individual who is eligible for the new adult group and whose income is above the December 1, 2009 medically needy income standard would be considered newly eligible. If an individual would have qualified by meeting the medically needy income standard without a spend-down, the state could not claim newly eligible FMAP for that individual. We requested comment on this analysis and received numerous responses, which we have used to add more detail to the final threshold methodology regulation at § 433.206(f).

Comment: Multiple commenters raised issues with respect to how the threshold methodology will account for medically needy determinations. Some noted that the final rule should explicitly indicate that if spend-down criteria are not met, the individual should be considered newly eligible. Commenters noted that this principle should also extend to ''209(b)'' states, which are states in which the Medicaid eligibility criteria for the elderly and people with disabilities are more restrictive than the federal SSI program standards. We take these comments to mean that if an individual's income is above the medically needy income level, he or she would be assumed not to be eligible under the December 2009 standards and therefore newly eligible for purposes of FMAP, even if it might have been possible for that person to spend-down and qualify in a medically needy eligibility category.

Response: In section IV below, and § 433.206(f), we address how the threshold methodology will account for the treatment of individuals in 209(b) states. Individuals eligible for SSI are enrolled in the eligibility group specified in § 435.120, and, as such, are not eligible for the newly eligible FMAP, which is only available to individuals enrolled in the new adult group at § 435.119.

f. Timeframes and Parameters for Notice to CMS

In light of the proposed rules that identified potential alternate FMAP claiming methodologies, § 433.206(b) of the August 2011 proposed rule proposed that a state provide notice to CMS of which methodology it plans to use at least two calendar years prior to the first day of the calendar year in which the state would have used the particular method. For 2014, we proposed that states would give notice to CMS no later than one year prior to the beginning of the CY, which is January 1, 2013.

Comment: Numerous commenters expressed concern about the amount of notice that CMS proposed states must give CMS with respect to choice of methodology or with respect to changes in methodology. They requested additional time to notify CMS of the selected methodology and noted that the proposed timeframe is insufficient to make an informed decision.

Response: As indicated in responses to previous comments and in section IV of this rule, the threshold methodology is the selected permissible methodology and, as such, there is no longer the need for states to provide notice to CMS as to their choice of methodology. We provide, at § 433.206(h), that states must revise their state plans under the provisions of subpart B of part 430. States will submit, as an attachment to their state plan, a threshold methodology plan that outlines how the threshold methodology will be applied. CMS will review and approve this plan pursuant to the timeframes that otherwise govern review of state plan amendments.

Comment: Several commenters noted that the regulations should define a timeline for states to submit and CMS to approve the threshold methodology prior to implementation. One commenter wrote to support proposed § 433.208(b), which proposed that each state submit a proposed methodology to CMS and receive CMS approval for that methodology prior to its implementation.

Response: As discussed previously and as indicated in revised § 433.206(h), states must amend their state plans under the provisions of subpart B of part 430 to reflect the threshold methodology the state implements in accordance with the provisions of this part 433. The threshold methodology, which will be reviewed and approved by CMS, will be included as an attachment to the state plan and will include details about the manner in which the state will apply

the methodology to FMAP determinations.

g. Comments Regarding Need for Technical Assistance for States

Comment: Several commenters suggested that CMS should provide technical assistance to states as they implement approaches to properly identify the FMAP associated with individuals in the new adult group. One commenter suggested that CMS should assist states upon request with determining individuals newly eligible for Medicaid as of 2014, particularly with respect to treatment of previously excluded income in determining Medicaid eligibility. Another commenter believes that states need specific guidance from CMS to operationalize the approach used to determine the appropriate FMAP. Another commenter requested more examples to illustrate how the three alternate methods would work and requested additional guidance about the appropriate sample size necessary to test each methodology.

Response: We will be working to provide states with technical assistance as they implement the final methodology and are already providing technical assistance in the context of the conversion process which is a component of the methodology. One of the concerns raised by commenters about the treatment, under MAGI rules, of income previously excluded in determining Medicaid eligibility, has been addressed by a legislative change included in section 401 of Public Law 112–56, which revised the MAGI rules to include as income an amount equal to the portion of the taxpayer's social security benefits (as defined in section 86(d) of the Internal Revenue Code) that is not included in gross income under section 86 for the taxable year.

h. Comments Regarding Transparency

Comment: Multiple commenters suggested that states should use an open and transparent process to determine the methodology they will use to claim the appropriate FMAP. Another commenter noted that given the significant budgetary and beneficiary implications of any methodology, negotiations between states and CMS on the proposed methodological approach should be public (including any documents submitted by the state and any question posed by CMS in response). In addition, the process should allow for input from beneficiaries and consumer advocates to ensure that the proposals do not unduly burden applicants.

Response: CMS is adopting the threshold methodology in this final regulation, in part to support the goals of transparency and simplicity. The methodology does offer states certain options and states that take them must clearly and transparently describe to CMS how they will implement the threshold methodology. The proposed rule, at § 433.208(b) indicated that to implement the threshold methodology, states must submit a methodology and receive CMS approval of such methodology prior to its application to new FMAP determinations. As described in more detail in section IV of this final rule, we have revised that provision, now included at § 433.206(h), to instead require states to submit a state plan amendment reflecting the manner in which they will implement the threshold methodology. This will achieve the goals of transparency that commenters supported.

i. Other General Methodology Comments

Comment: One commenter suggests that CMS should require states to take into account whether public entities other than the state, such as counties, provide the non-federal share of Medicaid payments when developing an FMAP methodology. The commenter further suggested that CMS could require the state to demonstrate that its methodology results in a distribution of funds among the public entities providing the non-federal share that reflect the actual enrollment of newly eligible adults.

Response: States have significant flexibility to finance their Medicaid programs consistent with existing federal laws and regulations. This final rule does nothing to change the regulatory requirements set forth in subpart B of part 433, including § 433.53, which permits entities other than the state to contribute up to 60 percent of the non-federal share of total expenditures under the plan and requires state and federal funds to be apportioned among political subdivisions of the state on a basis that ensures that individuals in similar circumstances will be treated similarly and that a lack of local financial participation will not result in lowering the amount, duration, scope, or quality of services available to beneficiaries. Nor does this rule address the provisions of section 1905(cc) of the Act, added by section 10201(c)(6) of the Affordable Care Act, which offer some protection to political subdivisions from increased requirements to contribute the non-federal share. We further note that due to the significantly increased FMAP rates available for the newly eligible adults, there will be no non-federal share for the medical assistance expenditures for such adults in calendar years 2014–2016 and a small non-federal share (no more than 10 percent of costs) thereafter.

Comment: Commenters recommended that CMS require that any claiming methodology include the total cost of providing care to patients, including supplemental payments such as disproportionate share hospital (DSH) or upper payment limit payments (UPL). The commenter notes that the proposed rule described the statistically valid sampling methodology as excluding Medicaid supplemental payments from medical expenditures paid to providers when providers are paid under a managed care capitated payment arrangement. The commenter believes that all payments should be in the claiming methodologies including costs associated with patients for whom supplemental payments such as DSH or UPL are made to reflect providers' total cost of care.

Response: The threshold methodology as contained in this final rule with comment period is not intended to revise the definition of or requirements for determining the amounts of the expenditures that may be claimed by a state as medical assistance provided to individuals. In that regard, Medicaid DSH payments are considered payments that are required under section 1923 of the Act and are payments made to hospitals to take into account the situation of hospitals which serve a disproportionate number of low income patients. Accordingly, DSH payments are not considered to be medical assistance expenditures for an eligible individual such as those in the new adult group. Therefore, the new increased FMAPs would not be available for any DSH payments.

Supplemental payments made by a state under its Medicaid state plan that are based on the upper payment limit (UPL) are always identifiable with specific services furnished to individuals not enrolled in managed care. Accordingly, a state could claim the new increased FMAPs for such supplemental payments when identified with a service furnished to a newly eligible individual (or a qualified nonpregnant childless adult in expansion states). We note that a state may need to work with CMS to develop such a UPL demonstration.

3. Statistically Valid Sampling Methodology (§ 433.210)

As originally proposed in § 433.210, one methodology to assign FMAP would

have used a sampling methodology across individuals in the adult group and related Medicaid expenditures to make a statistically valid extrapolation of who is newly eligible and their related expenditures.

Comment: Numerous commenters criticized the sampling methodology as unworkable. Among the objections provided by states, advocates, and other Medicaid stakeholders is the concern that sampling would create a scenario under which a state would operate a shadow eligibility system, requiring actual eligibility determinations under 2009 rules and would thus be counter to HHS' principle of avoiding two separate eligibility systems.

Other commenters noted that the sampling methodology would be administratively burdensome to develop and would place additional burdens on enrollees, including requests for information not required for eligibility. Other commenters noted that the proposed regulation appropriately required verification of the sampling results, but it is not clear how results can be verified without states retaining December 1, 2009 standards. Commenters also noted that if enrollees refused to undergo a full eligibility determination for purposes of FMAP, states would face additional administrative burdens in creating the statistically valid sample. Furthermore, other commenters noted that, at least for states that had not previously expanded Medicaid using section 1115 demonstrations, the statistically valid sampling methodology would not be applicable during the initial years of the Medicaid expansion (2014 through 2019) because states would not have applicable data for sampling purposes. Another commenter noted that the level of accuracy of the sampling method would depend on whether or not ''newly eligibles'' are more or less expensive than other adults.

One commenter noted that the sampling methodology would require a highly complex system to create a readily reviewable audit trail between the individual claim transaction and corresponding disposition on the CMS–64. Another commenter also noted that use of data sources like the Medical Expenditure Panel Survey (MEPS) or Medicaid Statistical Information Statistics (MSIS) will take some time to establish as reliable data elements.

Response: CMS agrees with commenters' concerns about administrative feasibility and accuracy, and therefore, we are not finalizing the proposed sampling methodology.

Comment: Commenters note that because the sampling results would apply retroactively, this methodology creates the potential for sizeable retroactively adjusted federal payments, which would make it difficult for states to budget. One commenter expressed concern about such retroactive adjustments to correct federal funds and noted that the proposed rule did not include any language that would hold states harmless from retroactive adjustments. The state also noted that the proposed rule could be revised to design an approach to create an incentive for states to correct the federal claiming if to their advantage to claim additional federal funds. Other commenters noted the statistically valid sampling methodology would hinder state budget planning and that it is not feasible to retroactively adjust the FMAP rates and adjust prior period CMS–64 claims.

Response: We understand the commenters' concerns about retroactive adjustments and this concern contributed to our decision not to finalize the sampling methodology.

Comment: One commenter supports the use of statistical sampling to ensure that the expanded Medicaid population is accounted for in the sampling methodology. Absent this basic statistical tool, the commenter is concerned that states may underestimate the significant numbers of Latinos who are expected to participate in the Affordable Care Act's various insurance affordability programs.

Response: We share the commenter's interest in promoting and accurately tracking participation in the Medicaid program. The purpose of the proposed methodologies is to properly designate the FMAP, and we believe that the threshold methodology does this most efficiently.

Comment: One commenter endorsed the sampling methodology as the best option available at this time, despite concerns about the burden for applicants/beneficiaries and the financial risk to states due to potentially inaccurate sampling. Nonetheless, the commenter concluded that the sampling method could be the least burdensome to states.

Response: We agree with the commenter's concerns and reach a different conclusion after weighing the considerations. Therefore, we are finalizing the threshold methodology instead of the sampling methodology.

4. CMS-Established FMAP Proportion Methodology (§ 433.212)

As originally proposed in § 433.212, the proportion methodology would have used an extrapolation from available data sources to determine the proportion of individuals covered under the new adult group who would not have been eligible under the eligibility category in effect under the state plan or applicable waiver as of December 1, 2009, validating and adjusting the estimate, based on sampling or some other mechanism going forward.

Comment: Several commenters opposed the use of the proportion methodology, noting that reliable data sources have limited experience with newly eligible populations and new rules under the Affordable Care Act, making it difficult to accurately estimate the proportion of individuals covered under the new adult group who would have been eligible under eligibility categories that would have been in effect as of December 1, 2009. Furthermore, the commenter noted that many newly eligible individuals will have insurance coverage for the first time and their actual utilization will be varied. Another commenter noted concerns about the proportion methodology in light of uncertainty regarding the fundamental restructuring of the Medicaid program resulting from the Affordable Care Act. Therefore, the commenter noted that it would be difficult for any model to accurately predict allocation of expenses on a state-by-state basis. This uncertainty would lead to the need for large annual adjustments of state-specific rates, particularly once the proportion methodology is tested in 2016. A commenter questioned the reliability of the estimates of proportions of enrollees who would be newly eligible, especially because this methodology would not provide an opportunity for retroactive adjustments.

Response: We agree with the commenters and for these reasons we are not including the proportion methodology in the final rule.

Comment: Many commenters noted that the proportion methodology could provide a consistent and administratively simple approach to determine the newly eligible FMAP, especially if statistical modeling cannot provide a reliable basis for FMAP determinations. Commenters specifically encouraged CMS to consider the Congressional Budget Office, the Urban Institute, and the Agency for Healthcare Research and Quality as credible sources of information on effective modeling techniques. Several other commenters supported the proportion methodology as the most appropriate since it appears to best fit the requirements of a streamlined process and is least likely to

place an undue and unnecessary burden on applicants, states, and CMS.

Some commenters further qualified their support for the proportion methodology by noting some data concerns. They noted that while they support the use of Medical Expenditure Panel Survey (MEPS), MSIS and Current Population Survey (CPS) data as the foundation for the implementation of the proportion method, they had concerns, especially for smaller states, with MEPS and CPS data. One commenter warned about survey margins of error and noted that the MEPS does not provide individual estimates for the 50 states, thus requiring additional imputation of the survey.

Response: We appreciate the commenters' thoughtful concerns about methodology and data related to the proportion methodology. Because we are not adopting the proportion methodology for the reasons stated in our prior response, we have not pursued these recommendations.

IV. Provisions of the Final Rule

This final rule incorporates certain provisions set forth in the Medicaid Eligibility proposed rule and reflects revisions made based on comments received on the proposed rule. The following describes the provisions of this final rule:

A. Availability of FMAP Rates for the Adult Group (§ 433.10(c)).

1. Newly Eligible FMAP (§ 433.10(c)(6))

The provisions of § 433.10(c)(6) describe the availability and amounts of the increased FMAP for newly eligible adults, as defined in § 433.204(a)(i), who are enrolled in the new adult group described in § 435.119 of this chapter. In response to comments and questions from the public about whether states that meet the definition of expansion states (which this rule redesignates from § 433.10(c)(8)(iii) in the proposed rule and codifies at § 433.204(b)) may receive the newly eligible FMAP, we revised § 433.10(c)(6)(i) to clarify that the increased FMAP for newly eligible individuals can be applied in states that meet the definition of expansion state. As discussed in the proposed rule (76 FR 51147, 51173 (August 17, 2011)), if a population covered by a state that qualifies as an expansion state meets the criteria for the newly eligible matching rate, the state will receive the newly eligible matching rate for expenditures for that population. The expansion state match is designed to help states that expanded coverage to adults prior to enactment of the Affordable Care Act to the extent that a particular expansion population does not qualify as newly eligible.

2. Temporary FMAP Increase (§ 433.10(c)(7)).

In accordance with section 1905(z)(1)(A) of the Act, § 433.10(c)(7) describes the availability of a temporary 2.2 percentage point increase in the regular FMAP for a state that meets three conditions specified in the regulation:

- The state meets the definition of expansion state in § 433.204(b);
- The state does not qualify for any payments for the medical assistance expenditures of newly eligible individuals under the newly eligible FMAP in § 433.10(c)(6); and
- The state has not been approved to divert a portion of its disproportionate share hospital allotment under a demonstration in effect on July 1, 2009.

Although in this final rule we are not making any substantive revisions to § 433.10(c)(7) as was contained in the proposed rule, the following provides clarification regarding this provision. If a state meets the three indicated conditions, then the regular FMAP in § 433.10(b) is increased as follows:

- *Medical assistance expenditures for individuals who are not eligible under the new adult group.* The regular FMAP in § 433.10(b), which is available for the medical assistance expenditures of individuals eligible under any eligibility group other than the new adult group, would be increased by 2.2 percentage points.
- *Medical assistance expenditures of individuals who are eligible under the new adult group, but who do not meet the definition of newly eligible individual in § 433.204(a)(1).* For these individuals:

++ *Increase in Expansion State FMAP.* The regular FMAP component of the expansion state FMAP formula is increased by 2.2 percentage points for the medical assistance expenditures of individuals in the new adult group who are not newly eligible and for whom the expansion state FMAP is available.

++ *Increase in Regular FMAP.* The 2.2 percentage point increase in the regular FMAP would also be available for the medical assistance expenditures of individuals in the new adult group who are not newly eligible and for whom the expansion state FMAP is not available, for example pregnant women or parents.

- *Expansion State FMAP (§ 433.10(c)(8)).* Section 433.10(c)(8) in general refers to the availability of the expansion state FMAP for certain individuals who are not newly eligible. This FMAP is only available for expenditures in states that meet the definition of an expansion state in § 433.204(b)(1).

In response to comments and for purposes of clarification, proposed § 433.10(c)(8)(iv) was deleted as redundant. As discussed above, § 433.10(c)(6)(i) as revised clarifies that the newly eligible FMAP is available for newly eligible individuals in an expansion state. However, § 433.10(c)(8)(iv), as contained in the proposed rule, also referred to the availability of the newly eligible FMAP for certain individuals in an expansion state. We believe the reference in the revised § 433.10(c)(6)(i) makes clear that the newly eligible FMAP is available for newly eligible individuals in expansion states.

B. Scope of Regulation (§ 433.202).

Section 433.202, which sets out the scope of the FMAP provisions for the new adult eligibility category in § 435.119, is revised to indicate explicitly in regulation the increased or regular FMAP rates that are potentially available, as applicable, for the medical assistance expenditures associated with individuals in the new adult eligibility group: the regular FMAP, the increased newly eligible FMAP, or the increased expansion state FMAP, as indicated in § 433.10(b) and (c).

C. Definitions (§ 433.204).

1. Newly Eligible Individual (§ 433.204(a)(1)).

Section 433.204 is revised to include the definition of newly eligible individual in the renumbered § 433.204(a)(1), which now indicates that the determination of an individual as newly eligible is in accordance with the requirements of § 433.206, the revised and renumbered threshold methodology.

- The definition of newly eligible individual in § 433.204(a)(1) is clarified to follow the statutory definition in section 1905(y)(2)(A) of the Act and, in particular, to refer to individuals who would not have been eligible for full benefits, benchmark coverage, or benchmark equivalent coverage as of December 1, 2009. Section 433.204(a)(1) as revised refers to the regulations in § 440.330 and § 440.335, referring to benchmark and benchmark equivalent coverage, respectively. These changes were necessary to more accurately reflect the statutory language of the Affordable Care Act, which was not included in the proposed rule. Individuals enrolled in § 435.119 who could have previously received full

Medicaid state plan benefits (either under an optional coverage category under the Medicaid state plan or a waiver of the plan), benchmark benefits, or benchmark equivalent benefits will not satisfy the definition of newly eligible in § 433.204(a)(1) and their medical assistance expenditures will not be matched at the newly eligible FMAP provided in § 433.10(c)(6)(i). Medical assistance expenditures for other populations in these states, however, may be matched at either of the increased FMAP rates described in § 433.10(c)(7) or (8).

As described in § 433.204(a)(3), states with section 1115 demonstrations that provided benefits to adult populations that are more limited than standard state plan benefits will need to analyze the benefit package that was offered so that CMS can determine the appropriate FMAP to apply to specific populations who were enrolled in Medicaid as of December 1, 2009. As CMS explained in FAQ guidance issued in February 2013 at *http://www.medicaid.gov/State-Resource-Center/Frequently-Asked-Questions/Downloads/ACA-FAQ-BHP.pdf* and in letters to states following this guidance, CMS will work with each state to ensure that the correct FMAP is applied to medical assistance expenditures for individuals enrolled under § 435.119. We are requesting that states that expanded eligibility through section 1115 demonstrations provide CMS with an analysis of the eligibility levels and scope of benefits available under demonstrations as of December 1, 2009 to enable CMS to confirm the applicable FMAP. CMS has provided states with guidance about the manner in which benefits should be analyzed to substantiate claims for the increased newly eligible FMAP; states are expected to utilize a consistent methodology and provide CMS with sufficient data to substantiate the states' analyses. In addition, states' benchmark equivalence analyses must be certified by a qualified actuary and must include information on the data, assumptions, and methodology used to calculate actuarial values. CMS will use the benefit analysis provided by states to determine the appropriate FMAP. States that do not qualify for the newly eligible FMAP but appear to meet the criteria to be an expansion state should provide CMS with information about coverage in effect as of the date of enactment of the Affordable Care Act, if they wish to claim the expansion state FMAP for qualified populations.

• The definition of newly eligible at § 433.204(a)(1) has also been clarified to include the provision in statute that describes as newly eligible those individuals in the new adult group who, as of December 1, 2009, would have been eligible but not enrolled (or could have been on a waiting list) for benefits or coverage through a waiver under the plan that has a capped or limited enrollment that is full.

2. Full Benefits (§ 433.204(a)(2)).

Section 433.204 is revised to add a new § 433.204(a)(2) to include the statutory definition of ''full benefits'' from section 1905(y)(2)(B) of the Act, which describes ''full benefits'' to mean those benefits required to be provided to mandatory adult populations under the state plan, or such benefits that are not less in amount, duration, or scope than the benefits offered to the mandatory populations, or benefits that are determined by the Secretary to be substantially equivalent to the medical assistance available for the mandatory populations. Adult populations covered by a state under a section 1115 demonstration under which any associated waivers of state plan requirements did not provide for any reduction of the benefits relative to those offered to the mandatory populations under the state plan are presumed to have received full benefits under the demonstration; that is, full benefits are presumed unless approved terms and conditions of the demonstration explicitly provided for a lesser benefit package.

3. Expansion State (§ 433.204(b)).

A new § 433.204(b)(1) is added to include the definition of ''expansion state,'' moving the definition from the proposed § 433.10(c)(8)(iii). We also clarified in a new § 433.204(b)(2), for purposes of applying the expansion state FMAP in § 433.10(c)(8) that a ''nonpregnant childless adult'' is an individual who is not eligible based on pregnancy and who does not meet the definition of a caretaker relative in § 435.4.

D. Choice of Methodology (§ 433.206 in proposed rule)

In the proposed rule § 433.206 referred to the ''Choice of Methodology.'' This regulatory provision is deleted in this final rule and the remaining sections are renumbered accordingly.

E. Threshold Methodology (§ 433.206, was § 433.208 in proposed rule)

Previously numbered as § 433.208 ''Threshold Methodology'' in the proposed rule, this final rule redesignates this section of the regulation as § 433.206. Under the threshold methodology, for individuals enrolled under § 435.119, the applicability of the newly eligible FMAP is determined, in part, by comparing individuals' MAGI-based income to converted MAGI-based income eligibility levels for each appropriate eligibility group as in effect on December 1, 2009 (this conversion process was described in a State Health Official letter #12–003, dated December 28, 2012).

The following highlights, by section, revisions to provisions of the proposed rule and, as appropriate, provides further description of revised provisions. The following provisions are being issued as final with an opportunity for comment: § 433.206(c)(4), § 433.206(d), § 433.206(e), § 433.206(f), and § 433.206(g).

1. Overview (§ 433.206(a)).

This paragraph specifies that the threshold methodology must be used by states to document claims for the newly eligible FMAP specified in § 433.10(b) and (c). The threshold methodology encompasses an individualized analysis of whether individuals determined eligible under § 435.119 are newly or not newly eligible individuals for purposes of determining the appropriate federal share of medical assistance expenditures. We note that for certain aspects of the threshold methodology, such as the treatment of resources and enrollment caps, states have options in applying the methodology, which may be based on either population or total medical assistance expenditures. Such options are addressed in the related regulation sections.

In general, this rule clarifies that the threshold methodology is designed to assign the applicable FMAP to the medical assistance expenditures only for individuals determined eligible under § 435.119. The methodology begins with a simplified method for determining the individuals who are and are not newly eligible based on MAGI-based income (as already determined for purposes of establishing eligibility under § 435.119) and disability status, and then offers states options for how they will adjust the results to take into account other factors that may be relevant to assess the appropriate FMAP; in particular, resources, and enrollment caps and limits to the extent that a cap or limit was in effect in a state for an applicable eligibility group in December 2009. These factors will not be accounted for in MAGI-converted income standards but have bearing on determining whether claims for individuals enrolled under § 435.119 can be matched at the

newly eligible FMAP. Therefore, although the threshold methodology is individual based, to ensure a simplified procedure, we are finalizing a rule to include some population-based adjustments, or proxies, to account for certain eligibility factors that may have been in place in a state in December 2009. As noted, the final rule includes options for how states might calculate or apply these adjustments and proxies.

2. General Principles (§ 433.206(b)).

This section of the threshold methodology regulation indicates general principles underlying the establishment and application of the threshold methodology. In accordance with these principles, the threshold methodology: must not affect the timing of any individual's eligibility determination; must not be biased; must provide for a valid and accurate accounting of medical assistance expenditures and claims for federal funding for Medicaid claims; and operate efficiently, without further review, once an individual has been determined not to be newly eligible based on the December 1, 2009 standards for any eligibility category.

3. Components for Threshold Methodology (§ 433.206(c)).

To clarify the threshold methodology, the final § 433.206(c) now indicates the basic components of the methodology. This section references the use of individuals' MAGI-based income determinations as established under the 2014 eligibility requirements; the threshold methodology does not require determining individuals' income under the income rules in effect as of December 1, 2009:

- The threshold methodology applies for individuals determined eligible and enrolled under § 435.119; the regulation clarifies that the threshold methodology is not applicable for individuals who have been determined eligible and enrolled under any other mandatory or optional Medicaid eligibility category.
- Under the threshold methodology, the individuals' MAGI-based income (as determined under the rules in effect as of January 1, 2014) is compared to converted MAGI-based income eligibility levels for each appropriate eligibility group as in effect on December 1, 2009. Appropriate eligibility groups include, for example, parent/caretaker relative groups, section 1115 demonstration expansion populations, and optional disabled groups. CMS is currently working with states to convert those standards. If an individual in the new adult group would only have qualified for a December 1, 2009 eligibility group which did not offer full benefits, benchmark coverage, or benchmark equivalent coverage, they will be considered newly eligible for FMAP determination purposes regardless of income;
- Finally, states must ensure that for purposes of the availability and applicability of the applicable FMAPs for individuals, the determination of such individuals' status as newly or not newly eligible continues until a new determination of MAGI-based income has been made, in accordance with § 435.916, or until the individual has been otherwise determined not to be covered under the adult group set forth at § 435.119 of this chapter. Section 433.206(c)(4) describes, for example, the treatment of individuals for whom a determination of disability alters the applicable FMAP.

Under this process, an individual enrolled in the new adult group with income at or below the converted MAGI-based income eligibility standard for a relevant December 1, 2009 eligibility group related to that individual's characteristics and who would have been eligible to receive full benefits, benchmark benefits, or benchmark-equivalent benefits as of December 1, 2009 would be considered as not newly eligible and the FMAP applicable to such individuals would apply; this would be the regular FMAP or the expansion FMAP for applicable individuals, in expansion states. An individual in the new adult group whose income is greater than the converted income eligibility standard for December 1, 2009 for the relevant eligibility group related to that individual's characteristics would be considered as newly eligible and the newly eligible FMAP applicable to such individuals may apply.

Disability Status. A new § 433.206(c)(4) is included in the components of the threshold methodology section of the regulation to clarify the role an individual's disability status plays in determining the availability of increased FMAP for the expenditures of the new adult eligibility group under the definition of newly eligible. This final rule with comment period clarifies that to the extent disability status is applicable to the determination of newly eligible, an individual will not be considered to be disabled during the period of a pending disability determination, and would be considered disabled for purposes of determining FMAP availability only effective with the actual determination of disability.

The disability status of an individual may be relevant with respect to establishing whether the individual would have been eligible under an eligibility category that was in effect on December 1, 2009 for which disability is a criteria. In that case, if the individual could be determined eligible based on disability and the financial criteria applicable for such December 1, 2009 eligibility category, the individual would not be considered to be newly eligible for purposes of applying the appropriate FMAP for the expenditures associated with such individual. For this reason, to establish the applicable FMAP, it is necessary to establish whether the individual met the appropriate definition of disability applicable for a state.

For purposes of establishing disability status with respect to determining whether an individual meets the definition of newly eligible, in the proposed rule we indicated we were considering using either a disability proxy methodology or using actual disability determinations under the threshold methodology. In recognition of the disability determination process currently used by states and the Social Security Administration, we have concluded that for purposes of applying the appropriate FMAP under the threshold methodology, only an actual disability determination can be used to establish whether an individual should be considered to be disabled as relates to meeting the definition of newly eligible. That is, absent an actual determination of disability made in accordance with the disability definition applicable for the state under Title XIX of the Act, an individual enrolled in the new adult group should be considered not disabled for any FMAP determination purpose, regardless of any indication of disability provided by the individual. Therefore, in general, with respect to any eligibility categories in effect on December 1, 2009 for which a disability determination was required, individuals eligible for the new adult group who do not have an actual determination of disability would be considered newly eligible.

Individuals who are disabled have an incentive to seek a disability determination to receive financial support based on disability; therefore, an actual disability determination under the established disability determination process may be initiated by and for such individuals. In circumstances in which a disability determination process is initiated, the individual will be considered not to be disabled for FMAP determination purposes while the disability determination is pending.

This means that the newly eligible FMAP will apply until the date on which the individual is actually determined to be disabled. On the date of the disability determination, the individual may shift, if eligible, to an eligibility category other than the new adult group, in which case the determination of newly or not newly eligible would no longer be relevant; or, if still enrolled in the new adult eligibility group, the individual might then be considered as not newly eligible (depending on the individual's income level), and, if no longer newly eligible, the state must adjust FMAP claiming from the date the disability determination is made. The determination relative to newly eligible status will depend on both the disability status and the individual's income: if the individual's income exceeds the converted MAGI threshold for any December 1, 2009 category of coverage related to disability status, expenditures for the individual would continue to be matched at the newly eligible FMAP.

In determining which expenditures can be claimed under the newly eligible matching rate relative to expenses for an individual who eventually is determined disabled, the application of the FMAP methodology is not intended to revise existing claiming rules. In particular, the FMAP applicable for provider claims paid by a state is generally determined based on when the state made the payment to the service provider; the application of the appropriate FMAP is not generally based on the date the service is provided. Therefore, the FMAP applicable for payments made by a state subsequent to the date of the disability determination would reflect any change in the individual's status as newly eligible and/or the individual's actual eligibility status; for example, if receiving a disability determination results in the individual becoming eligible under an eligibility category other than the new adult group, any FMAPs associated with the new adult group would not be applicable to claims paid after the change in status.

We developed this approach to support our general principle of providing states with certainty and avoiding retroactive recoupment of dollars from states. Numerous commenters also reinforced the concept that any selected methodology should minimize the need for retroactive financial adjustments to avoid subjecting states to financial uncertainty; this approach is consistent with those comments. While current practice requires states to adjust claiming back to the date of onset of the disability determination, we think creation of the new adult group gives us an alternative because individuals have a way to receive services during the period of the pending disability determination.

Finally, although we recognize that under normal circumstances the disability process may take a significant period of time to be completed, we do not wish to incentivize states to prolong this process—to the extent they play a role in conjunction with the Social Security Administration in determining disability—by providing the increased newly eligible FMAP during the period when the disability determination is pending. Therefore, to ensure timely determinations of disability status, we will closely monitor state implementation of the threshold methodology and develop safeguards, such as performance standards related to timeliness of disability determinations and work with states to ensure that such performance standards are satisfied. We will work with the Social Security Administration to continue to consider ways to expedite such determinations.

4. Application of Resource Criteria (§ 433.206(d)).

In this final rule, a new § 433.206(d) is added to indicate how resource criteria may be applied for purposes of determining the availability of an increased FMAP for the expenditures of newly eligible individuals (as described in § 433.204(a)(1)).

For the new adult group under § 435.119, which is effective beginning January 1, 2014, there is no resource test (sometimes called an ''asset test'') applied in determining individuals' eligibility. However, some individuals in the new adult group might have had income below the applicable income standards in effect in December 2009 but would not have been eligible due to resources. Under the threshold methodology, for FMAP purposes a state can account for the effect of resource standards in effect in December 2009.

To promote simplification and flexibility, in this final rule CMS is providing states the option of not applying a resource proxy. A number of states have indicated that resources did not keep many individuals from qualifying for Medicaid, and imposing a resource proxy for purposes of determining the applicable FMAP might be administratively burdensome and yet not yield a very different result than if no resource proxy were used. Therefore, § 433.206(d)(1) allows states to choose whether to apply a resource proxy methodology under the threshold methodology. For a state that elects not to impose a resource proxy methodology, the increased FMAP under § 433.10(c)(6)(i) would not apply to the medical assistance expenditures of individuals determined eligible under the adult group whose incomes are at or below the applicable income levels for the eligibility categories in effect on December 1, 2009.

For states that elect to apply a resource proxy methodology, as described in greater detail below, this rule also provides for two options for states to address the application of resource criteria which were applied to applicable eligibility groups under a state's Medicaid program as in effect on December 1, 2009:

- A state could elect to collect and use existing state data prior to January 1, 2014 related to denials of eligibility explicitly due to excess resources; or
- A state could elect to obtain similar data through sampling of beneficiaries in eligibility categories relevant to the adult group (for periods prior to January 1, 2014), or eligible and enrolled in the new adult group (for periods on or after January 1, 2014).

A state may elect to apply a resource proxy methodology under the threshold methodology with respect to a particular eligibility category that had a resource test in effect on December 1, 2009, or the state could apply the resource proxy methodology to all relevant eligibility categories that had a resource test in effect on December 1, 2009.

Consistent with previously issued regulations, the development of a resource proxy methodology must not delay or interfere with the eligibility determination for an individual nor rely on information from applicants or beneficiaries if such information is available electronically. Particularly for states that undertake a resource proxy sample on or after January 1, 2014, when new MAGI methodologies are in effect and resources are no longer a criteria for eligibility determinations, states may not require individuals to provide information that is not necessary for the determination of eligibility, such as resource information for purposes of determining FMAP. However, states are not precluded from asking for such information, if it is not available electronically through an accessible data base or through electronic means, for example, after an applicant has completed an application. Such requests may not be part of the formal application process, and states must provide applicants or beneficiaries with clear notice that the information solicited is not required for purposes of

eligibility determination and will not affect such determination.

Section 433.206(d)(2) describes the standards for the resource proxy methodology. In particular, the resource proxy methodology must be based on state-level data, which would be used to identify the percentage of denials of Medicaid eligibility over a period of time due to excess resources. The state data must either be existing data from and for periods before January 1, 2014 related to denials of eligibility explicitly due to excess resources, or data obtained through a statistically valid sample of beneficiaries in eligibility categories relevant to the new adult group (for periods prior to January 1, 2014) or eligible and enrolled in the new adult group (for periods on or after January 1, 2014).

Whether the state data is based on actual resource criteria determinations prior to January 1, 2014 or based on statistically valid post-eligibility sampling (whether prior to or on or after January 1, 2014), the data that will be used for the resource criteria proxy must represent sampling results for a period of sufficient length to be statistically valid. States who use data based on actual resource criteria determinations prior to January 1, 2014 must ensure the data validly reflects eligibility denials explicitly due to excess resources. Eligibility denials that were not explicitly related to excess resources, such as denials based on failure to return paperwork or other administrative issues, shall not be included as they would inappropriately inflate the number of people for whom the resource requirement was a bar to eligibility.

States that have not changed their resource eligibility criteria since December 1, 2009, that have valid state data, as described above, available from and for a statistically valid period prior to January 1, 2014 or that can collect such state data before January 1, 2014 (when resource tests will no longer be permissible), may rely on that data for the resource proxy. Alternatively, for states that do not have such data or cannot collect it before January 1, 2014, this rule permits states to develop a resource proxy based on data derived through a post-eligibility review of the resource information for a one-time sample of beneficiaries. Such sample would be with respect to applicable resources as assessed against standards for eligibility groups in effect on December 1, 2009, collected through a statistically valid sample obtained during the one year period that begins on the first day of the quarter in which eligibility for individuals under the new adult group is initially effective for the state (for example, by December 31, 2014, for states that adopt the new adult group effective January 1, 2014), and ends on the last day of the one year period. For example, denial data for a determined statistically valid period January to March 2014 could be used for claims beginning with January 1, 2014, subject to CMS approval of an amendment to the state plan submitted during the first calendar quarter of 2014, retroactive to the beginning of such quarter in which the SPA was submitted.

Because we believe that it is important to have consistent processes, we would provide for a one-time opportunity to elect to implement a resource proxy methodology. States may elect to implement a resource proxy methodology through submission of a state plan amendment no later than one year from the first day of the quarter in which eligibility for individuals under the new adult group under § 435.119 is initially effective for the state. For example, for states choosing to adopt the new adult group effective January 1, 2014, this would be by December 31, 2014. State claims for federal funding in accordance with the resource proxy could be allowable no earlier than the beginning of the quarter in which the state plan was submitted, subject to CMS approval. The state plan amendment would describe the data upon which the resource proxy is based. CMS will review such amendments to ensure all requirements both methodological and related to data are met.

Under the resource proxy, states would apply the proportion of denials with respect to the expenditures of individuals in the new adult group who would otherwise be considered not to be newly eligible based only on their income being at or below the applicable converted MAGI standard; this would allow such expenditures to be claimed at the increased newly eligible FMAP. To illustrate this approach, if based on the state data there was a 5 percent denial rate due to excess resources for an applicable eligibility group or groups in effect on December 1, 2009 for which resource criteria was applicable, then 5 percent of the new adult eligibility group expenditures related to such applicable group or groups, which would otherwise have been claimed at the FMAP for individuals who were not newly eligible, would be claimed at the newly eligible FMAP rate. That is, the amounts of such expenditures would be considered to be newly eligible expenditures. CMS will work with the states to ensure that the resource proxy methodology is appropriately determined and applied.

5. Enrollment Cap Adjustment (§ 433.206(e)).

Under section 1905(y)(2)(A) of the Act, the definition of a newly eligible individual includes individuals who would be eligible for full benefits, benchmark coverage, or benchmark equivalent coverage provided through a demonstration under the authority of section 1115 of the Act (1115 demonstration) as in effect on December 1, 2009 but would not have been enrolled (or would have been placed on a waiting list) based on the application of an enrollment cap or limit determined in accordance with such demonstration. As discussed above, the definition of newly eligible individual in § 433.204(a)(1) is clarified in this final rule to include a reference to this enrollment cap provision. For purposes of applying an enrollment cap, limit, or waiting list provision under the threshold methodology, individuals who would have been on a waiting list are considered as not enrolled under the demonstration. Proposed § 433.208(a)(2) of the August 17, 2011 proposed rule required the threshold methodology to incorporate any enrollment caps under section 1115 demonstrations programs that were in place in the state on December 1, 2009. In this final rule, § 433.206(e) is added to more fully describe the treatment of enrollment caps under the threshold methodology.

Section 433.206(e) indicates the underlying principles for applying an enrollment cap provision under the threshold methodology and describes how these principles are used for calculating the amount of federal funding to be claimed by states that had an enrollment cap or limit in effect on December 1, 2009, subject to the definition of newly eligible individual in § 433.204(a)(1). The main objective of the enrollment cap provision, added here to reflect the previously described revision to the definition of ''newly eligible'' contained in § 433.204(a)(1), is to establish the appropriate amount of federal funding available for the medical assistance expenditures that would be claimed at the FMAP applicable for individuals enrolled in the new adult group who are newly eligible individuals due to enrollment caps, and the amount of such expenditures that would be claimed at the FMAP applicable for individuals who are not newly eligible. Recognizing that enrollment limits or caps were designed differently in different section 1115 demonstrations, § 433.206(e) includes flexibility for states to reflect enrollment

caps in a manner consistent with the demonstration terms and conditions and with the policies in place in the state as of December 1, 2009.

In accordance with the goal of administrative simplicity, and as described below, for purposes of determining the applicable FMAP and appropriate level of federal funding for the medical assistance expenditures of the new adult group, under the threshold methodology the treatment of enrollment caps is based on the following three elements associated with the eligibility categories of individuals for which an enrollment cap/limit provision was applicable on December 1, 2009:

- Beginning in quarters ending after January 1, 2014, the total unduplicated number of individuals eligible and enrolled under the adult eligibility group for the applicable claiming period, that is, the period for which expenditures are being made.
- Beginning in quarters ending after January 1, 2014, the total state medical assistance expenditures for the new adult group for the applicable claiming period.
- The enrollment cap or limit in effect on December 1, 2009.

For purposes of the third element above, this final rule indicates that the enrollment cap/limit would be the level of such enrollment cap/limit as authorized under the approved demonstration in effect on December 1, 2009; or, if the state had affirmatively set the cap at a lower level consistent with flexibility provided by the demonstration terms and conditions, the state may elect to apply the lower cap as in effect in the state on December 1, 2009. To the extent that states imposed enrollment limits in accordance with the approved terms and conditions, this regulation seeks to assure that the newly eligible FMAP will be available to states for enrollment above such defined limits, as verified by CMS. Whether the state uses the enrollment cap specifically authorized in the demonstration or a lower, verifiable cap as in effect in the state that was consistent with the demonstration special terms and conditions, under the methodology described here, the amount of expenditures multiplied by the proportion of the 2009 enrollment cap to the total number of currently enrolled people in the group would be claimed at the regular FMAP (or, if applicable, at the expansion state FMAP); and the amount of expenditures multiplied by 100 percent minus the proportion (expressed as a percentage) would be claimed at the newly eligible FMAP.

In § 433.206(e)(2), under the threshold methodology, states may simplify application of enrollment caps/limits by electing to combine such enrollment caps as were in effect on December 1, 2009, unless such treatment would preclude claiming of federal funding at the applicable FMAP rates required under § 433.10(b) or (c). Combining enrollment caps would be precluded in certain circumstances when separate treatment of enrollment caps is necessary to distinguish claims for which different FMAP rates apply. For example, in an expansion state the applicable FMAP for childless adults who are not newly eligible is the expansion state FMAP, and the applicable FMAP for parents who are not newly eligible is the regular FMAP. This difference in the FMAP rates for individual who are not newly eligible in an expansion state necessitates separately capturing the number of parents and childless adults to whom the expansion state FMAP would apply. In all cases, all states can elect to apply the enrollment caps separately, even when combining such caps/limits is not precluded.

Whether the treatment is to combine or separate the applicable enrollment caps, for states that had enrollment caps in effect on December 1, 2009, using the three elements listed above, federal funding will be determined based on the proportion of the enrollment cap to the total number of individuals in the applicable demonstration coverage group who are eligible under the adult eligibility group. In particular, the total expenditures multiplied by the proportion would be claimed at the FMAP for individuals who are not newly eligible individuals; and the total expenditures multiplied by the difference between 100 percent and the proportion would be claimed at the increased newly eligible FMAP.

EXAMPLE 1

On December 1, 2009 the State had in effect a demonstration applicable only for childless adults for individuals with incomes up to 133 percent of FPL; the approved enrollment cap (C) for such childless adults in effect on December 1, 2009 under the demonstration was 1,000. The State is not an expansion state. The regular FMAP (F) for the State is 60.00 percent.

For the quarter ending after January 1, 2014, there are $10 million in total expenditures for the new adult group consisting of 4,000 childless adults with incomes up to 133 percent of FPL. Since the state is not an expansion State, the 60.00 percent regular FMAP would be applied for the amount of the total expenditures of individuals who are *not* newly eligible. The enrollment cap (C) for this group as applicable on December 1, 2009 is 1,000. Since all of the individuals have income up to 133 percent of FPL, they would otherwise be considered as not newly eligible. However, in accordance with the FMAP methodology for enrollment caps, the following describes how these expenditures would be claimed:

P = C/T = 1,000/4,000 = 25%
E = $10 million total expenditures
F = 60.00%
(100% − P) = 75%

Not Newly Eligible Claims for Childless Adults (at 60.00% regular FMAP):
= P × E × F = 25% x $10 million × 60.00% = *$1.5 million.*
Newly Eligible Claims for Childless Adults (at 100% newly eligible FMAP):
= (100% − P) × E × Newly Eligible FMAP
= 75% × $10 million × 100.00% = *$7.5 million*

SUMMARY: The total federal dollars for the new adult group comprised of childless adults in this example is *$9.0 million,* calculated as $1.5 million (not newly eligible) + $7.5 million (newly eligible).

Section 433.206(e)(4)specifies that each state for which the enrollment cap/limit provision applies will be required to indicate the treatment of such provisions in the state plan amendment submission required by new § 433.206(h), described below.

6. Application of Spend-down Income Eligibility Criteria (§ 433.206(f)).

States' Medicaid programs as in effect on December 1, 2009 may have included eligibility categories for which deduction of incurred medical expenses from income (referred to as spend-down) under the provisions of sections 1902(a)(10)(C) and/or 1902(f) of the Act was applied in determining individuals' Medicaid eligibility. Under the provisions of section 1902(a)(10(C) of the Act, and in regulations at part 435, subparts D and I, states had and continue to have the option of establishing a ''medically needy'' program under which the income of an individual above the spend-down income eligibility standard (referred to as the medically needy income level) could become eligible for Medicaid by applying incurred medical expenses to reduce the excess income to the medically needy income level. States could choose the categories of individuals who would be covered by the medically needy program. Under the authority of section 1902(f) of the Act, and in regulations at § 435.121, a similar eligibility spend-down process is also applied under which certain states (referred to as ''209(b) states''), in determining the Medicaid eligibility of aged, blind and disabled individuals, may apply certain more restrictive requirements than are applied under the Supplemental Security Income program to provide mandatory categorically needy coverage to such individuals. In certain circumstances, 209(b) states must use a spend-down process to determine eligibility of such affected individuals whose income is in excess of the applicable 209(b) mandatory categorically needy income level. 209(b) states may also elect to have a medically needy program in addition to covering the mandatory categorically needy aged, blind, and disabled individuals.

In general, the medically needy spend-down process and the 209(b) state spend-down process are the same with respect to the application of incurred medical expenses to reduce the excess income of individuals to the respective income eligibility levels. In that regard, as indicated in the August 17, 2011 proposed rule, for purposes of the determination of the applicable FMAP for individuals in the new adult group, individuals whose income is greater than the applicable respective medically needy or 209(b) spend-down levels as in effect on December 1, 2009 would be considered to be newly eligible individuals. Essentially, a state will only consider the income level of individuals in the new adult group, and not their potential spend-down amounts, in determining if they are newly eligible or not. However, based on comments received on the proposed rule on this issue, there continues to be confusion about the application of the spend-down provision in determining the appropriate FMAP for the adult group. Accordingly, to clarify the application of the spend-down provision under the threshold methodology, a new § 433.206(f) is being added in this final rule.

Section 433.206(f)(1) generally describes the spend-down process as applied in determining eligibility. Section 433.206(f)(2) and (3) describe the determination under the threshold methodology of an individual as not newly eligible or newly eligible, respectively, under the definition indicated in § 433.204 and the availability of the appropriate FMAP under § 433.10(b) or (c) for the medical assistance expenditures of such individual for which a spend-down eligibility category of a state effective on December 1, 2009 is applicable. As indicated in § 433.206(f)(2), if an individual's income before any deductions for incurred medical expenses are made is less than or equal to the applicable spend-down income level in the state, whether a medically needy or 209(b) spend-down level, the individual would be considered as not newly eligible and the medical assistance expenditures related to such individual would be claimed at the FMAP applicable to not newly eligible individuals in the state. As indicated in § 433.206(f)(3), if an individual's income before any deductions for incurred medical expenses is greater than the applicable spend-down income level in the state, whether a medically needy or 209(b) spend-down level, the individual would be considered as newly eligible, and the medical assistance expenditures related to such individual would be claimed at the newly eligible FMAP.

7. Special Circumstances (§ 433.206(g)).

As states implement the threshold methodology, we recognize and anticipate that special circumstances may necessitate the potential need to consider additional adjustments to provide a basis for states to properly claim federal funding for the expenditures of individuals enrolled in the new adult group at the appropriate FMAP. The final rule provides a basis at new § 433.206(g) for addressing such circumstances and to assure efficient transitions to the new eligibility and FMAP provisions. Subject to CMS approval, this provision will apply such as in the case of the operation of a waiver authorized under section 1902(e)(14)(A) of the Act or, to the extent that a section 1115 demonstration in effect as of December 1, 2009 applied non-financial eligibility criteria for demonstration eligibility that are otherwise not accounted for in the general rule. To the extent that such criteria are difficult to verify or unknowable in 2014 and beyond, this approach is intended to provide a basis for states to claim federal funding for the expenditures of individuals enrolled in the adult group at the appropriate FMAP. CMS will work with states to develop an appropriate proxy methodology, process, and the appropriate documentation for submission to and approval by CMS.

8. Threshold Methodology State Plan Requirements (§ 433.206(h)).

The proposed rule generally indicated that states would submit a threshold methodology plan to CMS for approval. In this final rule, states are directed to submit a threshold methodology state plan amendment to their Medicaid state plan for approval by CMS. The threshold methodology plan, which will be included as an attachment to the state plan, would indicate that the state will implement such methodology in accordance with the provisions of this section and include details about the methodology. The threshold methodology attachment to the state plan will include any options or alternatives the state elects with respect to:

- Treatment of resources, in accordance with (§ 433.206(d));
- Treatment of enrollment caps or waiting lists, in accordance with (§ 433.206(e));
- Any applicable special circumstances, as approved by CMS ((§ 433.206(g)); and
- Treatment of other aspects of the threshold methodology as approved by the CMS.

The process for submission and the format of the threshold methodology plan will be provided through guidance issued by CMS.

F. Statistically Valid Sampling Methodology (§ 433.210))

In the proposed rule, § 433.210 referred to the statistically valid sampling methodology. This regulatory provision is deleted in this final rule.

G. CMS Established FMAP Proportion (§ 433.212)

In the proposed rule, § 433.212 referred to the CMS established FMAP proportion. This regulatory provision is deleted in this final rule.

V. Collection of Information Requirements

In the Medicaid Eligibility proposed rule (RIN 0938–AQ62, 76 FR 51148), we solicited public comments for 60 days on the rule's information collection requirements but none were received. As described in this final rule, we are clarifying and finalizing the provisions of the threshold methodology for states to use in the claiming of federal funding at the appropriate FMAP rates for expenditures related to the new adult eligibility group. In that regard, and as previously explained, states will need to submit state plan amendments to reflect their implementation of the threshold methodology. States will also need to submit expenditure and other information in their submissions of their quarterly Medicaid expenditure reports. Any information collection requirements for states related to the state plan amendment or expenditure report submission will be described separately.

This final rule implements provisions of the Affordable Care Act that relate to the availability of increased FMAP rates under states' Medicaid programs. This final rule codifies the increased FMAP rates and the related conditions and requirements that will be applicable beginning January 1, 2014, for the expenditures of certain individuals determined eligible under the new adult eligibility group. In particular, with respect to the new adult eligibility group, increased FMAP rates will be available for state Medicaid expenditures associated with medical assistance for two groups of adults: certain individuals who are ''newly eligible'' and certain individuals who are in defined ''expansion states'' and are not ''newly eligible.'' This final rule selected one of the three methodologies described in the proposed rule and finalizes it as the methodology that states will use to determine the appropriate FMAP in claiming federal funding for the expenditures related to individuals determined eligible in the new adult group. In general, the threshold methodology offers a simplified approach that compares individuals' MAGI-based income, as already established through the basic eligibility process, to the income levels as were in effect under states' Medicaid programs on December 1, 2009. To further ease and simplify administration, the threshold methodology also provides for potential population-based adjustments in the federal claims to account for resources and enrollment caps that may have applied in the states' December 1, 2009, Medicaid programs. As specified in § 433.206(h), states must amend their state plans to reflect the threshold methodology the states will implement.

Although there are short-term burdens associated with implementation of these provisions, over time the Medicaid program will be made substantially easier for states to administer by simplifying the determinations of the applicable FMAP. The policies finalized in this final rule are intended to reduce or eliminate the burden on states seeking to determine the appropriate FMAP for claims as well as on individuals applying for Medicaid. The regulation makes clear that any additional information potentially requested from individuals for FMAP purposes cannot delay or otherwise affect the eligibility determination; nor can any individual be required to provide such information needed solely for FMAP purposes.

We recognize that there are information collection requirements related to the implementation of this regulation, particularly with respect to the state plan amendments required by § 433.206(h). CMS will seek OMB approval of those amendments at a later time under OCN 0938–1148. In addition, CMS will be making changes to its quarterly financial reporting form (CMS–64) to facilitate claiming under this final rule. CMS will seek public comment and OMB approval of those changes at a later time under OCN 0938–0067.

VI. Regulatory Impact Analysis

A. Introduction

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This final rule does not reach the economic threshold and thus is not considered a major rule. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

This final rule concerns the technical aspects of applying the appropriate FMAP to the expenditures of individuals in the new adult group (described at § 435.119) who are either newly eligible or, if not, meet the criteria for the increased expansion state FMAP. This final rule simply provides guidelines and a process by which states can claim the appropriate FMAP in a streamlined manner. The economic impacts of the Medicaid expansion are entirely attributable to the Affordable Care Act; the economic impact of this rule concerns the additional costs of the methodology described in § 433.206, but not the costs of the expansion or the IT costs of the systems, which are contained in other implementation rules. As such, the costs of this rule are not economically significant, particularly when considered relative to the alternatives CMS considered in developing this rule; the process described here is less costly and more equitable than the alternatives described below.

This final rule sets out a simplified methodology and process for determining the applicable FMAP, which will lessen the burden on states implementing the provisions described in the Affordable Care Act. In the absence of the threshold methodology being finalized by this regulation, states would have to conduct an individualized determination based on the eligibility rules in effect in 2009, or would be subject to uncertainty (and potentially ongoing and costly disputes) in their efforts to claim the increased FMAP. Instead, under this final rule, the threshold methodology simply requires a basic comparison of an individual's current income against converted MAGI income thresholds for applicable categories of eligibility, subject to a limited number of adjustments that states may elect to increase the accuracy of the methodology. Therefore, the approach being finalized in this rule provides relief from the burden that would otherwise accrue to states seeking to determine the applicable FMAP. Indeed, the key objective of this final rule, as described in the preamble to the proposed rule and as reaffirmed

here, is to alleviate the need to conduct complicated and unnecessary eligibility determinations simply for the purpose of applying the appropriate FMAP. The costs of implementing other aspects of the Affordable Care Act have been accounted for elsewhere and the impacts described here reflect the incremental costs of applying a process to claim the increased FMAPs available to individuals enrolled in the new adult group. We do not find this final rule to be economically significant because states are already undertaking related activity pursuant to the March 23, 2012 final eligibility rule and the December 28, 2012 letter to State and Health Officials (SHO #12–003, available at *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO12003.pdf*), regarding the conversion of net income standards to MAGI equivalent income standards. These converted income standards will provide the basis for applying the threshold methodology described in this rule; states will then use standard Medicaid claiming procedures (using the CMS–64 and MBES systems as modified by CMS) to claim the applicable FMAP.

B. Statement of Need

This final rule will implement provisions of the Affordable Care Act related to Medicaid, specifically provisions about the increased FMAPs and related provisions. It provides states with a simplified, less burdensome approach by which to identify the appropriate FMAP and alleviates the need for states to maintain a shadow eligibility system based on eligibility rules in effect in 2009. Instead, the regulation sets out a fair and accurate methodology by which to assess whether individuals seeking coverage in 2014 and beyond could have qualified for coverage under the state's eligibility standards as of December 1, 2009. Applying this methodology, individuals for whom it is determined could not have been eligible for specified coverage as of December 1, 2009 will be deemed newly eligible and the higher FMAP will apply.

C. Anticipated Effects

1. Effects on State Medicaid Programs

The final rule sets out standards for claiming the increased FMAPs created by the Affordable Care Act. Following the process and methodology outlined in this final rule will provide states that elect to expand coverage to the new adult group access to the increased FMAPs, resulting in a significant economic benefit to states. The threshold methodology approach will require minimal incremental increases in states' spending relative to the alternatives we considered in finalizing this rule, as described below.

Although state Medicaid programs will have to invest in administrative costs to implement the threshold methodology described in this rule, they will ultimately receive significant federal matching payments for the costs of new Medicaid beneficiaries. As described elsewhere in this section, the threshold methodology will minimize the costs to state Medicaid agencies relative to the costs that they would otherwise bear in claiming the increased Affordable Care Act FMAPs. For example, this rule provides a transparent and uniform process for states to use, eliminating the uncertainty they would experience with respect to federal funds claiming in the absence of this guidance. Most significantly, the threshold methodology provides an efficient and streamlined alternative to avoid indefinitely applying 2009 eligibility standards to every applicant (in addition to current standards) simply for the purposes of determining the applicable FMAP. Numerous state and other commenters wrote to express particular concern about the burden that any methodology might impose on states and on applicants if additional information is requested for FMAP purposes.

D. Alternatives Considered

We considered various alternative methodologies to determine the applicable FMAP in developing the proposed rule and in finalizing the provisions of this regulation, ultimately revising our approach from the proposed rule to finalize the threshold methodology. First, with regard to the increased FMAP rates available for state medical assistance expenditures relating to ''newly eligible'' individuals, in developing the proposed rule we considered requiring all states to complete a second, full eligibility determination on all Medicaid eligibles using the state's December 2009 eligibility standards to determine the appropriate FMAP rate based upon whether or not each individual was newly eligible. We determined that such a requirement would be overly burdensome to states and to beneficiaries and would likely lead to errors and unnecessary costs. We do not believe such an approach would result in an economic and efficient outcome in administering the program; rather, it would be significantly more burdensome than the approach we are adopting. In addition, such a requirement would directly contradict the principles of the Affordable Care Act to streamline and simplify eligibility and enrollment into health care programs. We did not propose this approach in the proposed rule and are not revisiting that decision in this final rule to avoid imposing unnecessary and unwarranted burdens on states or beneficiaries.

Second, we considered as an alternative approach the statistically valid sampling methodology (originally proposed in § 433.210). This alternative approach would use a sampling methodology across individuals in the adult group and related Medicaid expenditures to derive a statistically valid extrapolation of who is newly eligible and their related expenditures. We received numerous comments about the potential burdens associated with this methodology and concluded that it could require states to make actual eligibility determinations under 2009 rules and therefore maintain precisely the type of shadow eligibility system that the rule seeks to avoid. We also shared commenters' concerns that this alternative could place additional burdens on enrollees, including requests for information not required for eligibility. Such a result would not only be burdensome to beneficiaries but also inconsistent with standards established in the March 23, 2012 final rule that prevent states from asking applicants additional questions, when they apply for Medicaid, that are not related to the eligibility determination. Furthermore, we concluded that addressing concerns about burden on applicants could compromise the accuracy of the statistical sampling methodology.

We also determined that the statistically valid sampling methodology would not produce accurate results in states that had not expanded coverage through section 1115 demonstrations prior to 2014 because those states would not have applicable data for sampling purposes. Finally, we agreed with commenters' concerns that, because the sampling results would apply retroactively, this methodology would create the potential for sizeable retroactively adjusted federal payments, which would make it difficult for states to budget accurately and would introduce financial uncertainty for states. Given all of these concerns, we determined that the statistically valid sampling methodology would be more burdensome, less administratively feasible, and less accurate than the approach we elected, the threshold methodology.

A third alternative methodology considered was the CMS-established

FMAP proportion methodology (originally described in § 433.212). This alternative approach would have used an extrapolation from available data sources to determine the proportion of individuals covered under the new adult group who would not have been eligible under the eligibility category in effect under the state plan or applicable waiver as of December 1, 2009, validating and adjusting the estimate, based on sampling or some other mechanism going forward. Public comments and our ongoing analysis cast doubt on the accuracy of this methodology, in part because available data sources have limited experience with newly eligible populations and new rules under the Affordable Care Act, making it difficult to accurately estimate the proportion of individuals covered under the new adult group who would have been eligible under the eligibility category that would have been in effect as of December 1, 2009. Some commenters particularly noted data accuracy concerns for smaller states. Finally, other commenters pointed out that the proportion methodology could require large annual adjustments of state-specific rates, introducing uncertainty and potentially fiscal burden to states. Although some commenters supported this alternative methodology, we concluded that equity, accuracy, and administrative simplicity mitigated against its selection and that the threshold methodology would be a less burdensome alternative.

Finally, numerous commenters provided comments with respect to the provision (included in the proposed rule at § 433.206) regarding the choice of FMAP methodologies. Some commenters urged us to select one methodology for nationwide use while other commenters urged flexibility. In response to the various comments, particularly those noting concerns with the accuracy, equity, burden, and lack of certainty related to the statistically valid sampling methodology and the proportion methodology, we are finalizing one methodology, the threshold methodology. Our view is that the threshold methodology (originally proposed in § 433.208 and being finalized in § 433.206), particularly as modified in this final rule, is the least burdensome, most transparent, and most accurate approach relative to the other alternatives. We have worked and continue to work extensively with states to develop the converted MAGI income thresholds that will be the basis of this methodology. As noted above, we published a letter to State and Health Officials on December 28, 2012 (SHO #12–003, available at: *http://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO12003.pdf*) to provide guidance about the conversion of net income standards to MAGI equivalent income standards. The threshold methodology builds on this work and, relative to the other alternatives that we considered, will be less burdensome to implement.

In finalizing the threshold methodology, we accounted for various comments about specific elements of the threshold methodology, including how the methodology should account for past denials based on resources and how the methodology should treat individuals eligible for Medicaid based on disability status and/or spend-down rules. We revised this final rule to provide states with various options to account for these adjustments to the threshold methodology to enable accurate FMAP claiming. With respect to resources, for example, states may—but are not required to—undertake additional data analysis to develop a resource proxy to help determine additional expenditures eligible for the increased newly eligible FMAP. Rather than require all states adopting the new adult group to develop and apply a resource proxy, only states wishing to claim additional FMAP for populations that might not appear to be newly eligible in the absence of the consideration of resources will pursue the additional (but time-limited and minimal) administrative costs of doing so. We believe this approach strikes an appropriate balance that avoids increasing the burden on all states.

E. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold is approximately $141 million. However, it is important to understand that the UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of cost, mainly costs resulting from (A) imposing enforceable duties on state, local, or Tribal governments, or on the private sector, or (B) increasing the stringency of conditions in, or decreasing the funding of, state, local, or Tribal governments under entitlement programs.

Because of the favorable Affordable Care Act increased FMAPs and the availability of 90 percent federal match for systems improvements to facilitate upgrades to accommodate the Affordable Care Act eligibility changes, we believe that states can take actions that will have limited effects on state costs. The extensive consultation with states we describe below was aimed at the requirements of both UMRA and Executive Order 13132 on Federalism.

1. State and Local Governments

As noted previously, the Affordable Care Act creates a new mandatory eligibility group to cover adults with incomes below 133 percent of the FPL. The recent Supreme Court decision gives states the option not to cover this eligibility group but, for states that elect to provide such coverage, Title XIX now provides substantial new federal support to nearly offset the costs of covering that population. States will have to undertake some work to properly apply the threshold methodology, including developing procedures to properly identify and claim the appropriate FMAP for newly eligible and/or certain non-newly eligible populations in expansion states, but this work builds on existing work they are already undertaking as part of the conversion of income standards to MAGI-based standards. Furthermore, claiming expenditures will be done in accordance with current claiming requirements.

The Affordable Care Act changes the Medicaid and CHIP programs to improve coordination between programs and reduce the administrative burden on states by simplifying and streamlining systems. Following publication of the August 17, 2011 proposed eligibility rule, we received input from states about the FMAP provisions in that rule. In addition to analyzing the feasibility of each of the proposed alternatives, we solicited input from a group of states working intensively to prepare to implement the new Medicaid adult group, including the transition to MAGI, and analyzed the data from these states.

We have received input from states on how the various Affordable Care Act provisions codified in this final rule will affect them. We have participated in a number of conference calls and in person meetings with state officials since the law was enacted. These discussions have enabled the states to share their thinking and questions about how the Medicaid changes in the legislation would be implemented. The conference calls and meetings also furnished opportunities for State Medicaid Directors to comment informally on implementation issues and plans (although to be considered comments on the Medicaid Eligibility proposed rule, written comments using

the process described in the Medicaid Eligibility proposed rule were required). Based on the input we received, we believe that the threshold methodology best addresses state concerns about burden and simplification for those states that elect to adopt the new adult coverage group.

2. Private Sector and Tribal Governments

We do not believe this final rule will impose any unfunded mandates on the private sector. As we explain in more detail in the Regulatory Flexibility Act analysis, the provisions of the Affordable Care Act implemented by this final rule deal with FMAP rates for individuals in the new adult group, and as such are directed toward state governments rather than toward the private sector. Since the final rule will impose no mandates on the private sector, we conclude that the cost of any possible unfunded mandates would not meet the threshold amounts discussed previously that would otherwise require an unfunded mandate analysis for the private sector. We also conclude that an unfunded mandate analysis is not needed for Tribal governments since the final rules will not impose mandates on Tribal governments.

F. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small entities if a final rule will have a significant economic impact on a substantial number of small entities. We are not preparing an RFA because the Secretary has determined that this final rule would not have a significant economic impact on a substantial number of small entities. Few of the entities that meet the definition of a small entity as that term is used in the RFA (for example, small businesses, nonprofit organization, and small governmental jurisdictions with a population of less than 50,000) will be impacted directly by this final rule. Individuals and states are not included in the definition of a small entity. There are some states in which counties or cities share in the costs of Medicaid. To the extent that states require counties to share in these costs, some small jurisdictions could be affected by the requirements of this final rule, especially beginning in 2017 when the newly eligible FMAP is no longer 100 percent. However, nothing in this rule will constrain states from making changes to alleviate any adverse effects on small jurisdictions.

Because this final rule is focused on the appropriate FMAP to reimburse the expenditures of individuals enrolled in Medicaid, it does not contain provisions that would have a significant direct impact on hospitals, and other health care providers that are designated as small entities under the RFA. However, the provisions in this final rule, like the provisions in the final March 23, 2012 eligibility rule, may have a substantial, positive indirect effect on hospitals and other health care providers due to the substantial increase in the prevalence of health coverage among, and Medicaid reimbursement for, populations who are currently unable to pay for needed health care, leading to lower rates of uncompensated care at hospitals.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a final rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because the Secretary has determined that this final rule will not have a direct economic impact on the operations of a substantial number of small rural hospitals. As indicated in the preceding discussion, there may be indirect positive effects from reductions in uncompensated care.

G. Conclusion

In conclusion, we are not preparing analysis for either the RFA or section 1102(b) of the Act, because we have determined that this final rule will not have a direct significant economic impact on states, small entities, or small rural hospitals. Relative to the alternatives considered, we determined the threshold methodology to be less burdensome to states and beneficiaries, more equitable, and more transparent than other approaches considered. The threshold methodology provides a uniform, streamlined process for states that adopt to extend Medicaid to the new adult group to claim the higher FMAPs provided by the Affordable Care Act. Finalizing this methodology thereby eliminates the comparatively more burdensome approaches of either uncertainty about federal claiming standards or requiring states to indefinitely determine new applicants' eligibility using new standards as well as the eligibility rules in effect in 2009 simply for the purposes of assigning the FMAP. The incremental costs of implementing the threshold methodology process are therefore relatively small compared to the alternatives considered. This analysis, together with the remainder final rule, provides a final Regulatory Impact Analysis.

VIII. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct effects on states, preempts state law, or otherwise has Federalism implications. We have reviewed this rule under the threshold criteria of Executive Order 13132, Federalism, and have determined it will not have substantial direct effects on the rights, rules, and responsibilities of states, local or tribal governments.

List of Subjects in 42 CFR Part 433

Administrative practice and procedure, Child support Claims, Grant programs-health, Medicaid, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amend 42 CFR chapter IV as set forth below:

PART 433—STATE FISCAL ADMINISTRATION

■ 1. The authority citation for part 433 continues to read as follows:

Authority: Section 1102 of the Social Security Act (42 U.S.C. 1302).

■ 2. Section 433.10 is amended by—

■ A. In paragraph (a), removing the phrase ''and 1905(b),'' and adding in its place the phrase ''1905(b), 1905(y), and 1905(z)''.

■ B. Adding new paragraphs (c)(6), (c)(7), and (c)(8).

The additions read as follows:

§ 433.10 Rates of FFP for program services.

* * * * *

(c) * * *

(6)(i) *Newly eligible FMAP.* Beginning January 1, 2014, under section 1905(y) of the Act, the FMAP for a State that is one of the 50 States or the District of Columbia, including a State that meets the definition of expansion State in § 433.204(b), for amounts expended by such State for medical assistance for newly eligible individuals, as defined in § 433.204(a)(1), will be an increased FMAP equal to:

(A) 100 percent, for calendar quarters in calendar years (CYs) 2014 through 2016;

(B) 95 percent, for calendar quarters in CY 2017;

(C) 94 percent, for calendar quarters in CY 2018;

(D) 93 percent, for calendar quarters in CY 2019;

(E) 90 percent, for calendar quarters in CY 2020 and all subsequent calendar years.

(ii) The FMAP specified in paragraph (c)(6)(i) of this section will apply to amounts expended by a State for medical assistance for newly eligible individuals in accordance with the requirements of the methodology applied by the State under § 433.206.

(7)(i) *Temporary FMAP increase.* During the period January 1, 2014, through December 31, 2015, under section 1905(z)(1) of the Act for a State described in paragraph (c)(7)(ii) of this section, the FMAP determined under paragraph (b) of this section will be increased by 2.2 percentage points.

(ii) A State qualifies for the targeted increase in the FMAP under paragraph (c)(7)(i) of this section, if the State:

(A) Is an expansion State, as described in § 433.204(b) of this section;

(B) Does not qualify for any payments on the basis of the increased FMAP under paragraph (c)(6) of this section, as determined by the Secretary; and

(C) Has not been approved by the Secretary to divert a portion of the disproportionate share hospital allotment for the State under section 1923(f) of the Act to the costs of providing medical assistance or other health benefits coverage under a demonstration that is in effect on July 1, 2009.

(iii) The increased FMAP under paragraph (c)(7)(i) of this section is available for amounts expended by the State for medical assistance for individuals that are not newly eligible as defined in § 433.204(a)(1).

(8) *Expansion State FMAP.* Beginning January 1, 2014, under section 1905(z)(2) of the Act, the FMAP for an expansion State defined in § 433.204(b), for amounts expended by such State for medical assistance for individuals described in § 435.119 of this chapter who are not newly eligible as defined in § 433.204(a)(1), and who are nonpregnant childless adults with respect to whom the State may require enrollment in benchmark coverage under section 1937 of the Act, will be determined in accordance with the expansion State FMAP formula in paragraph (c)(8)(i).

(i) *Expansion State FMAP.*

$$F + (T \times (N - F))$$

F = The base FMAP for the State determined under paragraph (b) of this section, subject to paragraph (c)(7) of this section.

T = The transition percentage specified in paragraph (c)(8)(ii) of this section.

N = The Newly Eligible FMAP determined under paragraph (c)(6) of this section.

(ii) *Transition percentage.* For purposes of paragraph (c)(8)(i) of this section, the transition percentage is equal to:

(A) 50 percent, for calendar quarters in CY 2014;

(B) 60 percent, for calendar quarters in CY 2015;

(C) 70 percent, for calendar quarters in CY 2016;

(D) 80 percent, for calendar quarters in CY 2017;

(E) 90 percent, for calendar quarters in CY 2018; and

(F) 100 percent, for calendar quarters in CY 2019 and all subsequent calendar years.

■ 3. Subpart E is added to part 433 to read as follows:

Subpart E—Methodologies for Determining Federal Share of Medicaid Expenditures for Adult Eligibility Group

Sec.
433.202 Scope.
433.204 Definitions.
433.206 Threshold methodology.

Subpart E—Methodologies for Determining Federal Share of Medicaid Expenditures for Adult Eligibility Group

§ 433.202 Scope.

This subpart sets forth the requirements and procedures that are applicable to support State claims for the increased FMAP specified at § 433.10(c)(6) for the medical assistance expenditures for individuals determined eligible as specified in § 435.119 of this chapter who meet the definition of newly eligible individual specified in § 433.204(a)(1). These procedures will also identify individuals determined eligible as specified in § 435.119 of this chapter for whom the State may claim the regular FMAP rate specified at § 433.10(b) or the increased FMAP rate specified at § 433.10(c)(7) or (8), as applicable.

§ 433.204 Definitions.

(a)(1) *Newly eligible individual* means an individual determined eligible for Medicaid in accordance with the requirements of the adult group described in § 435.119 of this chapter, and who, as determined by the State in accordance with the requirements of § 433.206, would not have been eligible for Medicaid under the State's eligibility standards and methodologies for the Medicaid State plan, waiver or demonstration programs in effect in the State as of December 1, 2009, for full benefits or for benchmark coverage described in § 440.330(a), (b), or (c) of this chapter or benchmark equivalent coverage described in § 440.335 of this chapter that has an aggregate actuarial value that is at least actuarially equivalent to benchmark coverage described in § 440.330(a), (b), or (c) of this chapter, or would have been eligible but not enrolled (or placed on a waiting list) for such benefits or coverage through a waiver under the plan that had a capped or limited enrollment that was full.

(2) *Full benefits* means, for purposes of paragraph (a)(1) of this section, with respect to an adult individual, medical assistance for all services covered under the State plan under Title XIX of the Act that is not less in amount, duration, or scope, or is determined by the Secretary to be substantially equivalent, to the medical assistance available for an individual described in section 1902(a)(10)(A)(i) of the Act.

(3) For purposes of establishing under paragraphs (a)(1) and (2) of this section whether an individual would not have been eligible for full benefits, benchmark coverage, or benchmark equivalent coverage under a waiver or demonstration program in effect on December 1, 2009, the State must provide CMS with its analysis, in accordance with guidance issued by CMS, about whether the benefits available under such waiver or demonstration constituted full benefits, benchmark coverage, or benchmark equivalent coverage. CMS will review such analysis and confirm the applicable FMAP. Individuals for whom such benefits or coverage would have been available under such waiver or demonstration are not newly eligible individuals.

(b)(1) *Expansion State* means a State that, as of March 23, 2010, offered health benefits coverage statewide to parents and nonpregnant, childless adults whose income is at least 100 percent of the Federal Poverty Level. A State that offers health benefits coverage to only parents or only nonpregnant childless adults described in the preceding sentence will not be considered to be an expansion State. Such health benefits coverage must:

(i) Have included inpatient hospital services;

(ii) Not have been dependent on access to employer coverage, employer contribution, or employment; and

(iii) Not have been limited to premium assistance, hospital-only benefits, a high deductible health plan, or benefits under a demonstration program authorized under section 1938 of the Act.

(2) For purposes of paragraph (b)(1) of this section and for § 433.10(c)(8), a nonpregnant childless adult means an individual who is not eligible based on pregnancy and does not meet the definition of a caretaker relative in § 435.4 of this chapter.

§ 433.206 Threshold methodology.

(a) *Overview.* Effective January 1, 2014, States must apply the threshold methodology described in this paragraph for purposes of determining the appropriate claiming for the Federal share of expenditures at the applicable FMAP rates described in § 433.10(b) and (c) for medical assistance provided with respect to individuals who have been determined eligible for the Medicaid program under § 435.119 of this chapter. Subject to the provisions of this paragraph, States must apply the CMS-approved State specific threshold methodology to determine and distinguish such individuals as newly or not newly eligible individuals in accordance with the definition in § 433.204(a)(1), and in accordance with States' Medicaid eligibility criteria as in effect on December 1, 2009 and to attribute their associated medical expenditures with the appropriate FMAP. The threshold methodology must not be applied by States for the purpose of determining the applicable FMAP for individuals under any other eligibility category other than § 435.119 of this chapter.

(b) *General principles.* The threshold methodology should:

(1) Not impact the timing or approval of an individual's eligibility for Medicaid.

(2) Not be biased in such a manner as to inappropriately establish the numbers of, or medical assistance expenditures for, individuals determined to be newly or not newly eligible.

(3) Provide a valid and accurate accounting of individuals who would have been eligible in accordance with the December 1, 2009 eligibility standards and applicable eligibility categories for the benefits described in § 433.204(a)(1), and subject to paragraphs (d), (e), and (g) of this section, by incorporating simplified assessments of resources, enrollment cap requirements in place at that time, and other special circumstances as approved by CMS, respectively.

(4) Operate efficiently, without further review once an individual has been determined not to be newly eligible based on the December 1, 2009 standards for any eligibility category.

(c) *Components of the threshold methodology.* Subject to the submission of a threshold methodology State plan amendment as specified in paragraph (h) of this section, the provisions of the threshold methodology consist of two components, the individual income-based determination and population-based non-income adjustments to reflect resource criteria, enrollment caps in effect on December 1, 2009, and other factors in accordance with paragraph (g) of this section.

(1) *Scope.* The threshold methodology shall apply with respect to the population, and the associated expenditures for such population, which has been determined eligible for Medicaid under section 1902(a)(10)(A)(i)(VIII) of the Act and in accordance with § 435.119 of this chapter. This population and associated expenditures must not include individuals who have been determined eligible for Medicaid under any other mandatory or optional eligibility category.

(2) *Benefit criteria for newly eligible.* An individual eligible for and enrolled under § 435.119 of this chapter is considered newly eligible if, with respect to the applicable eligibility category in effect on December 1, 2009, the benefits did not meet the criteria described in the newly eligible definition at § 433.204(a)(1).

(3) *Individual income-based determination.* The individual income-based determination shall be a comparison of the individual's MAGI-based income to the income standard in effect on December 1, 2009, as converted to an equivalent MAGI-based income standard for each applicable eligibility category as in effect on that date, as follows.

(i) The amount of an individual's income under the threshold methodology is the MAGI-based income determined in accordance with § 435.603 of this chapter.

(ii) For each individual, the equivalent MAGI-based income eligibility standard is the applicable income eligibility standard for the applicable category of eligibility as in effect on December 1, 2009 that is converted to an equivalent MAGI-based income standard. For example, as applicable, a separate MAGI-based income standard will be applied for individuals determined to be disabled who would have been eligible under an optional eligibility category in effect on December 1, 2009 that was based on disability. For these purposes, the applicable equivalent MAGI-based standard is the standard as submitted by the State and approved by CMS in accordance with CMS guidance.

(iii) With respect to income eligibility criteria, if the individual's MAGI-based income is at or below the applicable converted MAGI-based income standard for the relevant eligibility category or group, then the individual is included in the population that is not newly eligible;

(iv) With respect to income eligibility criteria, if the individual's MAGI-based income is greater than the applicable converted MAGI-based income standard for the relevant eligibility category or group, then the individual is included in the population that is newly eligible;

(v) *Treatment of spend-down programs.* Treatment of medically needy or spend-down programs under the threshold methodology is described in paragraph (f) of this section.

(vi) For purposes of comparing the individual's MAGI-based income to the applicable converted MAGI-based income standard in effect on December 1, 2009, an individual will not be considered disabled absent an actual

disability determination for the individual that is in accordance with the disability definition applicable for the State under Title XIX of the Act.

(4) *Treatment of disability.* For purposes of applying the appropriate FMAP under § 433.10(b) or (c) for the medical assistance expenditures of an individual in applying the definition of newly eligible under § 433.204(a)(1), for eligibility categories or groups as in effect on December 1, 2009 for which disability was an eligibility criteria:

(i) *During the period of a disability determination.* During the period for which a disability determination is pending, including during the period of any appeal process, and absent an actual disability determination for the individual that is in accordance with the disability definition applicable for the State under Title XIX of the Act, the individual is not considered to be disabled.

(ii) *Following a disability determination.* With respect to an individual for which a disability determination was pending, following the actual determination of disability, the individual will be considered disabled effective with the date of the disability determination, or, if later, the disability onset date, as determined.

(5) *Population-based adjustments to the populations of newly eligible and not newly eligible.*

(i) The State may elect a resource criteria proxy adjustment described in paragraph (d) of this section.

(ii) States that had a waiver or demonstration program with an enrollment cap in effect as of December 1, 2009 must apply an adjustment based on enrollment caps, subject to the definition of newly eligible individual in § 433.204(a)(1) and paragraph (e) of this section.

(iii) States that have special circumstances may need to submit associated proxy methodologies to CMS for approval by CMS as described in paragraph (g) of this section.

(6) *Application of FMAP rates to adult group expenditures.* Subject to population adjustments under paragraphs (d), (e), or (g) of this section, federal funding for a State's expenditures for medical assistance provided to individuals determined eligible under § 435.119 of this chapter, including individuals determined eligible under that eligibility group during the evaluation for another eligibility category, must be claimed using the applicable FMAP as follows:

(i) The newly eligible FMAP under § 433.10(c)(6) is applicable for the medical assistance expenditures for individuals determined to be newly eligible, as defined in § 433.204(a)(1).

(ii) The applicable FMAP under § 433.10(b) or § 433.10(c)(7) or (8) is applicable for the medical assistance expenditures for individuals determined not to be newly eligible.

(7) *Status as newly or not newly eligible.* Under the threshold methodology States must provide that once individuals are determined under the threshold methodology to be either newly or not newly eligible individuals in accordance with the applicable December 1, 2009 eligibility criteria, the State would apply that determination until a new determination of MAGI-based income has been made in accordance with § 435.916 of this chapter, or the individual has been otherwise determined not to be covered under the adult group set forth at § 435.119 of this chapter.

(d) *Optional resource criteria proxy adjustment.* (1) *General.* Under an election under this paragraph (d), the State may use a resource proxy methodology for purposes of adjusting the claims for the expenditures of the population enrolled under § 435.119 of this chapter to account for individuals who would not have been eligible for Medicaid because of the application of resource criteria as in effect for such population as of December 1, 2009, and therefore would meet the newly eligible individual definition at § 433.204(a)(1). Under this paragraph (d), a State may elect to apply a resource proxy methodology with respect to the resource criteria as in effect on December 1, 2009 and applied to the expenditures for a specific eligibility category or categories of individuals as in effect on December 1, 2009, or applied to the expenditures of the entire population enrolled under § 435.119 of this chapter. As provided in paragraph (d)(4) of this section, the State must indicate any resource proxy election in the threshold methodology State plan amendment submitted under paragraph (h) of this section. The use of a resource proxy methodology must not delay or interfere with the eligibility determination for an individual.

(2) A State's resource proxy methodology must:

(i) Describe each eligibility group or groups for which an individual eligible under § 435.119 would have been eligible on December 1, 2009, subject to resource criteria, and a methodology to apply those resource criteria as an adjustment to the total expenditures to adjust determinations of the newly eligible population under paragraph (c) of this section.

(ii) Be auditable.

(iii) Be based on statistically valid data, which is either:

(A) Existing State data from and for periods before January 1, 2014 on the resources of individuals who had applied and received a determination with respect to Medicaid eligibility, including resource eligibility under the State's applicable December 1, 2009 eligibility criteria. The existing State data must be specifically related to resource eligibility determinations, indicate the number and types of individuals for whom resource determinations were made, and establish the denial rates specifically identified as due to excess resources; or

(B) Post-eligibility State data on the resources of individuals described in paragraph (d)(2)(iii)(B)(*1*) and (*2*) of this section, based on and obtained through a post-eligibility statistically valid sample of such individuals with respect to the applicable Medicaid eligibility categories and resource eligibility criteria under the State's applicable December 1, 2009 eligibility criteria:

(*1*) State data from and for periods before January 1, 2014 must be for individuals in eligibility categories relevant to § 435.119 of this chapter who apply and receive a determination with respect to Medicaid eligibility, including both approvals and denials, to establish denial rates specifically due to excess resources and identify numbers and types of individuals.

(*2*) State data from and for periods on or after January 1, 2014 must only be for individuals determined eligible and enrolled under § 435.119 of this chapter, must compare individuals' resources to the applicable December 1, 2009 resource criteria to establish denial rates specifically due to excess resources, and identify numbers and types of individuals.

(iv) Describe the State data on individuals' resources used and the application of such data. Whether such State data is based on data described in paragraph (d)(2)(iii)(A) or (B) of this section, such State data must represent sampling results for a period of sufficient length to be statistically valid.

(v) Provide that the resource proxy methodology will account for the treatment of resources in a statistically valid manner when there is a lack of sufficient information to make a resource determination for a particular individual in a sampled population.

(vi) Describe the application of the resource proxy methodology in establishing the amount and submission of claims for Federal funding by the State for the medical assistance expenditures of the applicable eligibility group(s). Such claims submitted under

the resource proxy methodology must reflect the appropriate FMAP for the medical assistance expenditures of the affected eligibility group(s).

(vii) As appropriate, describe and demonstrate the statistical validity of the resource proxy methodology and the use of data under such methodology.

(3) *Effective date for application of resource proxy.* The resource proxy shall not be effective prior to the beginning of the quarter in which such resource proxy is submitted to CMS under the threshold methodology State plan in paragraph (h) of this section.

(4) *One time election for resource proxy.* The election, application, and description of a resource proxy methodology under this paragraph for individuals determined eligible under § 435.119 must be included in a one-time submission of a State plan amendment submitted under paragraph (h) of this section no later than one year from the first day of the quarter in which eligibility for individuals under § 435.119 of this chapter is initially effective for the State.

(e) *Enrollment caps adjustment.* (1) *Scope.* Certain States may have applied enrollment caps, limits, or waiting lists in their Medicaid programs as in effect on December 1, 2009. Under the definition of newly eligible individual in § 433.204(a)(1), such States must consider as newly eligible those individuals eligible under § 435.119 of this chapter who would otherwise be eligible for full benefits, benchmark coverage, or benchmark equivalent coverage provided through a demonstration under the State plan effective December 1, 2009, but would not have been enrolled (or would have been on a waiting list) based on the application of an enrollment cap or limit determined in accordance with the approved demonstration as in effect on that date. Such States must only apply such enrollment cap, limit or waiting list provisions with respect to eligibility category or categories for which such provisions were applicable (for example, nonpregnant childless adults or parents/caretaker relatives) and in effect under the State's Medicaid program on December 1, 2009. For this purpose, individuals who would have been on a waiting list are considered as not enrolled under the demonstration.

(2) A State for which multiple enrollment caps or limits were in effect under its December 1, 2009 Medicaid program may elect to combine such enrollment caps or limits, unless such treatment would preclude claiming of Federal funding at the applicable FMAP rate required under § 433.10(b) or (c) (for example, to distinguish claims for childless adults and parents in an expansion State) for the medical assistance expenditures of individuals determined eligible and enrolled under § 435.119 of this chapter; a State with enrollment cap or limit provisions that would preclude combining enrollment caps or limit provisions must use separate caps; or, the State, at its option, may elect to use separate caps.

(3) For purposes of claiming Federal funding, with respect to each claiming period for which the State claims Federal funding for an eligibility category for which an enrollment cap or limit is applicable and in effect on December 1, 2009, the State must account for:

(i) The total unduplicated number of individuals eligible and enrolled under § 435.119 of this chapter for the applicable claiming period.

(ii) The total State medical assistance expenditures for individuals eligible and enrolled under § 435.119 of this chapter for the applicable claiming period.

(iii) The enrollment cap or limit in effect on December 1, 2009 for the eligibility category, determined in accordance with the approved demonstration as in effect on December 1, 2009.

(A) For States that elect under paragraph (e)(2) of this section to combine the enrollment caps, the enrollment cap is the sum of the enrollment caps for each eligibility group which is being combined.

(B) For States that elect to treat the enrollment caps separately under paragraph (e)(2) of this section, each enrollment cap will be accounted for separately.

(C) The level of the enrollment cap will be as authorized under the demonstration in effect on December 1, 2009; or, if the State had affirmatively set the cap at a lower level consistent with flexibility provided by the demonstration terms and conditions, the State may elect to apply the lower cap as in effect in the State on December 1, 2009. If a State elects to use such an alternate State-specified enrollment cap, the State will provide CMS with evidence, in its State plan amendment submitted to CMS under paragraph (h) of this section, that it had affirmatively implemented such a cap. Whether the State uses the authorized cap or a lower, verifiable cap as in effect in the State consistent with the demonstration special terms and conditions, the amount of expenditures up to the proportion of the 2009 enrollment cap to the total number of currently enrolled people in the group would not be claimed at the newly eligible FMAP.

(4) States for which an enrollment cap, limit, or waiting list was applicable under their Medicaid programs as in effect on December 1, 2009, must describe the treatment of such provision or provisions in the submission to CMS for approval by CMS in accordance with the State plan requirements outlined in § 433.206(h).

(f) *Application of spend-down income eligibility criteria.* (1) *General.* Certain States' Medicaid programs as in effect on December 1, 2009 may have included eligibility categories for which deduction of incurred medical expenses from income (referred to as spend-down) under the provisions of sections 1902(a)(10)(C) or 1902(f) of the Act was applied in determining individuals' Medicaid eligibility. Paragraphs (f)(2) and (3) of this section apply, for purposes of determining whether an individual enrolled under § 435.119 of this chapter meets the definition of newly eligible under § 433.204(a)(1), and for purposes of applying the appropriate FMAP under § 433.10(b) or (c) for the medical assistance expenditures of the individual for which a spend-down eligibility category of a State effective on December 1, 2009 is applicable.

(2) *Not newly eligible individual.* For purposes of a State's spend-down provision, an individual enrolled under § 435.119 of this chapter whose income before the deduction of incurred medical expenses is less than or equal to the applicable December 1, 2009 State spend-down eligibility income level that would have resulted in full benefits is considered not newly eligible. The FMAP applicable for the medical assistance expenditures of such an individual is the appropriate FMAP under § 433.10(b) and (c) as applicable for an individual who is not newly eligible.

(3) *Newly eligible individual.* For purposes of a State's spend-down provision, an individual enrolled under § 435.119 of this chapter whose income before the deduction of incurred medical expenses is greater than the applicable State spend-down eligibility income level is considered newly eligible. The FMAP applicable for the medical assistance expenditures of such an individual is the appropriate FMAP under § 433.10(b) and (c) as applicable for an individual who is newly eligible.

(g) *Special circumstances.* States may submit additional proxy methodologies to CMS for approval by CMS in accordance with the State plan requirements outlined in § 433.206(h).

(h) *Threshold methodology State plan requirements.* To claim expenditures at the increased FMAPs described in

§ 433.210(c)(6) of (c)(8), the State must amend its State plan under the provisions of subpart B of part 430 to reflect the threshold methodology the State implements in accordance with the provisions of this section. The threshold methodology will be included as an attachment to the State plan and, explicitly and by reference, must:

(1) Specify that the threshold methodology the State implements is in accordance with this section;

(2) Specify that the threshold methodology the State implements accounts for the individuals determined eligible under the adult group in § 435.119 of this chapter as a newly eligible individual or not newly eligible individual; and, on that basis, the State implements appropriate tracking for purpose of claiming Federal Medicaid funding for the associated medical assistance expenditures.

(3) Reference the converted MAGI-based December 1, 2009 income eligibility standards and the associated eligibility groups, describe how the State will apply such standards and methodologies, and include other relevant criteria in the assignment of FMAP.

(4) Indicate any required provisions, or options and alternatives the State elects, with respect to:

(i) Treatment of resources, in accordance with paragraph (d) of this section;

(ii) Treatment of enrollment caps or waiting lists, in accordance with paragraph (e) of this section; and

(iii) Special circumstances as approved by CMS in accordance with paragraph (g) of this section.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 20, 2013.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: March 26, 2013.

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

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Part V

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

The $500,000 Deduction Limitation for Remuneration Provided by Certain Health Insurance Providers; Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106796–12]

RIN 1545–BK88

The $500,000 Deduction Limitation for Remuneration Provided by Certain Health Insurance Providers

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations on the application of the $500,000 deduction limitation for remuneration provided by certain health insurance providers under section 162(m)(6) of the Internal Revenue Code (Code). These regulations affect health insurance providers that pay such remuneration.

DATES: Written or electronic comments and requests for a hearing must be received by July 1, 2013.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–106796–12), Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–106796–12), Courier's Desk Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the IRS Internet site via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–106796–12).

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Ilya Enkishev at (202) 622–6030; concerning the submission of comments or to request a public hearing, Oluwafunmilayo (Funmi) Taylor at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains a proposed amendment to 26 CFR part 1 under section 162(m)(6) of the Code. Section 162(m)(6) limits the allowable deduction for remuneration attributable to services provided by applicable individuals to certain health insurance providers that receive premiums from providing health insurance coverage. Section 162(m)(6) was added to the Code by section 9014 of the Patient Protection and Affordable Care Act (ACA) (Pub. L. 111–148, 124 Stat. 119, 868 (2010)).

On December 23, 2010, the Treasury Department and the IRS released Notice 2011–2 (2011–1 CB 260), which provides guidance on certain issues under section 162(m)(6). Specifically, the notice provides guidance on the application of the $500,000 deduction limitation to deferred deduction remuneration that is earned during taxable years beginning after December 31, 2009 and before January 1, 2013 and deductible in a taxable year beginning after December 31, 2012. The notice also provides a *de minimis* exception under which a covered health insurance provider is exempt from the deduction limitation if the health insurance premiums received by it and all other entities with which it must be aggregated under section 162(m)(6) are less than two percent of their combined gross revenues. In addition, the notice provides that remuneration subject to section 162(m)(6) does not include remuneration earned by independent contractors who are not subject to section 409A (meaning generally that the independent contractor provides substantial services to multiple unrelated customers). Finally, the notice provides that premiums under a reinsurance contract are not treated as premiums for providing health insurance coverage for purposes of section 162(m)(6).

Notice 2011–2 requested comments on the following issues:

- Application of the term *covered health insurance provider,* including the *de minimis* exception set forth in the notice and possible alternative *de minimis* exceptions;
- How deferred deduction remuneration should be attributed to a taxable year of an employer;
- Application of the term *covered health insurance provider* in the case of a corporate event such as a merger, acquisition, or reorganization; and
- Application of the deduction limitation to remuneration for services performed for insurers who are captive insurance companies or that provide reinsurance or stop loss insurance.

In drafting these proposed regulations, the Treasury Department and the IRS have considered all comments received, many of which are discussed in this preamble. See § 601.601(d)(2)(ii)(b).

Explanation of Provisions

For taxable years beginning after December 31, 2012, section 162(m)(6) limits to $500,000 the allowable deduction for the aggregate applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year beginning after December 31, 2012 that (but for section 162(m)(6)) is otherwise deductible under chapter 1 of the Code (referred to in this preamble as remuneration that is otherwise deductible). Deferred deduction remuneration attributable to services performed in a disqualified taxable year beginning after December 31, 2009 and before January 1, 2013 that becomes otherwise deductible in taxable years beginning after December 31, 2012 is also subject to the $500,000 deduction limitation, determined as if the deduction limitation applied to disqualified taxable years beginning after December 31, 2009.

Accordingly, if applicable individual remuneration, deferred deduction remuneration, or a combination of applicable individual remuneration and deferred deduction remuneration that is attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year exceeds $500,000, the amount of the remuneration that exceeds $500,000 is not allowable as a deduction in any taxable year. To the extent that the aggregate applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year is less than $500,000, the remuneration generally may be deducted by the covered health insurance provider in the taxable year or years in which the amount is otherwise deductible.

The following example illustrates the application of the section 162(m)(6) deduction limitation. In Year 1, a covered health insurance provider pays $400,000 in salary (applicable individual remuneration) to an applicable individual and also credits $300,000 to an account for the applicable individual under a nonqualified deferred compensation plan, which is payable in Year 5 (deferred deduction remuneration). The $300,000 credit is fully vested in Year 1 and is attributable to services provided by the applicable individual in that year. In Year 1, the covered health insurance provider may deduct the $400,000 of applicable individual remuneration paid to the applicable individual for services provided during that year because the amount of this payment is less than the $500,000 deduction limit. In Year 5, the covered health insurance provider pays the $300,000 that was credited under the nonqualified deferred compensation

plan for services provided by the applicable individual in Year 1. Because the aggregated applicable individual remuneration and deferred deduction remuneration attributable to services performed by the applicable individual in Year 1 exceeds the $500,000 deduction limit by $200,000 ($400,000 + $300,000 = $700,000), the covered health insurance provider can deduct only $100,000 of the $300,000 payment in year 5, and the remaining $200,000 is not deductible by the covered health insurance provider in any year.

I. Covered Health Insurance Provider

A. In General

Section 162(m)(6)(C) provides that a covered health insurance provider is any health insurance issuer described in section 162(m)(6)(C)(i) and certain persons that are treated as a single employer with that health insurance issuer, as described in section 162(m)(6)(C)(ii). These proposed regulations include rules for determining whether a health insurance issuer is a covered health insurance provider for any taxable year and whether a person is treated as a single employer with a health insurance issuer that is a covered health insurance provider for any taxable year. A person may be treated as a covered health insurance provider for one taxable year, but not be treated as a covered health insurance provider for another taxable year, depending on whether that person meets the requirements to be a covered health insurance provider under section 162(m)(6)(C) for a particular taxable year.

B. Health Insurance Issuers

For taxable years beginning after December 31, 2009 and before January 1, 2013, section 162(m)(6)(C)(i)(I) provides that a health insurance issuer (as defined in section 9832(b)(2)) is a covered health insurance provider for a taxable year if that health insurance issuer receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)) during the taxable year. For taxable years beginning after December 31, 2012, section 162(m)(6)(C)(i)(II) provides that a health insurance issuer (as defined in section 9832(b)(2)) is a covered health insurance provider for a taxable year if not less than 25 percent of the gross premiums that the provider receives from providing health insurance coverage (as defined in section 9832(b)(1)) during the taxable year are from minimum essential coverage (as defined in section 5000A(f)).

C. Persons Treated as a Single Employer with a Health Insurance Issuer

Section 162(m)(6)(C)(ii) provides that two or more persons that are treated as a single employer under sections 414(b), (c), (m), or (o) are treated as a single employer for purposes of determining whether a person is a covered health insurance provider, except that in applying section 1563(a) for purposes of these subsections of section 414, sections 1563(a)(2) and (3) (which provide for brother-sister groups and combined groups) are disregarded. Accordingly, these proposed regulations provide that each member of an aggregated group (as described in the final sentence of this paragraph) that includes a health insurance issuer described in section 162(m)(6)(C)(i) at any time during a taxable year is also a covered health insurance provider for purposes of section 162(m)(6), even if the member is not a health insurance issuer and does not provide health insurance coverage. (An exception for certain corporate transactions is provided in the transition rules described in section IX of this preamble.) For this purpose, these proposed regulations define the term *aggregated group* as a health insurance issuer (as defined in section 9832(b)(2)) and all persons that are treated as a single employer with the health insurance issuer under sections 414(b), (c), (m) or (o), disregarding sections 1563(a)(2) and (3) (with respect to controlled groups of corporations) and § 1.414(c)–(2)(c) (with respect to trades or businesses under common control).

For members of an aggregated group that have different taxable years, these proposed regulations provide rules to determine whether a member of an aggregated group that is not a health insurance issuer is a covered health insurance provider for a particular taxable year. Under these rules, the parent entity (as defined in the following paragraph of this preamble) of an aggregated group is a covered health insurance provider for its taxable year with which, or in which, ends the taxable year of the health insurance issuer that is a covered health insurance provider in the aggregated group of which the parent entity is a member. Each other member of an aggregated group is a covered health insurance provider for its taxable year that ends with, or within, the taxable year of the parent entity during which the parent entity is a covered health insurance provider. For purposes of these proposed regulations, the term *parent entity* refers to the common parent of an aggregated group that is a parent-subsidiary controlled group of corporations (within the meaning of section 414(b)) or a parent-subsidiary group of trades or businesses under common control (within the meaning of section 414(c)). With respect to an aggregated group that is an affiliated service group within the meaning of section 414(m) or other group within the meaning of section 414(o), the parent entity is the health insurance issuer in the aggregated group if the aggregated group includes only one health insurance issuer If an aggregated group that is an affiliated service group within the meaning of section 414(m) or other group within the meaning of section 414(o) includes more than one health insurance issuer, the parent entity is any health insurance issuer in the aggregated group that is designated in writing by the other members of the group as the parent entity for purposes of section 162(m)(6), provided that the members of the group treat the health insurance issuer as the parent entity consistently for all taxable years. If the members of an aggregated group that is an affiliated service group or other group fail to designate a parent entity in writing (or fail to apply the designation consistently for all taxable years), the members of the group are deemed to have a parent entity with a taxable year that is the calendar year. A health insurance issuer that has been designated as the parent entity of an aggregated group may leave that group as a result of a merger, disposition, or other corporate transaction; the Treasury Department and the IRS request comments on the circumstances under which a successor parent entity may be designated and any transition rules that may be necessary in this situation.

D. Self-insurers

In response to a request for comments in Notice 2011–2, commenters suggested that an employer that sponsors a self-insured medical reimbursement plan should not be treated as a covered health insurance provider because benefits under this type of plan should not be treated as health insurance coverage for purposes of section 162(m)(6) if the employer assumes the financial risk of providing health benefits to its employees and limits the availability of benefits only to employees (which may include former employees). The Treasury Department and the IRS agree that an employer should not be treated as a covered health insurance provider under these circumstances. Accordingly, these proposed regulations provide that an employer is not a covered health

insurance provider solely because it maintains a self-insured medical reimbursement plan. For this purpose, the term *self-insured medical reimbursement plan* means a separate written plan for the benefit of employees (which may include former employees) that provides for reimbursement of employee medical expenses referred to in section 105(b) and that does not provide for reimbursement under an individual or group policy of accident or health insurance issued by a licensed insurance company or under an arrangement in the nature of a prepaid health care plan that is regulated under federal or state law in a manner similar to the regulation of insurance companies. An arrangement described in the prior sentence may include a plan maintained by an employee organization described in section 501(c)(9). A captive insurance company, however, is treated as a covered health insurance provider under these proposed regulations if it is a health insurance issuer that is otherwise described in section 162(m)(6)(C).

E. De Minimis Exception

1. In General

After section 162(m)(6) was enacted, some commenters observed that the aggregation rule in section 162(m)(6)(C)(ii) could result in unintended consequences in situations in which a health insurance issuer's activities and revenue constitute an insignificant portion of the activities and revenue of persons that are treated as a single employer with the health insurance issuer under the aggregation rules. Commenters also suggested that employers that maintain only legacy policies (policies that are no longer sold but for which current policyholders have automatic renewal rights) should not be considered covered health insurance providers because those employers are no longer accepting new policyholders and may find it difficult to transfer the legacy policies for regulatory and other reasons.

In response to these concerns, Notice 2011–2 provides a *de minimis* exception under which a person that would otherwise be a covered health insurance provider under section 162(m)(6)(C)(i)(I) for a taxable year beginning after December 31, 2009 and before January 1, 2013 is not treated as a covered health insurance provider for that taxable year if the premiums received by that person and all other members of its aggregated group from providing health insurance coverage are less than two percent of the gross revenue of that person and all other members of its aggregated group for that taxable year. For taxable years beginning after December 31, 2012, the notice provides that a person that would otherwise be a covered health insurance provider under section 162(m)(6)(C)(i)(II) for a taxable year is not treated as a covered health insurance provider for that taxable year if the premiums received by that person and all other members of its aggregated group from providing health insurance coverage that constitutes minimum essential coverage are less than two percent of the gross revenue of that person and all other members of its aggregated group for that taxable year.

Commenters generally reacted favorably to the *de minimis* exception set forth in Notice 2011–2. One commenter, however, suggested that the *de minimis* exception should be based on compensation instead of revenues. The commenter suggested that a health insurance issuer and the persons that are treated as a single employer with the health insurance issuer under the aggregation rule should not be treated as covered health insurance providers if the compensation paid by the health insurance issuer is less than two percent of the total compensation paid by all members of the aggregated group. The commenter reasoned that comparing compensation rather than gross revenue and premiums would be a better method to measure the importance of the health insurance business to an aggregated group because basing a *de minimis* exception on gross revenue could overemphasize the importance of health insurance activities, which may generate relatively higher revenues but operate on slimmer profit margins. These proposed regulations do not adopt this suggestion. The Treasury Department and the IRS do not agree that comparing compensation paid by the health insurance issuer with the overall compensation paid by the aggregated group would be a better method of measuring the importance of the health insurance business to an aggregated group than comparing premiums with gross revenues. The Treasury Department and the IRS are also concerned that a *de minimis* exception based on compensation would be inadministrable because it would require taxpayers and the IRS to allocate compensation between members of an aggregated group if an individual performs services for more than one member of the aggregated group.

The commenter also suggested that if an individual provides services for a member of an aggregated group, but does not provide any services to the health insurance issuer within the group, then the remuneration for those services should not be subject to the section 162(m)(6) deduction limitation. These proposed regulations do not adopt this suggestion because that rule would be inconsistent with section 162(m)(6)(C)(ii), which treats all members of an aggregated group that includes a health insurance issuer described in section 162(m)(6)(C)(i) as covered health insurance providers subject to the section 162(m)(6) deduction limitation.

One commenter requested that the two-percent threshold for the *de minimis* exception be increased slightly to an unspecified percentage to avoid treating certain aggregated groups of employers that utilize captive insurance companies as covered health insurance providers. Several other commenters, however, requested that the two-percent threshold not be increased because a higher threshold could allow health insurance issuers that sell significant amounts of health insurance coverage to be exempt from the deduction limitation, and thereby provide them with a competitive advantage. After carefully considering these comments, the Treasury Department and the IRS have concluded that the two-percent threshold remains appropriate. Accordingly, these proposed regulations adopt a *de minimis* exception that is substantially similar to the *de minimis* exception set forth in Notice 2011–2.

To accommodate unexpected changes in the revenue sources of an aggregated group and other events that could affect application of the *de minimis* exception, and also to provide a reasonable period for employers that have not previously been treated as covered health insurance providers to adjust their compensation programs, these proposed regulations provide that if a person is not treated as a covered health insurance provider for one or more taxable years solely by reason of the *de minimis* exception, and then fails to meet the requirements for the *de minimis* exception for one or more taxable years, the person will not be treated as a covered health insurance provider for the first taxable year in which it fails to meet the requirements for the *de minimis* exception after previously not being treated as a covered health insurance provider solely by reason of the *de minimis* exception.

2. Application of the De Minimis Exception to Aggregated Groups the Members of Which Have Different Taxable Years

Commenters asked how the *de minimis* exception would apply in

situations in which the members of the aggregated group have different taxable years. These proposed regulations provide that the *de minimis* exception applies based on the premiums and gross revenues received for the taxable year of the health insurance issuer and the taxable years of the other members of the aggregated group for which they would otherwise be treated as covered health insurance providers in the absence of the *de minimis* exception. In other words, the *de minimis* exception applies based on the premiums and gross revenues of (i) the health insurance issuer for its taxable year, (ii) the parent entity for its taxable year with which, or in which, ends the taxable year of the health insurance issuer, and (iii) each other member of the aggregated group for its taxable year that ends with, or within, the taxable year of the parent entity.

II. Premiums

A. In General

Section 162(m)(6)(C)(i) provides that a health insurance issuer is a covered health insurance provider for a taxable year only if it receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)). These proposed regulations include rules specifying that amounts received under an indemnity reinsurance contract and amounts that are direct service payments are not treated as premiums from providing health insurance coverage for purposes of section 162(m)(6)(C)(i).

B. Amounts Received Under an Indemnity Reinsurance Contract

Health insurance issuers may reinsure a portion of their risks by entering into an indemnity reinsurance contract with a reinsurer. After Congress enacted section 162(m)(6), commenters suggested that premiums received under an indemnity reinsurance contract should not be treated as premiums from providing health insurance coverage. An indemnity reinsurance contract is a contract between a health insurance issuer and a reinsurer under which a reinsurance claim is payable only after the health insurance issuer has paid an amount for health benefits under its own insurance agreement with the policy holder. Thus, commenters reasoned, premiums for reinsurance coverage should not be treated as premiums from providing health insurance coverage for purposes of section 162(m)(6). In response to these comments, Notice 2011–2 provides that, solely for purposes of determining whether a taxpayer is a covered health insurance provider, premiums received under an indemnity reinsurance contract are not treated as premiums from providing health insurance coverage.

Consistent with Notice 2011–2, these proposed regulations provide that, solely for purposes of determining whether a person is a covered health insurance provider, premiums received under an indemnity reinsurance contract are not treated as premiums from providing health insurance coverage, provided that under the reinsurance contract (1) the reinsuring company agrees to indemnify the health insurance issuer for all or part of the risk of loss under policies specified in the agreement, and (2) the health insurance issuer retains its liability to, and its contractual relationship with, the individual insured.

C. Direct Service Payments

A health insurance issuer or other person that receives premiums from providing health insurance coverage may enter into an arrangement with a third party to provide, manage, or arrange for the provision of services by physicians, hospitals, or other healthcare providers. In connection with this arrangement, the health insurance issuer or other person that receives premiums from providing health insurance coverage may pay compensation to the third party in the form of capitated, prepaid, periodic, or other payments, and the third party may bear some or all of the risk that the compensation is insufficient to pay the full cost of providing, managing, or arranging for the provision of services by physicians, hospitals, or other healthcare providers as required under the arrangement. In addition, the third party may be subject to healthcare provider, health insurance, licensing, financial solvency, or other regulation under state insurance law. Commenters suggested that compensation payments to these third parties under these types of arrangements should not be treated as premiums from providing health insurance coverage for purposes of section 162(m)(6) because, while the third party bears some risk in connection with providing, managing, or arranging for the provision of healthcare services, a health insurance issuer or other entity that receives premiums from providing health insurance coverage is ultimately responsible for providing health insurance coverage to the insureds. The commenters explained that these risk shifting arrangements are simply methods by which health insurance issuers and other entities that provide health insurance coverage diversify and manage their risk, in a manner similar to reinsurance. The Treasury Department and the IRS agree with this comment. Accordingly, these proposed regulations provide that capitated, prepaid, periodic, or other payments (referred to as direct service payments) made by a health insurance issuer or other person that receives premiums from providing health insurance coverage to a third party as compensation for providing, managing, or arranging for the provision of healthcare services by physicians, hospitals, or other healthcare providers are not treated as premiums for purposes of section 162(m)(6), regardless of whether the third party is subject to healthcare provider, health insurance, licensing, financial solvency, or other similar regulatory requirements under state law.

The Treasury Department and the IRS also understand that certain government entities may make similar capitated, prepaid, or periodic payments to third parties to provide, manage, or arrange for the provision of services by physicians, hospitals, or other healthcare providers and that these third parties may also bear some or all of the risk that the payments are insufficient to pay the full cost of providing, managing, or arranging for the provision of services subject to the arrangement. Under certain circumstances, it may be inappropriate to treat these payments made by government entities as premiums for purposes of section 162(m)(6). However, because these payments are not made by an entity that has received premiums from providing health insurance, it may be difficult to distinguish between payments made to third parties that should be treated as premiums from providing health insurance and payments that should not be treated as premiums from providing health insurance. The Treasury Department and the IRS request comments on when such payments should be treated as premiums from providing health insurance coverage for purposes of section 162(m)(6) and when they should not be treated as premiums for these purposes.

III. Disqualified Taxable Year

Section 162(m)(6)(B) provides that a disqualified taxable year is, with respect to any employer, any taxable year for which the employer is a covered health insurance provider. Consistent with the statutory language, these proposed regulations provide that a disqualified taxable year is, with respect to any person, any taxable year for which that

person is a covered health insurance provider.

IV. Applicable Individual

Section 162(m)(6)(F) provides that with respect to a covered health insurance provider for a disqualified taxable year, an applicable individual is any individual (i) who is an officer, director, or employee in such taxable year, or (ii) who provides services for, or on behalf of, the covered health insurance provider during the taxable year. As noted in the Background section of this preamble, Notice 2011–2 provides that the term *applicable individual* for a taxable year does not include an independent contractor with respect to whom a compensation arrangement would not be subject to section 409A pursuant to § 1.409A–1(f)(2). Section 1.409A–1(f)(2) generally provides an exception from section 409A for arrangements that are made with independent contractors that provide substantial services to multiple unrelated service recipients. Commenters suggested that future guidance adopt this rule for purposes of section 162(m)(6).

These proposed regulations adopt this rule. The proposed regulations provide that remuneration for services provided by an independent contractor to a covered health insurance provider will not be subject to the deduction limitation under section 162(m)(6) if each of the following conditions are met. First, the independent contractor is actively engaged in the trade or business of providing services to recipients, other than as an employee or as a member of the board of directors of a corporation (or in a similar position with respect to an entity that is not a corporation). Second, the independent contractor provides significant services (as defined in § 1.409A–1(f)(2)(iii)) to two or more persons to which the independent contractor is not related and that are not related to one another (as defined in § 1.409A–1(f)(2)(ii)). Third, the independent contractor is not related to the covered health insurance provider or any member of its aggregated group, applying the definition of related person contained in § 1.409A–1(f)(2)(ii), except that for purposes of applying the references to sections 267(b) and 707(b)(1), the language ''20 percent'' is not substituted for ''50 percent'' in each place ''50 percent'' appears in sections 267(b) and 707(b)(1).

Commenters also suggested that future guidance clarify that the section 162(m)(6) deduction limitation applies to services provided by individuals that are natural persons and not services provided pursuant to a contract or arrangement with a corporation or partnership. For example, commenters were concerned that remuneration paid to doctors working for practice groups that provide services to a covered health insurance provider would be subject to the deduction limitation under section 162(m)(6). In general, a corporation or a partnership (for federal tax purposes) would not be treated as an applicable individual. However, the Treasury Department and the IRS remain concerned that covered health insurance providers may attempt to avoid the application of the deduction limitation under section 162(m)(6) by encouraging employees and independent contractors who are natural persons to form small or single-member personal service corporations or other similar entities to provide services that are historically provided by natural persons. The Treasury Department and the IRS invite comments regarding how the final regulations might address this potential abuse.

V. Applicable Individual Remuneration

Section 162(m)(6)(D) and these proposed regulations provide that applicable individual remuneration is the aggregate amount that is allowable as a deduction with respect to an applicable individual for a disqualified taxable year (determined without regard to section 162(m)) for remuneration for services performed by that individual (whether or not during the taxable year), except that applicable individual remuneration does not include any amount that is deferred deduction remuneration. Unlike the definition of remuneration in section 162(m)(1), the definition of applicable individual remuneration in section 162(m)(6)(D) includes remuneration that is performance-based compensation, remuneration payable on a commission basis, and remuneration payable under existing binding contracts. Whether remuneration is applicable individual remuneration is determined without regard to when the services for the remuneration are performed. For example, a discretionary bonus first granted and paid to an applicable individual in a disqualified taxable year solely in recognition of services provided in prior years is applicable individual remuneration for the disqualified taxable year even though the bonus does not relate to services provided in the disqualified taxable year. In addition, a grant of restricted stock in a disqualified taxable year for which an applicable individual makes an election under section 83(b) is applicable individual remuneration for the disqualified taxable year of the covered health insurance provider in which the grant of the restricted stock is made.

VI. Deferred Deduction Remuneration

Section 162(m)(6)(E) and these regulations provide that deferred deduction remuneration is remuneration that would be applicable individual remuneration for services that an applicable individual performs during a disqualified taxable year, but for the fact that it is not deductible until a later taxable year (such as generally occurs, for example, with nonqualified deferred compensation). Whether remuneration is deferred deduction remuneration is determined based on when the remuneration is deductible, regardless of when the remuneration is paid. For example, a bonus that is paid within 2½ months after the end of a covered health insurance provider's taxable year in which an applicable individual first obtains a right to the remuneration is deductible in the covered health insurance provider's taxable year in which the applicable individual obtains the right and, therefore, is applicable individual remuneration, rather than deferred deduction remuneration. See section 404(a)(5); § 1.404(b)–1T Q&A–2.

VII. Attribution of Applicable Individual Remuneration and Deferred Deduction Remuneration to Services Performed in Taxable Years

The $500,000 deduction limitation under section 162(m)(6) applies to the applicable individual remuneration and deferred deduction remuneration that is attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year. Accordingly, at the time that an amount of applicable individual remuneration or deferred deduction remuneration for an applicable individual becomes otherwise deductible (and not before that time), the remuneration must be attributed to services provided by the applicable individual during a particular taxable year or years of a covered health insurance provider.

In response to a request for comments in Notice 2011–2, some commenters asked that taxpayers be permitted to use any reasonable method to attribute remuneration to taxable years of a covered health insurance provider, as long as the method is applied consistently. Commenters observed that the allocation methods for purposes of section 162(m)(5) set forth in Notice 2008–94 (relating to recipients of payments under the Troubled Asset Relief Program) may not be appropriate

for purposes of section 162(m)(6) because the methods in Notice 2008–94 were developed for employers expected to be subject to the deduction limitation under section 162(m)(5) only temporarily, and thus necessarily provided less flexibility than may be appropriate for purposes of section 162(m)(6). Permitting taxpayers to use any reasonable method to attribute remuneration to a taxable year of a covered health insurance provider, however, may lead to results that are inconsistent with section 162(m)(6) and the legislative intent underlying the statute. Accordingly, these proposed regulations provide rules for attributing applicable individual remuneration and deferred deduction remuneration to services performed by an applicable individual during a taxable year or years of a covered health insurance provider. Nonetheless, the Treasury Department and the IRS remain concerned about imposing undue burdens on taxpayers and request comments regarding the ease or difficulty of applying the attribution rules described in these proposed regulations and regarding specific alternatives for attributing applicable individual remuneration and deferred deduction remuneration to services performed during taxable years of a covered health insurance provider that would be less burdensome or otherwise more appropriate.

A. In General

These proposed regulations provide that remuneration is attributable to services performed by an applicable individual in the taxable year of the covered health insurance provider in which the applicable individual obtains a legally binding right to the remuneration, unless the remuneration is attributable to a different taxable year under another provision of these regulations.

In addition, these proposed regulations provide that deferred deduction remuneration is not attributable to a taxable year ending before the later of the date that (i) an applicable individual begins providing services to a covered health insurance provider, or (ii) an applicable individual obtains a legally binding right to the remuneration. If any amount of remuneration that becomes otherwise deductible would be attributable under the rules provided in these proposed regulations to a taxable year ending before the applicable individual begins providing services to a covered health insurance provider or obtains a legally binding right to the remuneration, these proposed regulations provide that this remuneration is attributed to services performed by the applicable individual in the taxable year in which the latter of these two dates occurs.

These proposed regulations further provide that remuneration is not attributable to periods when an applicable individual is not a service provider. Solely for purposes of these proposed regulations, an individual is treated as a service provider for any period during which the individual is an officer, director, or employee of, or providing services for, or on behalf of, a covered health insurance provider or any member of its aggregated group. An amount of remuneration that otherwise would be attributable under the rules set forth in these proposed regulations to a period when an applicable individual is not a service provider must be reattributed to a period during which the applicable individual is a service provider in accordance with the rules set forth in these proposed regulations.[1] Accordingly, for example, compensation such as earnings on an account balance after termination of employment but before payment, or appreciation of a share's fair market value after termination of employment but before the exercise of a stock option or stock appreciation right, must be attributed to the period during which the applicable individual is a service provider.

If an amount of remuneration that becomes otherwise deductible may be attributed to services performed by an applicable individual in two or more taxable years of a covered health insurance provider in accordance with the rules for attributing remuneration set forth in the immediately following sections of this preamble for attributing remuneration under an account balance plan or a nonaccount balance plan, the amount must be attributed first to services performed by the applicable individual in the earliest taxable year to which the amount could be attributed under the applicable attribution rules, and then to the next subsequent taxable year to which the amount could be attributed under those attribution rules, until the entire amount has been attributed to one or more taxable years of the covered health insurance provider.

[1] These proposed regulations apply solely for purposes of section 162(m)(6), and therefore have no effect on the determination whether an amount is remuneration attributable to a particular taxable year for employment tax purposes, and thus wages subject to federal employment taxation (including the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, the Railroad Retirement Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 22, 23, and 24 of the Code)), or the timing or amount of any applicable federal employment taxation.

B. Account Balance Plans

To minimize the administrative burden on taxpayers in applying the remuneration attribution rules for account balance plans (as described in § 1.409A–1(c)(2)(i)(A) and (B)), these proposed regulations provide that remuneration for an account balance plan may be attributed to a taxable year based on the increase in the account balance during the taxable year, taking into account adjustments for the amount of any payments from that account during the taxable year. This method of attributing remuneration is referred to in the proposed regulations as the standard attribution method. Under the standard attribution method, the amount of remuneration attributable to services performed in a taxable year of a covered health insurance provider is equal to the excess of the account balance as of the last day of the taxable year, plus any payments made from that account during the taxable year, over the account balance as of the last day of the immediately preceding taxable year. Any net decrease in an account balance during a taxable year (again after adding back payments made under the plan during the taxable year) is treated as a reduction to deferred deduction remuneration for that taxable year and may offset other deferred deduction remuneration (but not applicable individual remuneration) attributable to services performed by the applicable individual in that year. If there is not sufficient other deferred deduction remuneration for that taxable year to offset the entire reduction, the excess may offset deferred deduction remuneration in the first subsequent taxable year or years in which the applicable individual has deferred deduction remuneration to be offset by the loss.

Under the standard attribution method, any increases or decreases in an account balance that occur in taxable years in which an applicable individual is not a service provider must be attributed to taxable years of the covered health insurance provider (i) during which the applicable individual is a service provider, and (ii) on one or more days of which the applicable individual retains an account balance under the plan. The Treasury Department and the IRS request comments on the appropriate method for attributing this remuneration to these taxable years. For taxable years beginning in 2013, and thereafter until the Treasury Department and the IRS issue further guidance prescribing the method for attributing this remuneration to these taxable years, this remuneration may be attributed

using any reasonable method to taxable years of the covered health insurance provider (i) during which the applicable individual is a service provider, and (ii) on one or more days of which the applicable individual retains an account balance under the plan. For this purpose, a method is reasonable only if it is consistent with a reasonable, good faith interpretation of section 162(m)(6) and is applied consistently for all remuneration provided by the covered health insurance provider under substantially similar plans or arrangements.

These proposed regulations provide an alternative method for attributing increases and decreases in account balance plans to services performed during a taxable year of a covered health insurance provider. Under the alternative attribution method, earnings and losses on a principal addition (including earnings and losses that occur in taxable years during which an applicable individual is not a service provider) are attributed to the taxable year in which an applicable individual is credited with the principal addition under the plan. For example, if a principal addition is credited to the account balance of an applicable individual for the 2014 taxable year, earnings (or losses) on that principal addition in 2028 are treated as additional deferred deduction remuneration (or reductions to deferred deduction remuneration) for the 2014 taxable year, and not the 2028 taxable year.

After an amount of remuneration has been attributed to a taxable year under a particular attribution method (for example, because a payment has been made and the amount of the payment becomes otherwise deductible), it is administratively difficult for the attribution method to be changed for future years. In addition, the Treasury Department and the IRS are concerned that the ability to change attribution methods may lead to selective use of methods to maximize deductions. Therefore, these proposed regulations provide that a covered health insurance provider must use the method chosen to attribute remuneration under all of its account balance plans consistently for all taxable years. However, the Treasury Department and the IRS understand that there may be valid business reasons for changing attribution methods, such as a merger or acquisition, change in compensation structure, or change in accounting method. Accordingly, the Treasury Department and the IRS request comments on the standards that should be applied to determine whether and when a method may be changed, and how that change would apply if deductions for some portion of the deferred deduction remuneration have already been taken.

C. Nonaccount Balance Plans

These proposed regulations provide that remuneration under a nonaccount balance plan (as described in § 1.409A–1(c)(2)(i)(C)) is attributable to services performed by an applicable individual in a taxable year based on the increase (or decrease) in the present value of the applicable individual's benefit under the plan during the taxable year. Under this method, the amount of remuneration attributable to services performed in a taxable year of a covered health insurance provider is equal to the increase (or decrease) in the present value of the future payment or payments due under the plan as of the last day of the taxable year of the covered health insurance provider, increased by any payments made during that year, over (or under) the present value of the future payment or payments as of the last day of the covered health insurance provider's preceding taxable year. For purposes of determining the increase (or decrease) in the present value of a future payment or payments, the rules of § 31.3121(v)(2)–1(c)(2) apply. Like losses under account balance plans, losses attributable to any taxable year under a nonaccount balance plan may offset other deferred deduction remuneration attributable to services performed by the applicable individual in that year (or, if there is not sufficient other deferred deduction remuneration for that taxable year to offset the entire reduction, the excess may offset deferred deduction remuneration in the first subsequent taxable year or years in which the applicable individual has deferred deduction remuneration to be offset by the loss).

Any increase (or decrease) in the present value of a future payment or payments under a nonaccount balance plan that occurs in a taxable year when an applicable individual is not a service provider must be attributed to taxable years of the covered health insurance provider during which the applicable individual (i) is a service provider and (ii) has a legally binding right to a future payment or payments under the nonaccount balance plan. The Treasury Department and IRS request comments on the appropriate method for attributing this remuneration to these taxable years. For taxable years beginning in 2013, and thereafter until the Treasury Department and the IRS issue further guidance prescribing the method for attributing this remuneration to these taxable years, this remuneration may be attributed using any reasonable method to taxable years during which the applicable individual (i) is a service provider and (ii) has a legally binding right to the future payment or payments. For this purpose, a method is reasonable only if it is consistent with a reasonable, good faith interpretation of section 162(m)(6) and is applied consistently for all remuneration provided by the covered health insurance provider under substantially similar plans or arrangements.

D. Equity-Based Remuneration

These proposed regulations provide specific rules for the attribution of equity-based remuneration to services performed in specific taxable years. They provide that remuneration resulting from the exercise of stock options and stock appreciation rights (SARs) generally is attributable, on a daily *pro rata* basis, to services performed by the applicable individual over the period beginning on the date of grant of the stock option or SAR and ending on the date that the stock right is exercised, excluding any days on which an applicable individual is not a service provider.

These proposed regulations further provide that remuneration resulting from the vesting or transfer (or transferability) of restricted stock for which an election under section 83(b) has not been made generally is attributable, on a daily *pro rata* basis, to services performed by the applicable individual over the period beginning on the grant date of the restricted stock and ending on the earliest of the date on which (i) the substantial risk of forfeiture lapses or (ii) the restricted stock is transferred (or becomes transferable), excluding any days on which an applicable individual is not a service provider.

These proposed regulations provide that remuneration resulting from restricted stock units (RSUs) is generally attributable, on a daily *pro rata* basis, to services performed over the period beginning on the date the applicable individual obtains the legally binding right to the RSU and ending on the date the remuneration is paid or made available such that it is includible in gross income, excluding any days on which an applicable individual is not a service provider.

E. Involuntary Separation Pay

These proposed regulations provide that involuntary separation pay is attributable to services performed by an applicable individual during the taxable year of the covered health insurance provider in which the involuntary

separation from service occurs. Alternatively, involuntary separation pay may be attributable, on a daily *pro rata* basis, to services performed by the applicable individual beginning on the date that the applicable individual obtains a legally binding right to the involuntary separation pay and ending on the date of the applicable individual's involuntary separation from service with the covered health insurance provider and all members of its aggregated group. Involuntary separation pay to different individuals may be attributed using different methods; however, if involuntary separation payments are made to the same individual over multiple taxable years, all the payments must be attributed using the same method. These regulations define involuntary separation pay as remuneration to which an applicable individual obtains a right to payment solely as a result of an involuntary separation from service. For these purposes, an involuntary separation from service means an involuntary separation from service under § 1.409A–1(n).

F. Substantial Risk of Forfeiture

An applicable individual's right to remuneration may be subject to a substantial risk of forfeiture. In response to Notice 2011–2, commenters suggested that remuneration be attributed to services performed over the period during which amounts are subject to a substantial risk of forfeiture (the vesting period). Consistent with this suggestion, these proposed regulations provide that in the case of remuneration that is subject to a substantial risk of forfeiture and that would otherwise be attributed to taxable years of a covered health insurance provider in accordance with (i) the general rule that attributes remuneration to the taxable year in which an applicable individual obtains a legally binding right to the remuneration, (ii) the attribution rules applicable to account balance plans, or (iii) the attribution rules applicable to nonaccount balance plans, the remuneration is attributed to taxable years of the covered health insurance provider using a two-step process. First, the remuneration is attributed to taxable years of the covered health insurance provider pursuant to the legally-binding-right rule or the rules applicable to account balance or nonaccount balance plans, as applicable. Second, the remuneration that was subject to a substantial risk of forfeiture is reattributed on a daily *pro rata* basis over the period that the remuneration was subject to a substantial risk of forfeiture (in other words, reattributed evenly over the vesting period).

If a vesting period ends on a day other than the last day of the covered health insurance provider's taxable year, the remuneration attributable to that taxable year under the first step of the attribution process is divided between the portion of the taxable year that includes the vesting period and the portion of the taxable year that does not include the vesting period. The amount attributed to the portion of the taxable year that includes the vesting period is equal to the total amount of remuneration that would be attributable to the taxable year under the first step of the attribution process, multiplied by a fraction, the numerator of which is the number of days during the taxable year that the amount is subject to a substantial risk of forfeiture and the denominator of which is the number of days in such taxable year. The remaining amount is attributed to the portion of the taxable year that does not include the vesting period and, therefore, is not reattributed over the vesting period under the second step of the attribution process.

For purposes of these proposed regulations, a substantial risk of forfeiture means a substantial risk of forfeiture under § 1.409A–1(d). If an individual makes an election pursuant to section 83(b), then the remuneration included in the individual's gross income is applicable individual remuneration that is attributed to the year in which the transfer of the property occurs.

VIII. Application of the $500,000 Deduction Limitation

A. In General

The section 162(m)(6) deduction limitation applies to the aggregate applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year. Accordingly, if the applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual for a covered health insurance provider in a disqualified taxable year exceed $500,000, the amount of the remuneration that exceeds $500,000 is not allowable as a deduction in any taxable year.

B. Timing of Application of the Deduction Limitation

The $500,000 deduction limitation with respect to the applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year is applied to that remuneration at the time that the remuneration otherwise becomes deductible. The deduction limitation with respect to an applicable individual for any particular disqualified taxable year is applied first to any applicable individual remuneration attributable to services performed by the applicable individual in that disqualified taxable year. If the amount of the applicable individual remuneration is less than the $500,000 deduction limitation, all of the applicable individual remuneration is deductible by the covered health insurance provider in that disqualified taxable year. To the extent the applicable individual remuneration exceeds the $500,000 deduction limitation, the covered health insurance provider's deduction for the applicable individual remuneration is limited to $500,000, and the amount of the applicable individual remuneration that exceeds $500,000 and, if applicable, any deferred deduction remuneration attributable to services performed by the applicable individual in that disqualified taxable year, cannot be deducted in any taxable year.

When the $500,000 deduction limitation is applied to an amount of applicable individual remuneration attributable to services performed by an applicable individual in a disqualified taxable year, the deduction limitation with respect to that applicable individual for that disqualified taxable year is reduced by the amount of the applicable individual remuneration against which it is applied, but not below zero. If the applicable individual also has an amount of deferred deduction remuneration attributable to services performed in that disqualified taxable year that becomes otherwise deductible in a subsequent taxable year, the deduction limitation, as reduced, is applied to that amount of deferred deduction remuneration in the first taxable year in which it becomes otherwise deductible. If the amount of the deferred deduction remuneration that becomes otherwise deductible is less than the reduced deduction limitation, then the full amount of the deferred deduction remuneration is deductible in that taxable year. To the extent that the amount of the deferred deduction remuneration exceeds the reduced deduction limitation, the covered health insurance provider's deduction for the deferred deduction remuneration is limited to the amount

of the reduced deduction limitation and the amount of the deferred deduction remuneration that exceeds the deduction limitation cannot be deducted in any taxable year.

After the deduction limitation with respect to an applicable individual for a disqualified taxable year (the original disqualified taxable year) is applied to an amount of deferred deduction remuneration, the deduction limitation with respect to that applicable individual for the original disqualified taxable year is further reduced by the amount of the deferred deduction remuneration against which it is applied, but not below zero. If the applicable individual has an additional amount of deferred deduction remuneration attributable to services performed in the original disqualified taxable year that becomes otherwise deductible in a subsequent taxable year, the deduction limitation, as further reduced, is applied to that amount of deferred deduction remuneration in the taxable year in which it is otherwise deductible. This process continues for future taxable years in which deferred deduction remuneration attributable to services performed by the applicable individual in the original disqualified taxable year is otherwise deductible. No deduction is allowed for any applicable individual remuneration or deferred deduction remuneration to the extent that remuneration exceeds the deduction limitation in effect at the time it is applied to the remuneration.

C. Application of Deduction Limitation to Payments of Deferred Deduction Remuneration

Any payment of deferred deduction remuneration may include remuneration that is attributable to services performed by an applicable individual in one or more taxable years of a covered health insurance provider under the rules set out in these proposed regulations. For example, remuneration resulting from the vesting of restricted stock that is subject to a substantial risk of forfeiture for three full taxable years of a covered health insurance provider is attributable to services performed in each of the three years during which the restricted stock was subject to a substantial risk of forfeiture. In that case, a separate deduction limitation applies to each portion of the payment that is attributed to services performed in a different disqualified taxable year of the covered health insurance provider. Any portion of the payment that is attributed to a disqualified taxable year will be deductible only to the extent that it does not exceed the deduction limit that applies to the applicable individual for that disqualified taxable year, as that deduction limit may have been previously reduced by the amount of any applicable individual remuneration or deferred deduction remuneration attributable to services performed in that disqualified taxable year that was previously deductible. If payments of deferred deduction remuneration under an account balance plan or a nonaccount balance plan are paid in installments (rather than a single lump-sum), the payments are deemed to be made from the deferred deduction remuneration to which they are attributable under the applicable attribution rules, with payments deemed to be made first with respect to the earliest taxable years to which they could be attributed. The proposed regulations contain numerous examples to illustrate how these rules apply to services performed and compensation payments made over multiple taxable years.

D. Application of the Deduction Limitation to an Aggregated Group

For purposes of applying the section 162(m)(6) deduction limitation, all members of an aggregated group are treated as a single employer. Accordingly, one $500,000 deduction limitation applies to the aggregate applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual during a disqualified taxable year for any member of the aggregated group. Each time this deduction limitation is applied to an amount of applicable individual remuneration or deferred deduction remuneration otherwise deductible by any member of the aggregated group, the deduction limitation is reduced by the amount of the remuneration against which it is applied, and the reduced deduction limitation is then applied to other remuneration attributable to services performed by the applicable individual in the original disqualified taxable year that is otherwise deductible by any member of the aggregated group, in the manner previously described.

In the case of two or more members of an aggregated group that are otherwise entitled to deduct in any taxable year applicable individual remuneration or deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year that exceeds the applicable deduction limitation for that disqualified taxable year, the deduction limitation is prorated and allocated to the members of the aggregated group in proportion to the applicable individual remuneration or deferred deduction remuneration that each otherwise would be entitled to deduct in the taxable year (but for section 162(m)(6)).

IX. Corporate Transactions

A corporation or other person may become a covered health insurance provider as a result of a merger, acquisition of assets or stock, disposition, reorganization, consolidation, or separation, or any other transaction (including a purchase or sale of stock or other equity interest) resulting in a change in the composition of its aggregated group (generally referred to in these proposed regulations as a corporate transaction). For example, as a result of the aggregation rules, members of a controlled group of corporations may become covered health insurance providers if a health insurance issuer that is a covered health insurance provider becomes a member of the controlled group. In response to Notice 2011–2, commenters suggested that if a person becomes a covered health insurance provider as a result of a corporate transaction, the person should not be treated as a covered health insurance provider for the taxable year in which the corporate transaction occurs. These proposed regulations adopt this suggestion by providing transition period relief to ease the administrative burden on persons that become covered health insurance providers solely as a result of a corporate transaction. Specifically, these proposed regulations provide that if a person that is not otherwise a covered health insurance provider would become a covered health insurance provider solely as a result of a corporate transaction, the person generally is not treated as a covered health insurance provider for the taxable year in which the transaction occurs (referred to as the transition period). The corporation or other person, however, is treated as a covered health insurance provider for any subsequent taxable year for which it qualifies as a covered health insurance provider under the general rules for determining whether a person is a covered health insurance provider. A person that was a covered health insurance provider immediately before a corporate transaction is not eligible for this transition period relief because the person did not become a covered health insurance provider solely as a result of a corporate transaction.

However, these proposed regulations provide that in certain circumstances the deduction limitation under section 162(m)(6) may apply to a person that is not treated as a covered health

insurance provider during the transition period. Specifically, these proposed regulations provide that transition period relief does not extend to remuneration provided to applicable individuals of a health insurance issuer that is a covered health insurance provider (which is not eligible for the transition period because it does not become a covered health insurance provider solely as a result of a corporate transaction) by other members of the acquiring aggregated group that are otherwise eligible for the transition period relief. For example, if a health insurance issuer that is a covered health insurance provider becomes a member of an acquiring aggregated group that is a consolidated group described in § 1.1502–1(h), the other members of which are not treated as covered health insurance providers in the year in which the corporate transaction occurs because of the transition period relief, then any applicable individual remuneration and deferred deduction remuneration attributable to services provided by an applicable individual of the health insurance issuer for the health insurance issuer or for the other members of the acquiring aggregated group during the transition period are subject to the deduction limitation of section 162(m)(6).

These proposed regulations also provide rules for covered health insurance providers that have short taxable years as a result of a corporate transaction. See proposed § 1.162–31(f).

X. Grandfathered Amounts Attributable to Services Performed Before January 1, 2010

The section 162(m)(6) deduction limitation only applies to applicable individual remuneration attributable to services performed by an applicable individual during taxable years beginning after December 31, 2012 and to deferred deduction remuneration attributable to services performed by an applicable individual during taxable years beginning after December 31, 2009. It does not apply to remuneration attributable to services performed during taxable years beginning before January 1, 2010. These proposed regulations provide rules for determining whether remuneration is attributable to services performed in taxable years beginning before January 1, 2010 that are in some ways different from the general attribution rules.

Commenters suggested that deferred deduction remuneration earned or granted in taxable years beginning before January 1, 2010, be attributed to services performed before that time, regardless of whether the remuneration was subject to a substantial risk of forfeiture after that time. Commenters reasoned that Congress did not intend for the deduction limitation to apply to remuneration attributable to taxable years starting before January 1, 2010 (even if such remuneration was not vested as of the first day of the taxable year beginning after December 31, 2009), because Congress enacted section 162(m)(6) to encourage the use of health insurance coverage premiums to lower insurance rates for taxable years beginning after December 31, 2012 (when health insurance issuers would begin to benefit from a substantial increase in new customers). Commenters also asserted that the statute should not apply to arrangements that existed before the statute was enacted because covered health insurance providers could not change those arrangements unilaterally in response to the statute.

In response to these comments, these proposed regulations provide that the section 162(m)(6) deduction limitation does not apply to deferred deduction remuneration attributable to services performed during taxable years beginning before January 1, 2010, regardless of whether the remuneration was subject to a substantial risk of forfeiture after that time. These proposed regulations provide special rules for determining the amount of remuneration attributable to services performed in taxable years beginning before January 1, 2010 with respect to account balance plans, nonaccount balance plans, and equity-based remuneration. For account balance plans and nonaccount balance plans, these proposed regulations provide that amounts are attributed based on the general attribution rules, except that any substantial risk of forfeiture is disregarded. For equity-based compensation, any remuneration resulting from equity-based compensation granted in a taxable year beginning before January 1, 2010, is not subject to the deduction limitation. Earnings on these grandfathered amounts, including earnings accruing in taxable years beginning after December 31, 2009, are also generally treated as remuneration attributable to services performed in taxable years beginning before January 1, 2010.

XI. Transition Rules for Certain Deferred Deduction Remuneration

Section 162(m)(6) applies to deferred deduction remuneration attributable to services performed in a disqualified taxable year beginning after December 31, 2009 that is otherwise deductible in a taxable year beginning after December 31, 2012. As described in section I.B of this preamble, for taxable years beginning before January 1, 2013, a covered health insurance provider is any health insurance issuer (as defined in section 9832(b)(2)) that receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)) (a pre-2013 covered health insurance provider). For taxable years beginning after December 31, 2012, a covered health insurance provider is any health insurance issuer (as defined in section 9832(b)(2)) that receives at least 25 percent of its gross premiums from providing minimum essential coverage (as defined in section 5000A(f)) (a post-2012 covered health insurance provider). Thus, the definition of the term *covered health insurance provider* is narrower for taxable years beginning after December 31, 2012, than it is for taxable years beginning before January 1, 2013.

After the enactment of section 162(m)(6), commenters suggested that if a pre-2013 covered health insurance provider does not qualify as a post-2012 covered health insurance provider, the section 162(m)(6) deduction limitation should not apply to deferred deduction remuneration attributable to services performed during taxable years when the health insurance issuer was a pre-2013 covered health insurance provider. These commenters cited legislative history suggesting that section 162(m)(6) was enacted to encourage health insurance issuers to use premiums from new customers to lower health insurance rates. 155 Cong. Rec. S12,540 (Dec. 6, 2009) (statement of Sen. Lincoln). These commenters reasoned that if a pre-2013 covered health insurance is not also a post-2012 covered health insurance provider, the health insurance issuer is not benefiting from new customers who are paying premiums for minimum essential coverage, and the health insurance issuer should not be subject to the deduction limitation.

In response to these comments, Notice 2011–2 provides that the section 162(m)(6) deduction limitation applies to deferred deduction remuneration attributable to services performed in a taxable year beginning after December 31, 2009 and before January 1, 2013 only if the covered health insurance provider is a pre-2013 covered health insurance provider for the taxable year to which the deferred deduction remuneration is attributable and a post-2012 covered health insurance provider for the taxable year in which that deferred deduction remuneration is otherwise deductible. These proposed regulations adopt this transition rule.

In response to Notice 2011–2, some commenters requested that the transition rule be applied more broadly, so that the section 162(m)(6) deduction limitation would not apply to deferred deduction remuneration for services attributable to taxable years beginning before January 1, 2013 if the employer is not a covered health insurance provider in 2013, regardless of whether the employer is a covered health insurance provider for the year the deferred deduction remuneration becomes otherwise deductible. The Treasury Department and the IRS have concluded that the standard set forth in Notice 2011–2 appropriately limits the transition rule to circumstances in which the deferred deduction remuneration is otherwise deductible in a taxable year for which the covered health insurance provider is not a post-2013 covered health insurance provider, and therefore these proposed regulations do not adopt this suggestion.

Effect on Other Documents

These proposed regulations do not affect the applicability of Notice 2011–2, (2011–1 CB 260). However, upon the effective date of the final regulations, the Treasury Department and the IRS anticipate that Notice 2011–2 will become obsolete for periods after the effective date of the final regulations.

Proposed Effective Date

These proposed regulations are proposed to be effective upon publication in the **Federal Register** of a Treasury decision adopting these rules as final regulations, and applicable to taxable years that begin after December 31, 2012, and end on or after April 2, 2013. Taxpayers may rely on these proposed regulations until the issuance of final regulations. The Treasury Department and the IRS anticipate that the final regulations will be issued before a covered health insurance provider is required to file an income tax return reflecting application of the section 162(m)(6) deduction limitation. However, to the extent the final regulations contain rules more restrictive than the rules contained in these proposed regulations, a covered health insurance provider will be able to rely on these proposed regulations for the purposes of the application of the section 162(m)(6) to its first taxable year beginning after December 31, 2012. Although these regulations will not apply to taxable years beginning after December 31, 2012 and ending before April 2, 2013, taxpayers may rely on these proposed regulations with respect to those taxable years to the same extent as taxpayers may rely with respect to taxable years to which the regulations will apply.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this regulation has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are timely submitted to the IRS. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Ilya Enkishev, Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

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

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805.

■ **Par. 2.** Section 1.162–31 is added to read as follows:

§ 1.162–31 The $500,000 deduction limitation for remuneration provided by certain health insurance providers.

(a) *Scope.* This § 1.162–31 provides rules regarding the deduction limitation under section 162(m)(6), which provides that a covered health insurance provider's deduction for applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year is limited to $500,000. Paragraph (b) of this section provides definitions of the terms used in this section. Paragraph (c) of this section states the general limitation on deductions under section 162(m)(6). Paragraph (d) of this section provides rules on the attribution of applicable individual remuneration and deferred deduction remuneration to services provided in one or more taxable years of a covered health insurance provider. Paragraph (e) of this section provides rules on the application of the deduction limitation to applicable individual remuneration and deferred deduction remuneration that is otherwise deductible under chapter 1 of the Internal Revenue Code (Code) but for the deduction limitation under section 162(m)(6) (referred to in these regulations as remuneration that is otherwise deductible). Paragraph (f) of this section provides rules for persons participating in certain corporate transactions. Paragraph (g) of this section provides rules on the coordination of section 162(m)(6) with sections 162(m)(1) and 280G. Paragraph (h) of this section provides rules for determining the amount of remuneration that is not subject to the deduction limitation under section 162(m)(6) due to application of the statutory effective date (referred to in these regulations as grandfathered amounts). Paragraph (i) of this section provides transition rules for deferred deduction remuneration that is attributable to services performed in taxable years beginning after December 31, 2009 and before January 1, 2013. Paragraph (j) of this section provides the effective and applicability dates of the rules in this section.

(b) *Definitions*—(1) *Health insurance issuer.* For purposes of this section, a *health insurance issuer* is a health insurance issuer as defined in section 9832(b)(2).

(2) *Aggregated group.* For purposes of this section, an *aggregated group* is a health insurance issuer and each other person that is treated as a single employer with the health insurance

issuer at any time during the taxable year of the health insurance issuer under sections 414(b) (controlled groups of corporations), 414(c) (partnerships, proprietorships, etc. under common control), 414(m) (affiliated service groups), or 414(o), except that the rules in section 1563(a)(2) and (a)(3) (with respect to corporations) and the rules in § 1.414(c)–2(c) (with respect to trades or businesses under common control) for brother-sister groups and combined groups are disregarded.

(3) *Parent entity*—(i) *In general.* For purposes of this section, a *parent entity* is either—

(A) The common parent of a parent-subsidiary controlled group of corporations (within the meaning of section 414(b)) or a parent-subsidiary group of trades or businesses under common control (within the meaning of section 414(c)) that includes a health insurance issuer, or

(B) The health insurance issuer in an aggregated group that is an affiliated service group (within the meaning of section 414(m)) or a group described in section 414(o).

(ii) *Certain aggregated groups with multiple health insurance issuers.* If two or more health insurance issuers are members of an aggregated group that is an affiliated service group (within the meaning of section 414(m)) or group described in section 414(o), the parent entity is the health insurance issuer in the aggregated group that is designated in writing by the other members of the group to act as the parent entity, provided the group treats that health insurance issuer as the parent entity consistently for all taxable years. If the members of a group that are required to designate in writing a health insurance issuer to act as a parent entity fail to do so, or if the members of the group fail to treat the health insurance issuer that they have designated as the parent entity consistently as such for all taxable years, the parent entity of the group is deemed to be an entity with a taxable year that is the calendar year (without regard to whether the aggregated group includes an entity with a calendar year taxable year) for all purposes under this section for which a parent entity's taxable year is relevant.

(4) *Covered health insurance provider*—(i) *In general.* For purposes of this section and except as otherwise provided in this paragraph (b)(4), a *covered health insurance provider* is—

(A) A health insurance issuer for any of its taxable years beginning after December 31, 2009 and before January 1, 2013 in which it receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)),

(B) A health insurance issuer for any of its taxable years beginning after December 31, 2012 in which at least 25 percent of the gross premiums it receives from providing health insurance coverage (as defined in section 9832(b)(1)) are from providing minimum essential coverage (as defined in section 5000A(f)),

(C) The parent entity of an aggregated group of which one or more health insurance issuers described in paragraphs (b)(4)(i)(A) or (B) of this section are members for the taxable year of the parent entity with which, or in which, ends the taxable year of any such health insurance issuer, and

(D) Each other member of an aggregated group of which one or more health insurance issuers described in paragraphs (b)(4)(i)(A) or (B) of this section are members for the taxable year of the other member ending with, or within, the parent entity's taxable year.

(ii) *Self-insured plans.* For purposes of this section, a person is not a covered health insurance provider solely because it maintains a self-insured medical reimbursement plan. For this purpose, a self-insured medical reimbursement plan is a separate written plan for the benefit of employees (including former employees) that provides for reimbursement of medical expenses referred to in section 105(b) and does not provide for reimbursement under an individual or group policy of accident or health insurance issued by a licensed insurance company or under an arrangement in the nature of a prepaid health care plan that is regulated under federal or state law in a manner similar to the regulation of insurance companies, and may include a plan maintained by an employee organization described in section 501(c)(9).

(iii) *De minimis exception*—(A) *In general.* A health insurance issuer and any member of its aggregated group that would otherwise be a covered health insurance provider under paragraph (b)(4)(i) of this section for a taxable year beginning after December 31, 2009 and before January 1, 2013 is not treated as a covered health insurance provider for purposes of this section for that taxable year if the premiums received by the health insurance issuer and any other health insurance issuers in its aggregated group from providing health insurance coverage (as defined in section 9832(b)(1)) are less than two percent of the gross revenues of the health insurance issuer and all other members of its aggregated group for the taxable year that the health insurance issuer and the other members of its aggregated group would otherwise be treated as covered health insurance providers under paragraph (b)(4)(i) of this section. A health insurance issuer and any member of its aggregated group that would otherwise be a covered health insurance provider under paragraph (b)(4)(i) of this section for a taxable year beginning after December 31, 2012 is not treated as a covered health insurance provider under this section for that taxable year if the premiums received by the health insurance issuer and any other health insurance issuers in its aggregated group for providing health insurance coverage (as defined in section 9832(b)(1)) that constitutes minimum essential coverage (as defined in section 5000A(f)) are less than two percent of the gross revenues of the health insurance issuer and all other members of its aggregated group for the taxable year that the health insurance issuer and the other members of its aggregated group would otherwise be treated as covered health insurance providers under paragraph (b)(4)(i) of this section. In determining whether premiums constitute less than two percent of gross revenues, the amount of premiums and gross revenues must be determined in accordance with generally accepted accounting principles.

(B) *One-year grace period.* If a health insurance issuer or a member of an aggregated group is not treated as a covered health insurance provider for a taxable year solely by reason of the *de minimis* exception described in paragraph (b)(4)(iii)(A) of this section, but fails to meet the requirements of the *de minimis* exception described in paragraph (b)(4)(iii)(A) of this section for the immediately following taxable year, that health insurance issuer or member of an aggregated group will not be treated as a covered health insurance provider for that immediately following taxable year.

(C) *Examples.* The following examples illustrate the principles of this paragraph (b)(4). For purposes of these examples, each corporation has a taxable year that is the calendar year, unless the example provides otherwise.

Example 1. (i) Corporations Y and Z are members of an aggregated group under paragraph (b)(2) of this section. Y is a health insurance issuer that is a covered health insurance provider pursuant to paragraph (b)(4)(i)(B) of this section and receives premiums from providing health insurance coverage that is minimum essential coverage during its 2015 taxable year in an amount that is less than two percent of the combined gross revenues of Y and Z for their 2015

taxable years. Z is not a health insurance issuer.

(ii) Y and Z are not treated as covered health insurance providers within the meaning of paragraph (b)(4) of this section for their 2015 taxable years because they meet the requirements of the *de minimis* exception under paragraph (b)(4)(iii)(A) of this section.

Example 2. (i) Corporations V, W, and X are members of an aggregated group under paragraph (b)(2) of this section. V is a health insurance issuer that is a covered health insurance provider pursuant to paragraph (b)(4)(i)(B) of this section, but neither W nor X is a health insurance issuer. W is the parent entity of the aggregated group. V's taxable year ends on December 31, W's taxable year ends on June 30, and X's taxable year ends on September 30. For its taxable year ending December 31, 2016, V receives $3x of premiums from providing minimum essential coverage and has no other revenue. For its taxable year ending June 30, 2017, W has $100x in gross revenue. For its taxable year ending September 30, 2016, X has $60x in gross revenue.

(ii) In the absence of the *de minimis* exception, V (the health insurance issuer) would be a covered health insurance provider for its taxable year ending December 31, 2016. W (the parent entity) would be a covered health insurance provider for its taxable year ending June 30, 2017 (its taxable year with which, or within which, ends the taxable year of the health insurance issuer), and X (the other member of the aggregated group) would be a covered health insurance provider for its taxable year ending on September 30, 2016 (its taxable year ending with, or within, the taxable year of the parent entity). However, the premiums received by V (the health insurance issuer) from providing minimum essential coverage during the taxable year that it would otherwise be treated as a covered health insurance provider under paragraph (b)(4)(i)(B) of this section are less than two percent of the combined gross revenues of V, W, and X for the related taxable years that they would otherwise be treated as covered health insurance providers under paragraph (b)(4)(i) of this section ($3x is less than two percent of $163x). Therefore, the *de minimis* exception of paragraph (b)(4)(iii)(A) of this section applies, and V, W, and X are not treated as covered health insurance providers for these taxable years.

Example 3. (i) The facts are the same as *Example 2,* except that V receives $4x of premiums for providing minimum essential coverage for its taxable year ending June 30, 2016. In addition, the members of the V, W, and X aggregated group were not treated as covered health insurance providers for their taxable years ending December 31, 2015, June 30, 2016, and September 30, 2015, respectively (their immediately preceding taxable years) solely by reason of the *de minimis* exception of paragraph (b)(4)(iii)(A) of this section.

(ii) Although the premiums received by the members of the aggregated group from providing minimum essential coverage are more than two percent of the gross revenues of the aggregated group for the taxable years during which the members would otherwise be treated as covered health insurance providers under paragraph (b)(4)(i) of this section ($4x is greater than two percent of $164x), they were not treated as covered health insurance providers for their immediately preceding taxable years solely by reason of the *de minimis* exception of paragraph (b)(4)(iii)(A) of this section. Therefore, V, W, and X are not treated as covered health insurance providers for their taxable years ending in December 31, 2016, June 30, 2017, and September 30, 2016, respectively, because of the one-year grace period under paragraph (b)(4)(iii)(B) of this section. However, the members of the V, W, and X aggregated group will be covered health insurance providers for their subsequent taxable years if they would otherwise be covered health insurance providers for those taxable years under paragraph (b)(4) of this section.

(5) *Premiums*—(i) For purposes of paragraph (b)(4) of this section, the term *premiums* means amounts received by a health insurance issuer from providing health insurance coverage (as defined in section 9832(b)(1)), except that premiums do not include—

(A) Amounts received under an indemnity reinsurance contract described in paragraph (b)(5)(ii) of this section, or

(B) Direct service payments described in paragraph (b)(5)(iii) of this section.

(ii) *Indemnity reinsurance contract.* For purposes of this paragraph (b)(5), the term *indemnity reinsurance contract* means an agreement between a health insurance issuer and a reinsuring company under which—

(A) The reinsuring company agrees to indemnify the health insurance issuer for all or part of the risk of loss under policies specified in the agreement, and

(B) The health insurance issuer retains its liability to provide health insurance coverage (as defined in section 9832(b)(1)) to, and its contractual relationship with, the insured.

(iii) *Direct service payments.* For purposes of this paragraph (b)(5), the term *direct service payment* means a capitated, prepaid, periodic, or other payment made by a health insurance issuer or another entity that receives premiums from providing health insurance coverage (as defined in section 9832(b)(1)) to another organization as compensation for providing, managing, or arranging for the provision of healthcare services by physicians, hospitals, or other healthcare providers, regardless of whether the organization that receives the compensation is subject to healthcare provider, health insurance, health plan licensing, financial solvency, or other similar regulatory requirements under state insurance law.

(6) *Disqualified taxable year.* For purposes of this section, the term *disqualified taxable year* means, with respect to any person, any taxable year for which the person is a covered health insurance provider.

(7) *Applicable individual*—(i) *In general.* For purposes of this section, except as provided in paragraph (b)(7)(ii) of this section, the term *applicable individual* means, with respect to any covered health insurance provider for any disqualified taxable year, any individual—

(A) Who is an officer, director, or employee in that taxable year, or

(B) Who provides services for or on behalf of the covered health insurance provider during that taxable year.

(ii) *Independent contractors*—Remuneration for services provided by an independent contractor to a covered health insurance provider is subject to the deduction limitation under section 162(m)(6). However, an independent contractor will not be treated as an applicable individual with respect to a covered health insurance provider for a disqualified taxable year if each of the following requirements is satisfied:

(A) The independent contractor is actively engaged in the trade or business of providing services to recipients, other than as an employee or as a member of the board of directors of a corporation (or similar position with respect to an entity that is not a corporation);

(B) The independent contractor provides significant services (as defined in § 1.409A–1(f)(2)(iii)) to two or more persons to which the independent contractor is not related and that are not related to one another (as defined in § 1.409A–1(f)(2)(ii)); and

(C) The independent contractor is not related to the covered health insurance provider or any member of its aggregated group, applying the definition of related person contained in § 1.409A–1(f)(2)(ii), subject to the modification that for purposes of applying the references to sections 267(b) and 707(b)(1), the language ''20 percent'' is not used instead of ''50 percent'' each place ''50 percent'' appears in sections 267(b) and 707(b)(1).

(8) *Service provider.* For purposes of this section, the term *service provider* means, with respect to a covered health insurance provider for any period, an individual who is an officer, director, or employee, or who provides services for, or on behalf of, the covered health insurance provider or any member of its aggregated group.

(9) *Remuneration*—(i) *In general.* For purposes of this section, except as provided in paragraph (b)(9)(ii) of this section, the term *remuneration* has the

same meaning as applicable employee remuneration, as defined in section 162(m)(4), but without regard to the exceptions under section 162(m)(4)(B) (remuneration payable on a commission basis), section 162(m)(4)(C) (performance-based compensation), and section 162(m)(4)(D) (existing binding contracts), and the regulations under those sections.

(ii) *Exceptions.* For purposes of this section, remuneration does not include—

(A) A payment made to, or for the benefit of, an applicable individual from or to a trust described in section 401(a) within the meaning of section 3121(a)(5)(A),

(B) A payment made under an annuity plan described in section 403(a) within the meaning of section 3121(a)(5)(B),

(C) A payment made under a simplified employee pension plan described in section 408(k)(1) within the meaning of section 3121(a)(5)(C),

(D) A payment made under an annuity contract described in section 403(b) within the meaning of section 3121(a)(5)(D),

(E) Salary reduction contributions described in section 3121(v)(1), and

(F) Remuneration consisting of any benefit provided to, or on behalf of, an employee if, at the time the benefit is provided, it is reasonable to believe that the employee will be able to exclude the value of the benefit from gross income.

(10) *Applicable individual remuneration.* For purposes of this section, the term *applicable individual remuneration* means, with respect to any applicable individual for any disqualified taxable year, the aggregate amount allowable as a deduction under this chapter for that taxable year (determined without regard to section 162(m)) for remuneration for services performed by that applicable individual (whether or not in that taxable year), except that applicable individual remuneration does not include any deferred deduction remuneration with respect to services performed during any taxable year. Applicable individual remuneration for a disqualified taxable year may include remuneration for services performed in a taxable year before the taxable year in which the deduction for the remuneration is allowable. For example, a discretionary bonus granted and paid to an applicable individual in a disqualified taxable year in recognition of services performed in prior taxable years is applicable individual remuneration for that disqualified taxable year. In addition, a grant of restricted stock in a disqualified taxable year with respect to which an applicable individual makes an election under section 83(b) is applicable individual remuneration for the disqualified taxable year of the covered health insurance provider in which the grant of the restricted stock is made. See paragraphs (d)(1)(iv) and (d)(5)(v) of this section for certain remuneration that is not treated as applicable individual remuneration for purposes of this section.

(11) *Deferred deduction remuneration.* For purposes of this section, the term *deferred deduction remuneration* means remuneration that would be applicable individual remuneration for services performed in a disqualified taxable year but for the fact that the deduction (determined without regard to section 162(m)(6)) for the remuneration is allowable in a subsequent taxable year. Whether remuneration is deferred deduction remuneration is determined without regard to when the remuneration is paid, except to the extent that the timing of the payment affects the taxable year in which the remuneration is otherwise deductible. For example, payments that are otherwise deductible by a covered health insurance provider in an initial taxable year, but are paid to an applicable individual by the 15th day of the third month of the immediately subsequent taxable year of the covered health insurance provider (as described in § 1.404(b)-1T, Q&A–2(b)(1)), are applicable individual remuneration for the initial taxable year (and not deferred deduction remuneration) because the deduction for the payments is allowable in the initial taxable year, and not a subsequent taxable year. Except as otherwise provided in paragraph (i) of this section (regarding transition rules for certain deferred deduction remuneration attributable to services performed in taxable years beginning before January 1, 2013), deferred deduction remuneration that is attributable to services performed in a disqualified taxable year of a covered health insurance provider is subject to the section 162(m)(6) deduction limitation even if the taxable year in which the remuneration is otherwise deductible is not a disqualified taxable year. Similarly, deferred deduction remuneration is subject to the section 162(m)(6) deduction limitation regardless of whether an applicable individual is a service provider of the covered health insurance provider in the taxable year in which the deferred deduction remuneration is otherwise deductible. However, remuneration that is attributable to services performed in a taxable year that is not a disqualified taxable year is not deferred deduction remuneration even if the remuneration is otherwise deductible in a disqualified taxable year. See also paragraphs (d)(1)(iv) and (d)(5)(v) of this section for certain remuneration that is not treated as deferred deduction remuneration for purposes of this section.

(12) *Substantial risk of forfeiture.* For purposes of this section, the term *substantial risk of forfeiture* has the same meaning as provided in § 1.409A–1(d).

(c) *Deduction Limitation*—(1) *Applicable individual remuneration.* For any disqualified taxable year beginning after December 31, 2012, no deduction is allowed under this chapter for applicable individual remuneration that is attributable to services performed by an applicable individual in that taxable year to the extent that the amount of that remuneration exceeds $500,000.

(2) *Deferred deduction remuneration.* For any taxable year beginning after December 31, 2012, no deduction is allowed under this chapter for deferred deduction remuneration that is attributable to services performed by an applicable individual in any disqualified taxable year beginning after December 31, 2009, to the extent that the amount of such remuneration exceeds $500,000 reduced (but not below zero) by the sum of:

(i) The applicable individual remuneration for that applicable individual for that disqualified taxable year; and

(ii) The portion of the deferred deduction remuneration for those services that was deductible under section 162(m)(6)(A)(ii) and this paragraph (c)(2) in a preceding taxable year, or would have been deductible under section 162(m)(6)(A)(ii) and this paragraph (c)(2) in a preceding taxable year if section 162(m)(6) was effective for taxable years beginning after December 31, 2009 and before January 1, 2013.

(d) *Services to which remuneration is attributable*—(1) *Attribution to a taxable year*—(i) *In general.* The deduction limitation under section 162(m)(6) applies to applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year of a covered health insurance provider. When an amount of applicable individual remuneration or deferred deduction remuneration becomes otherwise deductible (and not before that time), that remuneration must be attributed to services performed by an applicable individual in a taxable year of the covered health insurance provider

in accordance with the rules of this paragraph (d). After the remuneration has been attributed to services performed by an applicable individual in a taxable year of a covered health insurance provider, the rules of paragraph (e) of this section are then applied to determine whether the deduction with respect to the remuneration is limited by section 162(m)(6).

(ii) *Attribution of deferred deduction remuneration to earliest years first.* If an amount of deferred deduction remuneration that becomes otherwise deductible may be attributed to services performed by an applicable individual in two or more taxable years of a covered health insurance provider in accordance with paragraphs (d)(3) (providing for the attribution of amounts credited under an account balance plan) or (d)(4) (providing for the attribution of amounts credited under a nonaccount balance plan) of this section, the amount must be attributed first to services performed by the applicable individual in the earliest year to which the amount could be attributable under paragraphs (d)(3) or (4) of this section, as applicable, and then to the next subsequent taxable year or years to which the amount could be attributable under paragraphs (d)(3) or (4) of this section, as applicable, until the entire amount has been attributed to one or more taxable years of the covered health insurance provider.

(iii) *Example.* The following example illustrates the principles of paragraph (d)(1)(ii) of this section.

Example. (i) A is an employee of corporation Z, which has a taxable year that is the calendar year and is a covered health insurance provider for all relevant taxable years. A participates in a nonqualified deferred compensation plan that is an account balance plan maintained by Z. A's account balances under the plan on the last day of all relevant taxable years are as follows: $10,000 for 2014, $13,000 for 2015, $17,000 for 2016, and $24,000 for 2017. A's account balance is fully vested at all times. In accordance with the terms of the plan, Z pays $15,000 to A in 2018 and $9,000 to A in 2019. These amounts are otherwise deductible by Z in the year in which they are paid.

(ii) Because the nonqualified deferred compensation plan is an account balance plan, deferred deduction remuneration provided under the plan is attributable to services provided by A in accordance with paragraph (d)(3)(i) of this section. Z does not use the alternate method of allocating earnings and losses permitted under paragraph (d)(3)(ii) of this section. Accordingly, the deferred deduction remuneration under the plan attributable to services provided by A in a taxable year is generally equal to the increase in the account balance on the last day of each taxable year over the account balance on the last day of the immediately preceding taxable year, increased by the amount of any payments made during the taxable year. The increases in A's account balances are $10,000 for 2014, $3,000 for 2015, $4,000 for 2016, and $7,000 for 2017. Therefore, pursuant to paragraph (d)(1)(ii), Z must attribute $10,000 of the $15,000 payment to services performed by A in 2014, $3,000 of the $15,000 payment to services performed by A in 2015, and $2,000 of the $15,000 payment to services performed by A in 2016 (leaving $2,000 remaining to be attributed to 2016). Similarly, Z must attribute $2,000 of the $9,000 payment to services performed by A in 2016, and the remaining $7,000 of the $9,000 payment to services performed by A in 2017.

(iv) *No attribution to taxable years during which no services are performed or before a legally binding right arises*—(A) *In general.* For purposes of this section, remuneration is not attributable—

(*1*) to a taxable year of a covered health insurance provider ending before the later of the date the applicable individual begins providing services to the covered health insurance provider (or any member of its aggregated group) and the date the applicable individual obtains a legally binding right to the remuneration, or

(*2*) to any other taxable year of a covered health insurance provider during which the applicable individual is not a service provider.

(B) *Attribution of remuneration before commencement of services or legally binding right.* To the extent that remuneration would otherwise be attributed to a taxable year ending before the later of the date the applicable individual begins providing services to the covered health insurance provider (or any member of its aggregated group) and the date the applicable individual obtains a legally binding right to the remuneration in accordance with paragraphs (d)(2) through (d)(8) or paragraph (d)(10) of this section, the remuneration is attributable to services provided in the taxable year in which the latter of these dates occurs. For example, if an applicable individual obtains a contractual right to remuneration in a taxable year of a covered health insurance provider and the remuneration would otherwise be attributable to that taxable year pursuant to paragraph (d)(2) of this section, but the applicable individual does not begin providing services to the covered health insurance provider until the next taxable year, the remuneration is attributable to the taxable year in which the applicable individual begins providing services.

(v) *Attribution to 12-month periods.* To the extent that a covered health insurance provider is required to attribute remuneration on a daily *pro rata* basis under this paragraph (d), it may assume that any 12-month period has 365 days (and so may ignore the extra day in leap years).

(vi) *Remuneration subject to nonlapse restriction or similar formula.* For purposes of this section, if stock or other equity is subject to a nonlapse restriction (as defined in § 1.83–3(h)), or if the remuneration payable to an applicable individual is determined under a formula that, if applied to stock or other equity, would be a nonlapse restriction, the amount of the remuneration and the attribution of that remuneration to taxable years must be determined based upon application of the nonlapse restriction or formula. For example, if the earnings or losses on an account under an account balance plan are determined based upon the performance of company stock, the valuation of which is based on a formula that if applied to the stock would be a nonlapse restriction, then that formula must be used consistently for purposes of determining the amount of the remuneration credited to that account balance to taxable years and the attribution of that remuneration to taxable years.

(2) *Legally binding right.* Unless remuneration is attributable to services performed in a different taxable year pursuant to paragraphs (d)(3) through (d)(8) or paragraph (d)(10) of this section, the remuneration is attributable to services performed in the taxable year of a covered health insurance provider in which an applicable individual obtains a legally binding right to the remuneration. An applicable individual does not have a legally binding right to remuneration if the remuneration may be reduced unilaterally or eliminated by the covered health insurance provider or other person after the services creating the right to the remuneration have been performed. However, if the facts and circumstances indicate that the discretion to reduce or eliminate the remuneration is available or exercisable only upon a condition, or the discretion to reduce or eliminate the remuneration lacks substantive significance, the applicable individual will be considered to have a legally binding right to the remuneration. For this purpose, remuneration is not considered to be subject to unilateral reduction or elimination merely because it may be reduced or eliminated by operation of the objective terms of a plan, such as the application of a nondiscretionary,

objective provision creating a substantial risk of forfeiture.

(3) *Account balance plans*—(i) *Standard attribution method*—(A) *In general.* Except as provided in paragraphs (d)(3)(i)(B) and (d)(3)(ii) of this section, the increase (or decrease) in the account balance of an applicable individual under a plan described in § 1.409A–1(c)(2)(i)(A) or (B) (an account balance plan) as of the last day of a taxable year of the covered health insurance provider (the measurement date), over (or under) the account balance as of the last day of the immediately preceding taxable year, is attributable to services provided by the applicable individual in the taxable year that includes the measurement date. For purposes of determining the increase (or decrease) in an account balance in any taxable year, the applicable individual's account balance as of the last day of the taxable year that includes the measurement date is increased by any payments made during that taxable year that reduce the account balance. If an account balance plan credits income or earnings based on a method or formula that is neither a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(B) nor a rate of interest that is reasonable within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(B), the excess of the amount that would be credited as income or earnings under the terms of the plan over the amount that would be credited as income or earnings under a reasonable rate of interest (as described in § 31.3121(v)(2)–1(d)(2)(iii)) must be included in the account balance. Increases in the applicable individual's account balance with respect to any taxable year are treated as remuneration attributable to services performed during that taxable year. Decreases in the applicable individual's account balance with respect to any taxable year are treated as reductions to deferred deduction remuneration for that taxable year and may offset other deferred deduction remuneration (but not applicable individual remuneration) attributable to services performed by the applicable individual during that taxable year under any plan or arrangement (or if there is not sufficient deferred deduction remuneration for that taxable year to offset the reduction entirely, the excess may offset deferred deduction remuneration in first subsequent taxable year or years in which the applicable individual has deferred deduction remuneration to be offset by the loss).

(B) *Attribution of increases (or decreases) in an account balance in taxable years during which an applicable individual is not a service provider.* [Reserved].

(ii) *Alternative attribution method*—(A) *Attribution of principal additions*—(*1*) *In general.* Except as provided in paragraph (d)(3)(ii)(A)(*2*), any increase in the account balance of an applicable individual in an account balance plan as of the last day of a taxable year, increased by any payments made during the taxable year, over the account balance as of the last day of the immediately preceding taxable year that is not due to earnings or losses (as described in paragraph (d)(3)(ii)(C) of this section) is treated as a principal addition and is remuneration attributable to services performed during that taxable year.

(*2*) *Attribution of principal additions in taxable years during which an applicable individual is not a service provider.* [Reserved].

(B) *Attribution of earnings or losses.* Earnings or losses on a principal addition (including earnings and losses arising after an applicable individual ceases to be a service provider) are attributable to the services provided by the applicable individual in the same disqualified taxable year of the covered health insurance provider to which the principal addition is attributed in accordance with paragraph (d)(3)(ii)(A) of this section. Earnings are treated as remuneration for the taxable year to which they are attributed, and losses are treated as reductions to deferred deduction remuneration for that taxable year and may offset other deferred deduction remuneration (but not applicable individual remuneration) attributable to services performed by the applicable individual during that taxable year (or if there is not sufficient deferred deduction remuneration to offset the reduction entirely during that taxable year, the first subsequent taxable year or years in which the applicable individual has deferred deduction remuneration to be offset by the loss, if applicable).

(C) *Earnings.* Whether remuneration constitutes earnings on a principal addition is determined under the principles defining income attributable to an amount taken into account under § 31.3121(v)(2)–1(d)(2). Therefore, for an account balance plan (as defined in § 31.3121(v)(2)–1(c)(1)(ii)(A)), earnings on an amount deferred generally include an amount credited on behalf of the applicable individual under the terms of the arrangement that reflects a rate of return that does not exceed either the rate of return on a predetermined actual investment (as defined in § 31.3121(v)(2)–1(d)(2)(i)(B)), or, if the income does not reflect the rate of return on a predetermined actual investment, a reasonable rate of interest. For purposes of this section, the use of an unreasonable rate of return generally will result in the treatment of some or all of the remuneration as a principal addition that is attributable to services provided by an applicable individual in a taxable year of a covered health insurance provider in accordance with paragraph (d)(3)(ii)(A) of this section. For purposes of determining whether an account balance plan has a reasonable rate of return, the rules of § 31.3121(v)(2)–1(d)(2)(iii)(A) apply.

(D) *Consistency requirement.* If a covered health insurance provider applies a method described in either paragraph (d)(3)(i) or paragraph (d)(3)(ii) of this section, the covered health insurance provider must apply that method consistently for all taxable years for all plans of the covered health insurance provider that would be aggregated and treated as a single account balance plan under § 1.409A–1(c)(2) if one hypothetical applicable individual had deferrals of compensation under all of the plans described in this paragraph.

(4) *Nonaccount balance plans*—(i) *In general.* The increase (or decrease) in the present value of the future payment or payments to which an applicable individual has a legally binding right under a plan described in § 1.409A–1(c)(2)(i)(C) (nonaccount balance plan) as of a measurement date (as defined in paragraph (d)(3)(i)), over (or under) the present value of the future payment or payments as of the last day of the immediately preceding taxable year is attributable to services provided by the applicable individual in the taxable year of the covered health insurance provider that includes the measurement date. For purposes of determining the increase (or decrease) in the present value of a future payment or payments under a nonaccount balance plan, the rules of § 31.3121(v)(2)–1(c)(2) apply (including the requirement that reasonable actuarial assumptions and methods be used). For purposes of determining the increase (or decrease) in the present value of a future payment or payments under a nonaccount balance plan attributable to any taxable year, the present value of the future payment or payments as of the last day of the taxable year is increased by the amount of any payments made during that taxable year. Increases in the present value of the future payment or payments to which an applicable individual has a legally binding right under a nonaccount balance plan with respect to any taxable year are treated as remuneration attributable to services

performed in that taxable year. Decreases in the present value of the future payment or payments to which an applicable individual has a legally binding right under a nonaccount balance plan with respect to any taxable year are treated as reductions to deferred deduction remuneration for that taxable year and may offset other deferred deduction remuneration (but not applicable individual remuneration) attributable to services performed by the applicable individual during that taxable year under any plan or arrangement (or if there is not sufficient deferred deduction remuneration for that taxable year to offset the reduction entirely, the excess may offset deferred deduction remuneration in the first subsequent taxable year or years in which the applicable individual has deferred deduction remuneration to be offset by the loss).

(ii) *Attribution of increases (or decreases) in the present value of a future payment or payments in taxable years during which an applicable individual is not a service provider.* [Reserved].

(5) *Equity-based remuneration*—(i) *Stock options and stock appreciation rights.* Remuneration resulting from the exercise of a stock option (including an incentive stock option described in section 422 and an option under an employee stock purchase plan described in section 423) or a stock appreciation right (SAR) is attributable to services performed by an applicable individual for a covered health insurance provider, and it must be allocated on a daily *pro rata* basis over the period beginning on the date of grant (within the meaning of § 1.409A–1(b)(5)(vi)(B)) of the stock option or SAR and ending on the date that the stock right is exercised, excluding any days on which the applicable individual is not a service provider.

(ii) *Restricted stock.* Remuneration resulting from the vesting or transfer of restricted stock for which an election under section 83(b) has not been made is attributable on a daily *pro rata* basis to services performed by an applicable individual for a covered health insurance provider over the period, excluding any days on which the applicable individual is not a service provider, beginning on the date the applicable individual obtains a legally binding right to the restricted stock and ending on the earliest of—

(A) the date the substantial risk of forfeiture lapses with respect to the restricted stock, or

(B) the date the restricted stock is transferred by the applicable individual (or becomes transferable as defined in § 1.83–3(d)).

(iii) *Restricted stock units.* Remuneration resulting from a restricted stock unit (RSU) is attributable to services performed by an applicable individual for a covered health insurance provider, and must be allocated on a daily *pro rata* basis, over the period beginning on the date the applicable individual obtains a legally binding right to the RSU and ending on the date the remuneration is paid or made available such that it is includible in gross income, excluding any days on which the applicable individual is not a service provider.

(iv) *Partnership interests and other equity.* The rules provided in this paragraph (d)(5) may be applied by analogy to grants of equity-based compensation in situations in which the compensation is determined by reference to equity in an entity treated as a partnership for federal tax purposes, or where compensation is determined by reference to equity interests in an entity described in § 1.409A–1(b)(5)(iii) (for example, a mutual company).

(6) *Involuntary separation pay.* Involuntary separation pay is attributable to services performed by an applicable individual for a covered health insurance provider in the taxable year in which the involuntary separation from service occurs. Alternatively, the covered health insurance provider may attribute involuntary separation pay to services performed by an applicable individual on a daily *pro rata* basis beginning on the date that the applicable individual obtains a legally binding right to the involuntary separation pay and ending on the date of the involuntary separation from service. Involuntary separation pay to different individuals may be attributed using different methods; however, if involuntary separation payments are made to the same individual over multiple taxable years, all the payments must be attributed using the same method. For purposes of this section, the term *involuntary separation pay* means remuneration to which an applicable individual has a right to payment solely as a result of the individual's involuntary separation from service (within the meaning of § 1.409A–1(n)).

(7) *Reimbursements.* Remuneration that is provided in the form of a reimbursement or benefit provided in-kind (other than cash) is attributable to services performed by an applicable individual in the taxable year of the covered health insurance provider in which the applicable individual makes a payment for which the applicable individual has a right to reimbursement or receives the in-kind benefit, except that remuneration provided in the form of a reimbursement or in-kind benefit during a taxable year of the covered health insurance provider in which an applicable individual is not a service provider is attributable to services provided in the first preceding taxable year of the covered health insurance provider in which the applicable individual is a service provider.

(8) *Split-dollar life insurance.* Remuneration resulting from a split-dollar life insurance arrangement (as defined in § 1.61–22(b)) under which an applicable individual has a legally binding right to economic benefits described in § 1.61–22(d)(2)(ii) (policy cash value to which the non-owner has current access within the meaning of § 1.61–22(d)(4)(ii)) or § 1.61–22(d)(2)(iii) (any other economic benefits provided to the non-owner) is attributable to services performed in the taxable year of the covered health insurance provider in which the legally binding right arises. Split-dollar life insurance arrangements under which payments are treated as split-dollar loans under § 1.7872–15 generally will not give rise to deferred deduction remuneration within the meaning of paragraph (b)(11) of this section, although they may give rise to applicable individual remuneration. However, in certain situations, this type of arrangement may give rise to deferred deduction remuneration for purposes of section 162(m)(6), for example, if amounts on a split-dollar loan are waived, cancelled, or forgiven.

(9) *Examples.* The following examples illustrate the principles of paragraphs (d)(1) through (8) of this section. For purposes of these examples, each corporation has a taxable year that is the calendar year and is a covered health insurance provider for all relevant taxable years; deferred deduction remuneration is otherwise deductible in the taxable year in which it is paid, and amounts payable under nonaccount balance plans are not forfeitable upon the death of the applicable individual.

Example 1 (Account balance plan with earnings using the standard attribution method). (i) B is an applicable individual of corporation Y for all relevant taxable years. On January 1, 2016, B begins participating in a nonqualified deferred compensation plan of Y that is an account balance plan. Under the terms of the plan, all amounts are fully vested at all times, and Y will pay B's entire account balance on January 1, 2019. Y credits $10,000 to B under the plan annually on January 1 for three years beginning on January 1, 2016. The account earns interest at a fixed rate of five percent per year, compounded annually under the terms of the

plan, which solely for purposes of this example, is assumed to be a reasonable rate of interest. Thus, B's account balance is $10,500 ($10,000 + ($10,000 × 5%)) on December 31, 2016; $21,525 ($10,500 + $10,000 + ($20,500 × 5%)) on December 31, 2017; and $33,101 ($21,525 + $10,000 + ($31,525 × 5%)) on December 31, 2018. Y attributes increases and decreases in account balances under the plan using the standard allocation method described in paragraph (d)(3)(i) of this section.

(ii) Under the standard attribution method for account balance plans described in paragraph (d)(3)(i) of this section, any increase in B's account balance as of the last day of Y's taxable year over the account balance as of the last day of the immediately preceding taxable year, increased by any payments made during the taxable year, is remuneration that is attributable to services provided by B in that taxable year. Accordingly, $10,500 of deferred deduction remuneration is attributable to services performed by B in Y's 2016 taxable year (the difference between the $10,500 account balance on December 31, 2016 and the zero account balance on December 31, 2015); $11,025 of deferred deduction remuneration is attributable to services performed in Y's 2017 taxable year (the difference between the $21,525 account balance on December 31, 2017 and the $10,500 account balance on December 31, 2016); and $11,576 of deferred deduction remuneration is attributable services performed in Y's 2018 taxable year (the difference between the $33,101 account balance on December 31, 2018 and the $21,525 account balance on December 31, 2017).

Example 2 (Account balance plan with earnings using the alternate attribution method). (i) The facts are the same as in *Example 1,* except that Y allocates earnings and losses based on the alternative attribution method described in paragraph (d)(3)(ii) of this section.

(ii) Under the alternative attribution method described in paragraph (d)(3)(ii) of this section, each principal addition of $10,000 is attributed to the taxable year of Y as of which the addition is credited, and earnings and losses on each principal addition are attributed to the same taxable year to which the principal addition is attributed. Therefore, $1,576 of earnings are attributable to Y's 2016 taxable year (interest on the 2016 $10,000 principal addition at five percent for three years compounded annually); $1,025 of earnings are attributable to Y's 2017 taxable year (interest on the 2017 $10,000 principal addition at five percent for two years compounded annually); and $500 of earnings are attributable to Y's 2018 taxable year (interest on the 2018 $10,000 principal addition at five percent for one year).

Example 3 (Account balance plan with earnings and losses using the standard attribution method). (i) The facts are the same as in *Example 1,* except that the earnings under the terms of the plan are based on a notional investment in a predetermined actual investment (as defined in § 31.3121(v)(2)–1(e)(2)(i)(B)), which results in B's account balance increasing by five percent in the 2016 taxable year, decreasing by five percent in the 2017 taxable year, and increasing again by five percent in the 2018 taxable year. Therefore, on December 31, 2016, B's account balance is $10,500 ($10,000 + ($10,000 × 5%)); on December 31, 2017, B's account balance is $19,475 ($10,500 + $10,000 − ($20,500 × 5%)); and on December 31, 2018, B's account balance is $30,479 ($19,475 + $10,000 + ($29,475 × 5%)).

(ii) Under the standard attribution method for account balance plans described in paragraph (d)(3)(i) of this section, increases (or decreases) in B's account balance as of the last day of Y's taxable year over (or under) the account balance as of the last day of the immediately preceding taxable year, increased by any payments made during the taxable year, are attributable to services provided by B in that taxable year.

(iii) Accordingly, $10,500 of deferred deduction remuneration is attributable to services performed by B in Y's 2016 taxable year (the difference between the $10,500 account balance on December 31, 2016 and the zero account balance on December 31, 2015); $8,975 of deferred deduction remuneration is attributable to services performed in Y's 2017 taxable year (the difference between the $19,475 account balance on December 31, 2017 and the $10,500 account balance on December 31, 2016); and $11,474 of deferred deduction remuneration is attributable to services performed in Y's 2018 taxable year (the difference between the $30,949 account balance on December 31, 2018 and the $19,475 account balance on December 31, 2017).

Example 4 (Account balance plan with earnings and losses using the alternative attribution method). (i) The facts are the same as in *Example 3,* except that Y attributes earnings and losses based on the method described in paragraph (d)(3)(ii) of this section.

(ii) Under the alternative attribution method for account balance plans described in paragraph (d)(3)(ii) of this section, each $10,000 principal addition is attributed to the taxable year of Y as of which the addition is made, and earnings and losses on each principal addition are attributed to the same taxable year of Y to which the principal addition is attributed. With respect to the $10,000 principal addition to B's account for 2016, the account balance is $10,500 on December 1, 2016 ($500 of earnings), $9,975 on December 31, 2017 ($525 of losses), and $10,474 on December 31, 2018 ($499 of earnings). Accordingly, $474 ($500 − $525 + $499) of net earnings is attributable to Y's 2016 taxable year. With respect to the $10,000 principal addition to B's account for 2017, the account balance is $9,500 on December 31, 2017 ($500 of losses), and $9,975 on December 31, 2018 ($475 of earnings). Accordingly, $25 in net losses are attributable to Y's 2017 taxable year ($500 losses for 2017 and $475 earnings for 2018). Because losses attributable to a taxable year may reduce deferred deduction remuneration attributable to that taxable year (but not applicable individual remuneration), the $25 loss reduces the $10,000 principal addition to B's account in 2017 for purposes of applying the section 162(m)(6) deduction limitation. With respect to the $10,000 principal addition to B's account in 2018, the account balance is $10,500 on December 31, 2018. Therefore, the $500 of earnings is attributable to Y's 2018 taxable year.

Example 5 (Nonaccount balance plan). (i) C is an applicable individual of corporation X for all relevant taxable years. On January 1, 2015, X grants C a vested right to a $100,000 payment on January 1, 2020.

(ii) Under the attribution method for nonaccount balance plans described in paragraph (d)(4) of this section, any increase (or decrease) in the present value of the future payment that C is entitled to receive under the nonaccount balance plan as of the last day of X's taxable year, over (or under) the present value of the future payment as of the last day of the preceding taxable year, increased by any payments made during the taxable year, is attributable to services provided by C in that taxable year. X determines the present value of the payment using an interest rate of five percent for all years, which, solely for purposes of this example, is assumed to be a reasonable actuarial assumption. The present value of $100,000 payable on January 1, 2020, determined using a five percent interest rate, is $82,300 as of December 31, 2015; $86,400 as of December 31, 2016; $90,700 as of December 31, 2017; and $95,200 as of December 31, 2018. Accordingly, $82,300 of deferred deduction remuneration is attributable to services performed by C in X's 2015 taxable year; $4,100 ($86,400 − $82,300) of deferred deduction remuneration is attributable to services performed by C in X's 2016 taxable year; $4,300 ($90,700 − $86,400) of deferred deduction remuneration is attributable to services performed by C in X's 2017 taxable year; $4,500 ($95,200 − $90,700) of deferred deduction remuneration is attributable to services performed by C in X's 2018 taxable year; and $4,800 ($100,000 − $95,200) of remuneration is attributable to services performed by C in X's 2019 taxable year.

Example 6 (Nonaccount balance plan). (i) D is an applicable individual of corporation W for all relevant taxable years. D begins employment with W on January 1, 2016. On December 31, 2020, D obtains the right to a payment from W equal to 10 percent of D's highest annual salary multiplied by D's years of service commencing on January 1 of the year following D's separation from service. In 2020, D has an annual salary of $375,000, which increases by $25,000 on January 1 of each subsequent calendar year. D separates from service with W on December 31, 2023, and W pays $360,000 to D on January 1, 2024. W determines the present value of amounts to be paid under the plan using an interest rate of five percent for all years, which, solely for purposes of this example, is assumed to be a reasonable actuarial assumption.

(ii) Under the attribution method for nonaccount balance plans described in paragraph (d)(4) of this section, the increase (or decrease) in the present value of the future payment to which D is entitled under the nonaccount balance plan as of the last day of W's taxable year, over (or under) the

present value of the future payment as of the last day of the preceding taxable year, increased by any payments made during the taxable year, is attributable to services provided by D in that taxable year. W determines the present value of this payment using an interest rate of five percent for all years, which solely for purposes of this example, is assumed to be a reasonable actuarial assumption. As of December 31, 2021, D has the right to a payment of $240,000 on January 1, 2024 ($400,000 × 10% × 6 years of service). The present value as of December 31, 2021 of $240,000 payable on January 1, 2024 is $217,687. Therefore, $217,687 of deferred deduction remuneration is attributable to services performed by D in W's 2021 taxable year.

(iii) As of December 31, 2022, D has the right to a payment of $297,500 on January 1, 2023 ($425,000 × 10% × 7 years of service). The present value as of December 31, 2022 of $297,500 payable on January 1, 2023 is $283,333. Therefore, the deferred deduction remuneration attributable to services performed by D in W's 2022 taxable year is $65,546 ($283,333 − $217,680).

(iv) As of December 31, 2023, D has the right to a payment of $360,000 on January 1, 2024 ($450,000 × 10% × 8 years of service). The present value as of December 31, 2023 of $360,000 payable on January 1, 2024 is $360,000. Therefore, the deferred deduction remuneration attributable to services performed by D in W's 2023 taxable year is $76,767 ($360,000 − $283,333).

Example 7 (Stock option). (i) E is an applicable individual of corporation V for all relevant taxable years. On January 1, 2016, V grants E an option to purchase 100 shares of V common stock at an exercise price of $50 per share (the fair market value of V common stock on the date of grant). On December 31, 2017, E ceases to be a service provider of V or any member of V's aggregated group. On January 1, 2019, E resumes providing services for V and again becomes both a service provider and an applicable individual of V. On December 31, 2020, when the fair market value of V common stock is $196 per share, E exercises the stock option. The remuneration resulting from the stock option exercise is $14,600 (($196 − $50) × 100).

(ii) Pursuant to paragraph (d)(5)(i) of this section, the remuneration resulting from the exercise of a stock option is attributable to services performed by E over the period beginning on the date of grant of the stock option and ending on the date that the stock right is exercised, excluding any days on which E is not a service provider of V. Therefore, the $14,600 is attributed *pro rata* over the 1,460 days from January 1, 2016 to December 31, 2017 and from January 1, 2019 to December 31, 2020 (365 days per year for the 2016, 2017, 2019, and 2020 taxable years), so that $10 ($14,600 divided by 1,460) is attributed to each calendar day in this period, and $3,650 (365 days × $10) of remuneration is attributed to services performed by E in each of V's 2016, 2017, 2019, and 2020 taxable years.

Example 8 (Restricted stock). (i) F is an applicable individual of corporation U for all relevant taxable years. On January 1, 2017, U grants F 100 shares of restricted U common stock. Under the terms of the grant, the shares will be forfeited if F voluntarily terminates employment before December 31, 2019 (so that the shares are subject to a substantial risk of forfeiture through that date) and are nontransferable until the substantial risk of forfeiture lapses. F does not make an election under section 83(b) and continues in employment with U through December 31, 2019, at which time F's rights in the stock become substantially vested within the meaning of § 1.83–3(b) and the fair market value of a share of the stock is $109.50. The deferred deduction remuneration resulting from the vesting of the restricted stock is $10,950 ($109.50 × 100).

(ii) Pursuant to paragraph (d)(5)(ii) of this section, the remuneration resulting from the vesting of restricted stock is attributable to services performed by F on a daily *pro rata* basis over the period, excluding any days on which F is not a service provider of U, beginning on the date F is granted the restricted stock and ending on the earliest of the date the substantial risk of forfeiture lapses or the date the restricted stock is transferred (or becomes transferable as defined in § 1.83–3(d)). Therefore, the $10,950 of remuneration is attributed to services performed by F over the 1,095 days between January 1, 2017 and December 31, 2019 (365 days per year for the 2017, 2018, and 2019 taxable years), so that $10 ($10,950 divided by 1,095) is attributed to each calendar day in this period, and remuneration of $3,650 (365 days × $10) is attributed to services performed by F in each of U's 2017, 2018, and 2019 taxable years.

Example 9 (Restricted stock units (RSUs)). (i) G is an applicable individual of corporation T for all relevant taxable years. On January 1, 2018, T grants G 100 RSUs. Under the terms of the grant, T will pay G an amount on December 31, 2020 equal to the fair market value of 100 shares of T common stock on that date, but only if G continues to provide substantial services to T (so that the RSU is subject to a substantial risk of forfeiture) through December 31, 2020. G remains employed by T through December 31, 2020, at which time the fair market value of a share of the stock is $219, and T pays G $21,900 ($219 × 100).

(ii) Pursuant to paragraph (d)(5)(iii) of this section, remuneration from the payment under the RSUs is attributed on a daily *pro rata* basis to services performed by G over the period beginning on the date the RSUs are granted and ending on the date the remuneration is paid or made available, excluding any days on which G is not a service provider of T. Therefore, the $21,900 in remuneration is attributed over the 1,095 days beginning on January 1, 2018 and ending on December 31, 2020 (365 days per year for the 2018, 2019, and 2020 taxable years), so that $20 ($21,900 divided by 1,095) is attributed to each calendar day in this period, and $7,300 (365 days × $20) is attributed to service performed by G in each of T's 2018, 2019, and 2020 taxable years.

Example 10 (Involuntary separation pay). (i) H is an applicable individual of corporation S. On January 1, 2015, H and S enter into an employment contract providing that S will make two payments of $150,000 each to H if H has an involuntary separation from service. Under the terms of the contract, the first payment is due on January 1 following the involuntary separation from service, and the second payment is due on January 1 of the following year. On December 31, 2016, H has an involuntary separation from service. S pays H $150,000 on January 1, 2017 and $150,000 on January 1, 2018.

(ii) Pursuant to paragraph (d)(6) of this section, involuntary separation pay may be attributed to services performed by H in the taxable year of S in which the involuntary separation from service occurs. Alternatively, involuntary separation pay may be attributed to services performed by H on a daily *pro rata* basis beginning on the date H obtains a right to the involuntary separation pay and ending on the date of the involuntary separation from service. The entire $300,000 amount, including both $150,000 payments, must be attributed using the same method. Therefore, the entire $300,000 amount (comprised of two $150,000 payments) may be attributed to services performed by H in S's 2016 taxable year, which is the taxable year in which the involuntary separation from service occurs. Alternatively, the two $150,000 payments may be attributable to the period beginning on January 1, 2015 and ending December 31, 2016, so that $410.96 ($300,000/(365 × 2)) is attributed to each day of S's 2015 and 2016 taxable years, and $150,000 ($410.96 × 365) is attributed to services performed by H in each of S's 2015 and 2016 taxable years.

Example 11 (Reimbursement after termination of services). (i) I is an applicable individual of corporation R. On January 1, 2018, I enters into an agreement with R under which R will reimburse I's country club dues for two years following I's separation from service. On December 31, 2020, I ceases to be a service provider of R. I pays $50,000 in country club dues on January 1, 2021 and $50,000 on January 2, 2022. Pursuant to the agreement, R reimburses I $50,000 for the country club dues in 2021and $50,000 in 2022.

(ii) Pursuant to paragraph (d)(7) of this section, remuneration provided in the form of a reimbursement or in-kind benefit after I ceases to be a service provider of R is attributed to services provided by I in R's taxable year in which I ceases to be an officer, director, or employee of R and ceases performing services for, or on behalf of, R. Therefore, $100,000 is attributed to services performed in R's 2020 taxable year.

(10) *Certain deferred deduction remuneration subject to a substantial risk of forfeiture.* If remuneration is attributable in accordance with paragraph (d)(2) (legally binding right), (d)(3) (account balance plan), or (d)(4) (nonaccount balance plan) of this section to services performed in a period that includes two or more taxable years of a covered health insurance provider during which the remuneration is subject to a substantial risk of forfeiture, that remuneration must be attributed using a two-step process. First, the remuneration must be attributed to the taxable years of the covered health insurance provider in accordance with paragraph (d)(2), (3), or (4) of this section, as

applicable. Second, the remuneration attributed to the period during which the remuneration is subject to a substantial risk of forfeiture (the vesting period) must be reattributed on a daily *pro rata* basis over that period beginning on the date that the applicable individual obtains a legally binding right to the remuneration and ending on the date that the substantial risk of forfeiture lapses. If a vesting period ends on a day other than the last day of the covered health insurance provider's taxable year, the remuneration attributable to that taxable year under the first step of the attribution process is divided between the portion of the taxable year that includes the vesting period and the portion of the taxable year that does not include the vesting period. The amount attributed to the portion of the taxable year that includes the vesting period is equal to the total amount of remuneration that would be attributable to the taxable year under the first step of the attribution process, multiplied by a fraction, the numerator of which is the number of days during the taxable year that the amount is subject to a substantial risk of forfeiture and the denominator of which is the number of days in such taxable year. The remaining amount is attributed to the portion of the taxable year that does not include the vesting period and, therefore, is not reattributed under the second step of the attribution process. For purposes of this section, the date on which a substantial risk of forfeiture lapses is the date on which the substantial risk of forfeiture lapses for any reason, including the death, disability, or involuntary termination of employment of the applicable individual, or the discretionary action of a covered health insurance provider or any other person.

(11) *Examples.* The following examples illustrate the principles of paragraph (d)(10) of this section. For purposes of these examples, each corporation has a taxable year that is the calendar year and is a covered health insurance provider for all relevant taxable years; deferred deduction remuneration is otherwise deductible in the taxable year in which it is paid, and amounts payable under nonaccount balance plans are not forfeitable upon the death of the applicable individual.

Example 1 (Account balance plan subject to a substantial risk of forfeiture using the standard attribution method). (i) J is an applicable individual of corporation Q for all relevant taxable years. On January 1, 2016, J begins participating in a nonqualified deferred compensation plan that is an account balance plan. Under the terms of the plan, Q will pay J's account balance on January 1, 2021, but only if J continues to provide substantial services to Q through December 31, 2018 (so that the amount credited to J's account is subject to a substantial risk of forfeiture through that date). Q credits $10,000 to J's account annually for five years on January 1 of each year beginning on January 1, 2016. The account earns interest at a fixed rate of five percent per year, compounded annually, which solely for the purposes of this example, is assumed to be a reasonable rate of interest. Therefore, J's account balance is $10,500 ($10,000 + ($10,000 × 5%)) on December 31, 2016; $21,525 ($10,500 + $10,000 + ($20,500 × 5%)) on December 31, 2017; $33,101 ($21,525 + $10,000 + ($31,525 × 5%)) on December 31, 2018; $45,256 ($33,101 + $10,000 + ($43,101 × 5%)) on December 31, 2019; and $58,019 ($45,256 + $10,000 + ($55,256 × 5%)) on December 31, 2020. Q attributes increases and decreases in account balances under the plan using the standard attribution method described in paragraph (d)(3)(i) of this section.

(ii) Under the standard attribution method for account balance plans described in paragraph (d)(3)(i) of this section, any increases in J's account balance as of the last day of Q's taxable year over the account balance as of the last day of the immediately preceding taxable year, increased by any payments made during the taxable year, is attributable to services provided by J in that taxable year. Accordingly, $10,500 of deferred deduction remuneration is initially attributable to services performed by J in Q's 2016 taxable year (the difference between the $10,500 account balance on December 31, 2016 and the zero account balance on December 31, 2015); $11,025 of deferred deduction remuneration is initially attributable to services performed by J in Q's 2017 taxable year (the difference between the $21,525 account balance on December 31, 2017 and the $10,500 account balance on December 31, 2016); $11,576 of deferred deduction remuneration is initially attributable to services performed by J in Q's 2018 taxable year (the difference between the $33,101 account balance on December 31, 2018 and the $21,525 account balance on December 31, 2017); $12,155 of deferred deduction remuneration is attributable to services performed by J in Q's 2019 taxable year (the difference between the $45,256 account balance on December 31, 2019 and the $33,101 account balance on December 31, 2018); and $12,763 of deferred deduction remuneration is attributable to services performed by J in Q's 2020 taxable year (the difference between the $58,019 account balance on December 31, 2020 and the $45,256 account balance on December 31, 2018).

(iii) Under the attribution method described in paragraph (d)(10) of this section, deferred deduction remuneration that is attributable to services performed in a period that includes two or more taxable years of Q during which the deferred deduction remuneration is subject to a substantial risk of forfeiture must be reattributed on a daily *pro rata* basis over the period beginning on the date that J obtains a legally binding right to the remuneration and ending on the date that the substantial risk of forfeiture lapses. Therefore, $33,101 ($10,500 + $11,025 + $11,576) is reattributed on a daily *pro rata* basis over the period beginning on January 1, 2016, and ending on December 31, 2018, and $11,034 is attributed to each of Q's 2016, 2017, and 2018 taxable years.

Example 2 (Account balance plan subject to a substantial risk of forfeiture using the alternative attribution method). (i) The facts are the same as in *Example 1,* except that Q allocates earnings and losses using the alternative attribution method described in paragraph (d)(3)(ii) of this section.

(ii) Under the alternative attribution method for account balance plans described in paragraph (d)(3)(ii) of this section, earnings and losses on a principal addition are attributed to the same disqualified taxable year of Q to which the principal addition is attributed. Therefore, the amount initially attributable to Q's 2016 taxable year is $12,763 (the $10,000 principal addition in 2016 at five percent interest for five years); the amount initially attributable to Q's 2017 taxable year is $12,155 (the $10,000 principal addition in 2017 at five percent interest for four years); the amount initially attributable to Q's 2018 taxable year is $11,576 (the $10,000 principal addition in 2018 at five percent interest for three years); the amount attributable to Q's 2019 taxable year is $11,025 (the $10,000 principal addition in 2019 at five percent interest for two years), and the amount attributable to Q's 2020 taxable year is $10,500 (the $10,000 principal addition in 2020 at five percent interest for one year).

(iii) Under the attribution method described in paragraph (d)(10) of this section, deferred deduction remuneration that is attributable to two or more taxable years of Q during which the deferred deduction remuneration is subject to a substantial risk of forfeiture must be reattributed on a daily *pro rata* basis to that period beginning on the date that J obtains a legally binding right to the remuneration and ending on the date that the substantial risk of forfeiture lapses. Therefore, $36,494 ($12,763 + $12,155 + $11,576) is reattributed on a daily *pro rata* basis over the period beginning on January 1, 2016, and ending on December 31, 2018, and $12,165 is attributed to each of Q's 2016, 2017, and 2018 taxable years.

Example 3 (Nonaccount balance plan subject to a substantial risk of forfeiture). (i) K is an applicable individual of corporation J for all relevant taxable years. K begins employment with J on January 1, 2016 and begins participating in a nonqualified deferred compensation plan that is a defined benefit plan. Under the terms of the plan, J will pay K an amount equal to ten percent of K's highest annual salary multiplied by K's years of service as of K's separation from service, but only if K remains employed through December 31, 2020 (so that the right to the remuneration is subject to a substantial risk of forfeiture through that date). In 2016, K has annual salary of $275,000, which increases by $25,000 on January 1 of each subsequent calendar year. K has a separation from service from J on December 31, 2025, and J pays $500,000 to K on January 1, 2026 pursuant to the terms of the plan. J determines the present value of amounts to be paid under the plan using an interest rate of five percent for all years, which, solely for purposes of this example, is assumed to be a reasonable actuarial assumption.

(ii) As of December 31, 2016, K has a right to a payment of $27,500 on January 1, 2026 ($275,000 × 10% × 1 years of service). The present value as of December 31, 2021, of a $27,500 payment to be made on January 1, 2026, is $17,727. Therefore, the remuneration initially attributable to services performed by K in J's 2021 taxable year is $17,727 ($17,727 − $0).

(iii) As of December 31, 2017, K has a right to a payment of $60,000 on January 1, 2026 ($300,000 × 10% × 2 years of service). The present value as of December 31, 2021, of a $60,000 payment to be made on January 1, 2026, is $40,610. Therefore, the remuneration initially attributable to services performed by K in J's 2021 taxable year is $22,884 ($40,610 − $17,727).

(iv) As of December 31, 2018, K has a right to a payment of $97,500 on January 1, 2026 ($325,000 × 10% × 3 years of service). The present value as of December 31, 2021, of a $97,500 payment to be made on January 1, 2026, is $69,291. Therefore, the remuneration initially attributable to services performed by K in J's 2021 taxable year is $28,681 ($69,291 − $40,610).

(v) As of December 31, 2019, K has a right to a payment of $140,000 on January 1, 2026 ($350,000 × 10% × 4 years of service). The present value as of December 31, 2021, of a $140,000 payment to be made on January 1, 2026, is $104,470. Therefore, the remuneration initially attributable to services performed by K in J's 2021 taxable year is $35,179 ($104,470 − $69,291).

(vi) As of December 31, 2020, K has a right to a payment of $187,500 on January 1, 2026 ($375,000 × 10% × 5 years of service). The present value as of December 31, 2021, of a $187,500 payment to be made on January 1, 2026, is $146,911. Therefore, the remuneration initially attributable to services performed by K in J's 2021 taxable year is $42,441 ($146,911 − $104,470).

(vii) As of December 31, 2021, K has a right to a payment of $240,000 on January 1, 2026 ($400,000 × 10% × 6 years of service). The present value as of December 31, 2021, of a $240,000 payment to be made on January 1, 2026, is $197,449. Therefore, the remuneration attributable to services performed by K in J's 2021 taxable year is $50,537 ($197,449 − $146,911).

(viii) As of December 31, 2022, K has a right to a $297,500 payment on January 1, 2026 ($425,000 × 10% × 7 years of service). The present value as of December 31, 2022, of a $297,500 payment to be made on January 1, 2026, is $256,992. Therefore, the remuneration attributable to services performed by K in J's 2022 taxable year is $59,543 ($256,992 − $197,449).

(ix) As of December 31, 2023, K has a right to a $360,000 payment on January 1, 2026 ($450,000 × 10% × 8 years of service). The present value as of December 31, 2023 of a $360,000 payment to be made on January 1, 2026 is $326,532. Therefore, the remuneration attributable to services performed by K in J's 2023 taxable year is $69,539 ($326,531 − $256,992).

(x) As of December 31, 2024, K has a right to a $427,500 payment on January 1, 2026 ($475,000 × 10% × 9 years of service). The present value as of December 31, 2024 of a $427,500 payment to be made on January 1, 2026 is $407,143. Therefore, the remuneration attributable to services performed by K in J's 2024 taxable year is $80,612 ($407,143 − $326,531).

(xi) As of December 31, 2025, K has a right to a $500,000 payment on January 1, 2026 ($500,000 × 10% × 10 years of service). The present value as of December 31, 2025 of a $500,000 payment to be made on January 1, 2026 is $500,000. Therefore, the applicable individual remuneration attributable to services performed by K in J's 2025 taxable year is $92,857 ($500,000 − $407,143).

(xii) Under the attribution method described in paragraph (d)(10) of this section, deferred deduction remuneration that is attributable to two or more taxable years of a covered health insurance provider during which the deferred deduction remuneration is subject to a substantial risk of forfeiture must be reattributed on a daily *pro rata* basis to that period beginning on the date that the applicable individual obtains a legally binding right to the remuneration and ending on the date that the substantial risk of forfeiture lapses. Therefore, $146,911 ($17,727 + $22,884 + $28,681 + $35,179 + $42,441) is reattributed on a daily *pro rata* basis over the period beginning on January 1, 2016, and ending on December 31, 2020, and, accordingly, $29,382 (($146,911/(5 × 365)) × 365) is attributed to services performed by K in each of L's 2016, 2017, 2018, 2019, and 2020 taxable years.

(e) *Application of the deduction limitation*–(1) *To aggregate amounts.* The $500,000 deduction limitation is applied to the aggregate amount of applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year. The aggregate amount of applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year that exceeds the $500,000 deduction limitation is not allowed as a deduction in any taxable year. Therefore, for example, if an applicable individual has $500,000 or more of applicable individual remuneration attributable to services provided to a covered health insurance provider in a disqualified taxable year, the amount of that applicable individual remuneration that exceeds $500,000 is not deductible in any taxable year, and no deferred deduction remuneration attributable to services performed by the applicable individual in that disqualified taxable year is deductible in any taxable year. However, if an applicable individual has applicable individual remuneration for a disqualified taxable year that is less than $500,000 and deferred deduction remuneration attributable to services performed in the same disqualified taxable year that, when combined with the applicable individual remuneration for the year, is greater than $500,000, all of the applicable individual remuneration is deductible in that disqualified taxable year, but the amount of deferred deduction remuneration that is deductible in future taxable years is limited to the excess of $500,000 over the amount of the applicable individual remuneration for that year.

(2) *Order of application and calculation of deduction limitation*–(i) *In general.* The deduction limitation with respect to any applicable individual for any disqualified taxable year is applied to applicable individual remuneration and deferred deduction remuneration attributable to services performed by that applicable individual in that disqualified taxable year at the time that the remuneration becomes otherwise deductible, and each time the deduction limitation is applied to an amount that is otherwise deductible, the deduction limitation is reduced (but not below zero) by the amount against which it is applied. Accordingly, the deduction limitation is applied first to an applicable individual's applicable individual remuneration attributable to services performed in a disqualified taxable year and is reduced (but not below zero) by the amount of the applicable individual remuneration against which it is applied. If the applicable individual also has an amount of deferred deduction remuneration attributable to services performed in that disqualified taxable year that becomes otherwise deductible in a subsequent taxable year, the deduction limitation, as reduced, is applied to that amount of deferred deduction remuneration in the first taxable year in which it becomes otherwise deductible. The deduction limitation is then further reduced (but not below zero) by the amount of the deferred deduction remuneration against which it is applied. If the applicable individual has an additional amount of deferred deduction remuneration attributable to services performed in the original disqualified taxable year that becomes otherwise deductible in a subsequent taxable year, the deduction limitation, as further reduced, is applied to that amount of deferred deduction remuneration in the taxable year in which it is otherwise deductible. This process continues for future taxable years in which deferred deduction remuneration attributable to services performed by the applicable individual in the original disqualified taxable year is otherwise deductible. No deduction is allowed in any taxable year for any applicable individual remuneration or deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year to the extent that it exceeds the deduction limitation (as reduced, if applicable) for that disqualified taxable year at the time

the deduction limitation is applied to the remuneration.

(ii) *Application to payments*—(A) *In general.* Any payment of deferred deduction remuneration may include remuneration that is attributable to services performed by an applicable individual in one or more earlier taxable years of a covered health insurance provider pursuant to paragraphs (d)(2) through (d)(8) and paragraph (d)(10) of this section. In that case, a separate deduction limitation applies to each portion of the payment that is attributed to services performed in a different disqualified taxable year. Any portion of a payment that is attributed to a taxable year that is a disqualified taxable year is deductible only to the extent that it does not exceed the deduction limit that applies with respect to the applicable individual for that disqualified taxable year, as reduced by the amount, if any, of applicable individual remuneration and deferred deduction remuneration attributable to services performed in that disqualified taxable year that was deductible in an earlier taxable year.

(B) *Application to series of payments.* Under the rule described in paragraph (d)(1)(ii) of this section, amounts attributable to services performed by an applicable individual pursuant to paragraph (d)(3) or (4) of this section must be attributed to services performed by the applicable individual in the earliest year that the amount could be attributable under paragraph (d)(3) of (4) of this section, as applicable. Any portion of a payment that is attributed to services performed in a taxable year is treated as paid for all purposes under this section, including the calculation of future earnings and the attribution of other remuneration.

(3) *Examples.* The following examples illustrate the rules of paragraphs (e)(1) and (e)(2) of this section. For purposes of these examples, each corporation has a taxable year that is the calendar year and is a covered health insurance provider for all relevant taxable years; deferred deduction remuneration is otherwise deductible in the taxable year in which it is paid, and amounts payable under nonaccount balance plans are not forfeitable upon the death of the applicable individual.

Example 1 (Lump-sum payment of deferred deduction remuneration attributable to a single taxable year).

(i) L is an applicable individual of corporation O. During O's 2015 taxable year, O pays L $550,000 in salary, which is applicable individual remuneration, and grants L a right to $50,000 of deferred deduction remuneration payable upon L's separation from service from O. L has a separation from service in 2020, at which time O pays L the $50,000 of deferred deduction remuneration attributable to services performed by L in O's 2015 taxable year.

(ii) The $500,000 deduction limitation for 2015 is applied first to L's $550,000 of applicable individual remuneration for 2015. Because the $550,000 otherwise deductible by O in 2015 is greater than the deduction limitation, O may deduct only $500,000 of the applicable individual remuneration for 2015, and $50,000 of the $550,000 of applicable individual remuneration is not deductible for any taxable year. The deduction limitation for remuneration attributable to services provided by L in O's 2015 taxable year is then reduced to zero. Because the $50,000 in deferred deduction remuneration attributable to services performed by L in 2015 exceeds the reduced deduction limitation of zero, that $50,000 is not deductible for any taxable year.

Example 2 (Installment payments of deferred deduction remuneration attributable to a single taxable year). (i) M is an applicable individual of corporation N. During N's 2016 taxable year, N pays M $300,000 in salary, which is applicable individual remuneration, and grants M a right to $220,000 of deferred deduction remuneration payable on a fixed schedule beginning upon M's separation from service. The $220,000 is attributable to services provided by M in N's 2016 taxable year. M has a separation from service in 2020. In 2020, N pays M $400,000 in salary, which is applicable individual remuneration, and also pays M $120,000 of deferred deduction remuneration that is attributable to services performed in N's 2016 taxable year. In 2021, N pays M the remaining $100,000 of deferred deduction remuneration attributable to services performed by M in N's 2016 taxable year.

(ii) The $500,000 deduction limitation for 2016 is applied first to M's $300,000 of applicable individual remuneration for 2016. Because the deduction limitation is greater than the applicable individual remuneration, N may deduct the entire $300,000 of applicable individual remuneration paid in 2016. The $500,000 deduction limitation is then reduced to $200,000 by the amount of the applicable individual remuneration ($500,000 − $300,000). The reduced deduction limitation is applied to M's $120,000 of deferred deduction remuneration attributable to services performed by M in N's 2016 taxable year that is paid in 2020. Because the reduced deduction limitation of $200,000 is greater than the $120,000 of deferred deduction remuneration, for N's 2020 taxable year, N may deduct the entire $120,000 of deferred deduction remuneration paid in 2020. The $200,000 deduction limitation is reduced to $80,000 by the $120,000 in deferred deduction remuneration against which it was applied ($200,000 − $120,000). The reduced deduction limitation of $80,000 is then applied to the remaining $100,000 payment of deferred deduction remuneration attributable to services performed by M in N's 2016 taxable year. Because the $100,000 in deferred deduction remuneration otherwise deductible by N for 2021 exceeds the reduced deduction limitation of $80,000, N may deduct only $80,000 of the deferred deduction remuneration for the 2021 taxable year, and $20,000 of the $100,000 payment is not deductible by N for any taxable year.

Example 3 (Lump-sum payment attributable to multiple years from an account balance plan using the standard attribution method). (i) N is an applicable individual of corporation M for all relevant taxable years. On January 1, 2013, N begins participating in a nonqualified deferred compensation plan sponsored by M that is an account balance plan. Under the plan, all amounts are fully vested at all times. The balances in N's account (including principal additions and earnings) are $50,000 on December 31, 2013, $100,000 on December 31, 2014, and $200,000 on December 2015. N's applicable individual remuneration from M is $425,000 for 2013, $450,000 for 2014, and $500,000 for 2015. On January 1, 2016, in accordance with the plan terms, M pays $200,000 to N, which is a payment of N's entire account balance under the plan.

(ii) To determine the extent to which M is entitled to a deduction for any portion of the $200,000 payment under the plan, the payment must first be attributed to services performed by N in M's taxable years in accordance with the attribution rules set forth in paragraph (d) of this section. Under the standard attribution method for account balance plans in paragraph (d)(3)(i) of this section, remuneration under an account balance plan is attributed to services performed by N in M's taxable years in an amount equal to the increase (or decrease) in the account balance as of the last day of M's taxable year over the account balance as of the last day of the immediately preceding taxable year, increased by any payments made during that year. Therefore, N's remuneration under the account balance plan is attributed to services performed by N in M's taxable years as follows: $50,000 ($50,000 − $0) in 2013, $50,000 ($100,000 − $50,000) in 2014, and $100,000 ($200,000 − $100,000) in 2015.

(iii) Under the rules in paragraphs (d)(1)(ii) and (e)(2)(ii)(B) of this section, the January 1, 2016 payment of $200,000 is deemed a payment of remuneration attributed to services performed by N in the earliest year that the amount could be attributed under

paragraph (d)(3)(i) of this section. M's first taxable year to which any portion of the payment could be attributed is M's 2013 taxable year. Accordingly, $50,000 of the $200,000 payment is attributed to services performed by N in M's 2013 taxable year. M's next earliest taxable year to which any portion of the payment could be attributed is M's 2014 taxable year. Accordingly, $50,000 of the $200,000 payment is attributed to services performed by N in M's 2014 taxable year. M's next earliest disqualified taxable year to which any portion of the payment could be attributed is M's 2015 taxable year. Accordingly, the remaining $100,000 of the $200,000 payment is attributed to services performed by N in M's 2015 taxable year.

(iv) The portion of the deferred deduction remuneration attributed to services performed in a disqualified taxable year under paragraph (d) of this section that exceeds the deduction limitation for that disqualified taxable year, as reduced through the date of payment, is not deductible in any taxable year. For M's 2013 taxable year, the deduction limitation is reduced to $75,000 by the $425,000 of applicable individual remuneration for that year. Because $50,000 does not exceed that reduced deduction limitation, all $50,000 of the deferred deduction remuneration attributed to services performed by N in M's 2013 taxable year is deductible for 2016, the year of payment. The deduction limitation for remuneration attributable to services performed by N that are attributable to 2013 is then reduced to $25,000, and this reduced limitation is applied to any future payment of deferred deduction remuneration attributable to services performed by N in 2013. For M's 2014 taxable year, the deduction limitation is reduced to $50,000 by N's $450,000 of applicable individual remuneration for that year. Because $50,000 does not exceed that reduced deduction limitation, all $50,000 of the deferred deduction remuneration attributed to M's 2014 taxable year is deductible for 2016, the year of payment. The deduction limitation for remuneration attributable to services performed by N in 2014 is then reduced to zero, and this reduced limitation is applied to any future payment of deferred deduction remuneration attributable to services performed by N in 2014. For M's 2015 taxable year, the deduction limitation is reduced to zero during 2015 by N's $500,000 of applicable individual remuneration for that year. Because $100,000 exceeds the reduced limit of zero, the $100,000 of the deferred deduction remuneration attributed to services performed by N in M's 2015 taxable year is not deductible for the year of payment (or any other taxable year). As a result, $100,000 of the $200,000 payment ($50,000 + $50,000 + $0) is deductible by M for M's 2016 taxable year, and the remaining $100,000 is not deductible by M for any taxable year.

Example 4 (Installment payments attributable to multiple taxable years from an account balance plan using the standard attribution method). (i) O is an applicable individual of corporation L for all relevant taxable years. On January 1, 2016, O begins participating in a nonqualified deferred compensation plan sponsored by L that is an account balance plan. Under the plan, all amounts are fully vested at all times. L credits principal additions to O's account each year, and credits earnings based on a predetermined actual investment within the meaning of § 31.3121(v)(2)–1(d)(2)(i)(B). The balances in O's account (including principal additions and earnings) are $100,000 on December 31, 2016, $250,000 on December 31, 2017, and $450,000 on December 2018. O's applicable individual remuneration from L is $500,000 for 2016, $300,000 for 2017, and $450,000 for 2018. On January 1, 2019, L pays O $400,000 in accordance with the plan terms. As a result of the payment, O's remaining account balance is $50,000 ($450,000 − $400,000). On December 31, 2019, O's account balance is increased to $200,000 by additional credits made during the year. O's applicable remuneration from L is $200,000 for 2019. On January 1, 2020, L pays O $200,000 in accordance with the plan terms.

(ii) To determine the extent to which L is entitled to a deduction for any portion of either of the payments under the plan, O's payments under the plan must first be attributed to services performed by O in L's taxable years in accordance with the attribution rules set forth in paragraph (d) of this section. Under the standard attribution method for account balance plans described in paragraph (d)(3)(i) of this section, remuneration is attributed to services performed by O in L's taxable years in an amount equal to the increase in O's account balance as of the last day of L's taxable year over the account balance as of the last day of the immediately preceding taxable year, increased by any payments made during that year. Therefore, O's deferred deduction remuneration under the plan is attributed to L's taxable years as follows: $100,000 ($100,000 − $0) in 2016, $150,000 ($250,000 − $100,000) in 2017, $200,000 ($450,000 − $250,000) in 2018, and $150,000 ($200,000 − $450,000 + $400,000) in 2019.

(iii) Under the rules in paragraphs (d)(1)(ii) and (e)(2)(ii)(B) of this section, the January 1, 2019 payment of $400,000 is deemed a payment of remuneration attributed to services performed by O in the earliest taxable year that the amount could be attributed under paragraph (d)(3)(i) of this section. L's first taxable year to which any portion of the payment could be attributed is L's 2016 taxable year. Accordingly, $100,000 of the $400,000 payment is attributed to services performed by O in L's 2016 taxable year. L's next earliest taxable year to which any portion of the payment could be attributed is L's 2017 taxable year. Accordingly, $150,000 of the $400,000 payment is attributed to services performed by O in L's 2017 taxable year. L's next earliest taxable year to which any portion of the payment could be attributed is L's 2018 taxable year. Accordingly, the remaining $150,000 of the $400,000 payment is attributed to services performed by O in L's 2018 taxable year. Because the portion of the $400,000 payment attributed to L's 2018 taxable year is less than the total deferred deduction remuneration attributed to L's 2018 taxable year, the excess deferred deduction remuneration ($50,000) is treated as paid in a subsequent taxable year.

(iv) The portion of the deferred deduction remuneration attributed to services performed in a disqualified taxable year under paragraph (d) of this section that exceeds the deduction limitation for that disqualified taxable year, as reduced, is not deductible for any taxable year. For L's 2016 taxable year, the deduction limitation is reduced to zero by the $500,000 of applicable individual remuneration for that year. Because $100,000 exceeds the reduced deduction limitation of zero, the $100,000 of the deferred deduction remuneration is not deductible for L's 2019 taxable year, the year of payment, or any other taxable year. For L's 2017 taxable year, the deduction limitation is reduced to $200,000 by the $300,000 of applicable individual remuneration for that year. Because $150,000 does not exceed that reduced deduction limitation, the $150,000 of the deferred deduction remuneration is deductible for 2019, the year of payment. The deduction limitation for remuneration attributable to services performed by O in 2017 is then reduced to $50,000, and this reduced limitation is applied to any future payment of deferred deduction remuneration attributable to services performed by O in 2017. For L's 2018 taxable year, the deduction limitation is reduced to $50,000 by the $450,000 of applicable individual remuneration for that year. Because the $150,000 of deferred deduction remuneration exceeds the reduced deduction limitation of $50,000, $100,000 of the $150,000 attributable to services performed by O in L's 2018 taxable year is not deductible for L's 2019 taxable year, the year of payment, or any other taxable year. As a result, $200,000 of the $400,000 payment ($0 + $150,000 + $50,000) is deductible by L for L's 2019 taxable year, and the remaining $200,000 is not deductible by L for any taxable year.

(v) Applying the rules in paragraphs (d)(1)(ii) and (e)(2)(ii)(B) of this section to the January 1, 2020 payment of $200,000, the payment is deemed a payment of deferred deduction remuneration attributed to services performed by O in the earliest taxable year that the amount could be attributed under paragraph (d)(3)(i) of this section. L's first taxable year to which any portion of the payment could be attributed is L's 2018 taxable year because all of the deferred deduction remuneration attributed to earlier taxable years was deemed paid as part of the January 1, 2019 payment. Accordingly, $50,000 of the $200,000 payment is attributed to services performed by O in L's 2018 taxable year (because the remaining portion of the deferred deduction remuneration under the plan originally attributed to services performed by O in L's 2018 taxable year was deemed paid as part of the January 1, 2019 payment). L's next earliest taxable year to which any portion of the payment is attributed is L's 2019 taxable year. Accordingly, $150,000 of the $200,000 payment is attributed to services performed by O in L's 2019 taxable year.

(vi) The portion of the deferred deduction remuneration attributed to a disqualified taxable year under paragraph (d) of this section that exceeds the deduction limitation

for that disqualified taxable year, as reduced, is not deductible for any taxable year. For L's 2018 taxable year, the deductible limitation is reduced to zero by the $450,000 of applicable individual remuneration for that year and the $50,000 of deferred deduction remuneration deducted in 2019. Because $50,000 exceeds the reduced deduction limitation of zero, $50,000 of the deferred deduction remuneration is not deductible for L's 2020 taxable year, the year of payment, or any other taxable year. For L's 2019 taxable year, the deduction limitation is not reduced because there is no applicable individual remuneration for that year. Because $150,000 does not exceed the unreduced $500,000 limitation, the $150,000 of the deferred deduction remuneration is deductible for L's 2020 taxable year, the year of payment. As a result, $150,000 of the $200,000 payment ($0 + $150,000) is deductible by L for L's 2020 taxable year, and the remaining $50,000 is not deductible by L for any taxable year.

Example 5 (Installment payments attributable to multiple taxable years from an account balance plan using the alternative attribution method for account balance plans). (i) The facts are the same as set forth in *Example 4,* paragraph (i), except as set forth in this paragraph (i). L uses the alternative method for attributing remuneration from an account balance plan. Principal additions under the plan are $50,000 in 2016 and 2017, $100,000 in 2018, and $125,000 in 2019. As of the January 1, 2019 initial payment date, earnings on the 2016, 2017, and 2018 are $125,000, $75,000, and $50,000 respectively.

(ii) To determine the extent to which L is entitled to a deduction for any portion of either payment under the plan, the payments to O under the plan must first be attributed to services performed by O in F's taxable years in accordance with the attribution rules set forth in paragraph (d) of this section. Under the alternative attribution method for account balance plans in paragraph (d)(3)(ii) of this section, the amount of remuneration under an account balance plan attributed to services performed in a taxable year is equal to the sum of the principal additions credited to the plan for that taxable year plus (or minus) the earnings (or losses) credited on those principal additions.

(iii) Under the rule in paragraphs (d)(1)(ii) and (e)(2)(ii)(B) of this section, the $400,000 payment on January 1, 2019, is deemed to constitute a payment of remuneration attributed to services performed by O in the earliest taxable year that the amount could be attributed under paragraph (d)(3)(ii) of this section. L's first taxable year to which any portion of the payment could be attributed is L's 2016 taxable year. Accordingly, $175,000 of the $400,000 payment is attributed to services performed by O in L's 2016 taxable year. The next earliest taxable year of L to which any portion of the payment could be attributed is L's 2017 taxable year. Accordingly, $125,000 of the $400,000 payment is attributed to services performed by O in L's 2017 taxable year. L's next earliest taxable year to which any portion of the payment could be attributed is L's 2018 taxable year. Accordingly, the remaining $100,000 of the $400,000 payment is attributed to services performed by O in L's 2018 taxable year. Because the portion of the $400,000 payment attributed to L's 2018 taxable year is less than the total deferred deduction remuneration attributable to services performed by O in L's 2018 taxable year, the excess deferred deduction remuneration ($50,000) is treated as paid in a subsequent taxable year.

(iv) The portion of the deferred deduction remuneration attributable to services performed in a disqualified taxable year under paragraph (d) of this section that exceeds the deduction limitation for that disqualified taxable year, as reduced, is not deductible for any taxable year. For L's 2016 taxable year, the deduction limitation is reduced to zero by the $500,000 of applicable individual remuneration for that year. Because $175,000 exceeds the reduced deduction limitation of zero, the $175,000 is not deductible for L's 2019 taxable year, the year of payment, or any other taxable year. For L's 2017 taxable year, the deduction limitation is reduced to $200,000 by the $300,000 of applicable individual remuneration for that year. Because $125,000 does not exceed the reduced deduction limitation, the $125,000 payment is deductible for 2019. For L's 2018 taxable year, the deduction limitation is reduced to $50,000 by the $450,000 of applicable individual remuneration for that year. Because $100,000 exceeds the reduced limitation of $50,000, $50,000 of the $100,000 attributable to L's 2018 taxable year is not deductible for 2019, the year of payment, or any other taxable year. As a result, $175,000 of the $400,000 payment ($0 + $125,000 + $50,000) is deductible by L for L's 2019 taxable year, and the remaining $225,000 is not deductible by L for any taxable year.

(v) Earnings through January 1, 2020 on the excess deferred deduction remuneration attributable to L's 2018 taxable year ($50,000) that was not paid as part of the January 1, 2019 payment are $10,000. Earnings through January 1, 2020 on the $100,000 in principal credited to O's account on January 1, 2019 are $15,000. Therefore, as of January 1, 2020, O's remaining deferred deduction remuneration under the plan is attributed to L's taxable years as follows: $60,000 ($50,000 + $10,000) to 2018 and $140,000 ($125,000 + $15,000) to 2019. Applying the rules in paragraphs (d)(1)(ii) and (e)(2)(ii)(B) to the January 1, 2020 payment of $200,000, the payment is deemed a payment of deferred deduction remuneration attributed to services performed by O in the earliest taxable year that the amount could be attributed under paragraph (d)(3)(ii) of this section. L's first taxable year to which any portion of the payment could be attributed is L's 2018 taxable year because all of the deferred deduction remuneration attributed to earlier taxable years was deemed paid as part of the January 1, 2019 payment. Accordingly, $60,000 of the $200,000 payment is attributed to services performed by O in L's 2018 taxable year. L's next taxable earliest taxable year to which any portion of the payment could be attributed is F's 2019 taxable year. Accordingly, $140,000 of the $200,000 payment is attributed to services performed by O in L's 2019 taxable year.

(vi) The portion of the deferred deduction remuneration attributed to a disqualified taxable year under paragraph (d) of this section that exceeds the deduction limitation for that disqualified taxable year, as reduced, is not deductible for any taxable year. For L's 2018 taxable year, the deductible limitation is reduced to zero by the $450,000 of applicable individual remuneration for that year and the payment of $50,000 of deferred deduction remuneration attributable to that year. Because $60,000 exceeds the reduced deduction limitation of zero, the $60,000 is not deductible for the year of payment (or any other taxable year). For L's 2019 taxable year, the deduction limitation is not reduced because there is no applicable individual remuneration for that year. Because $140,000 does not exceed the unreduced $500,000 limitation, the $140,000 is deductible for 2020, the year of payment. As a result, $140,000 of the $200,000 payment ($0 + $140,000) is deductible for L's 2020 taxable year, and the remaining $60,000 is not deductible by L for any taxable year.

(4) *Application of deduction limitation to aggregated groups of covered health insurance providers*—(i) *In general.* The total combined deduction for applicable individual remuneration and deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year allowed for all members of an aggregated group that are treated as covered health insurance providers for any taxable year is limited to $500,000. Therefore, if two or more members of an aggregated group that are treated as covered health insurance providers may otherwise deduct applicable individual remuneration or deferred deduction remuneration attributable to services provided by an applicable individual in a disqualified taxable year, the applicable individual remuneration and deferred deduction remuneration otherwise deductible by all members of the aggregated group is combined, and the deduction limitation is applied to the total amount.

(ii) *Proration of deduction limitation.* If the total amount of applicable individual remuneration or deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year that is otherwise deductible by two or more members of an aggregated group in any taxable year exceeds the $500,000 deduction limitation (as reduced by previous applications to applicable individual remuneration or deferred deduction remuneration, if applicable), the deduction limitation is prorated based on the applicable individual remuneration and deferred deduction remuneration otherwise deductible by

the members of the aggregated group in the taxable year and allocated to each member of the aggregated group. The deduction limitation allocated to each member of the aggregated group is determined by multiplying the deduction limitation for the disqualified taxable year (as previously reduced, if applicable) by a ratio, the numerator of which is the applicable individual remuneration and deferred deduction remuneration otherwise deductible by that member in that taxable year that is attributable to services performed by the applicable individual in the disqualified taxable year, and the denominator of which is the total applicable individual remuneration and deferred deduction remuneration otherwise deductible by all members of the aggregated group in that taxable year that is attributable to services performed by the applicable individual in the disqualified taxable year. The amount of applicable individual remuneration or deferred deduction remuneration otherwise deductible by a member of the aggregated group in excess of the portion of the deduction limitation allocated to that member is not deductible in any taxable year.

(5) *Examples.* The following examples illustrate the rules of paragraph (e)(4) of this section. For purposes of these examples, each corporation has a taxable year that is the calendar year and is a covered health insurance provider for all relevant taxable years, and deferred deduction remuneration is otherwise deductible by the covered health insurance provider in the taxable year in which it is paid.

Example 1. (i) Corporations I, J, and K are members of the same aggregated group under paragraph (b)(3) of this section. In 2016, C is an employee of, and performs services for, I, J, and K. C's total applicable individual remuneration for 2016 is $1,500,000, which consists of $750,000 of applicable individual remuneration for services provided to K; $450,000 of applicable individual remuneration for services provided to J; and $300,000 of applicable individual remuneration for services to I.

(ii) Because I, J, and K are members of the same aggregated group, the applicable individual remuneration otherwise deductible by them is aggregated for purposes of applying the deduction limitation. Further, because the aggregate applicable individual remuneration otherwise deductible by I, J, and K for 2016 exceeds the deduction limitation for C for that taxable year, the deduction limitation is prorated and allocated to the members of the aggregated group in proportion to the applicable individual remuneration otherwise deductible by each member of the aggregated group for that taxable year. Therefore, the deduction limitation that applies to the applicable individual remuneration otherwise deductible by K is $250,000 ($500,000 × ($750,000/$1,500,000)); the deduction limitation that applies to the applicable individual remuneration otherwise deductible by J is $150,000 ($500,000 × ($450,000/$1,500,000)); and the deduction limitation that applies to applicable individual remuneration otherwise deductible by I is $100,000 ($500,000 × ($300,000/$1,500,000)). Therefore, for the 2016 taxable year, K may not deduct $500,000 of the $750,000 of applicable individual remuneration paid to C ($750,000 − $250,000); J may not deduct $300,000 of the $450,000 of applicable individual remuneration paid to C ($450,000 − $150,000); and I may not deduct $200,000 of the $300,000 of applicable individual remuneration paid to C ($300,000 − $100,000).

Example 2. (i) The facts are the same as *Example 1,* except that C's total applicable individual remuneration for 2016 is $400,000, which consists of $75,000 for services provided to K; $150,000 for services provided to J; and $175,000 for services provided to I. In addition, C becomes entitled to $60,000 of deferred deduction remuneration attributable to services provided to K in 2016, which is payable on April 1, 2018, and $75,000 of deferred deduction remuneration attributable to services provided to J in 2016, which is payable on April 1, 2019.

(ii) Because C's total applicable individual remuneration of $400,000 for 2016 for services provided to K, J, and I does not exceed the $500,000 limitation, K, J, and I may deduct $75,000, $150,000, and $175,000, respectively, for 2016. The deduction limitation is then reduced to $100,000 by the total applicable individual remuneration deductible by all members of the aggregated group ($500,000 − $400,000). The deduction limitation, as reduced, is then applied to any deferred deduction remuneration attributable to services provided by C in 2016 in the first subsequent taxable year that it becomes deductible, which is the $60,000 payment made on April 1, 2018. Because the $60,000 of deferred deduction remuneration otherwise deductible by K does not exceed the $100,000 deduction limitation, K may deduct the entire $60,000 for its 2018 taxable year. The $100,000 deduction limitation is then reduced by the $60,000 of deferred deduction remuneration deductible by K for 2018, and the reduced deduction limitation of $40,000 ($100,000 − $60,000) is applied to the $75,000 of deferred deduction remuneration that is otherwise deductible for 2019. Because the deferred deduction remuneration of $75,000 otherwise deductible by J exceeds the reduced deduction limitation of $40,000, J may deduct only $40,000, and the remaining $35,000 ($75,000 − $40,000) is not deductible by J for that taxable year or any other taxable year.

Example 3. (i) The facts are the same as *Example 2,* except that C's deferred deduction remuneration of $75,000 attributable to services performed by C in J's 2016 taxable year is payable on July 1, 2018.

(ii) The results are the same as *Example 2,* except that the reduced deduction limitation of $100,000 is prorated between K and J in proportion to the deferred deduction remuneration otherwise deductible by them for 2018. Accordingly, $44,444 of the remaining deduction limitation is allocated to K ($100,000 × ($60,000/$135,000)), and $55,556 of the remaining deduction limitation is allocated to J ($100,000 × ($75,000/$135,000)). Because the $60,000 of deferred deduction remuneration otherwise deductible by K exceeds the $44,444 deduction limitation applied to that remuneration, K may deduct only $44,444 of the $60,000 payment, and $15,556 may not be deducted by K for any taxable year. Similarly, because the $75,000 of deferred deduction remuneration otherwise deductible by J exceeds the $55,556 deduction limitation applied to that remuneration, J may deduct only $55,556 of the $75,000 payment, and $19,444 may not be deducted by J for that taxable year or any other taxable year.

(f) *Corporate transactions*—(1) *Treatment as a covered health insurance provider in connection with a corporate transaction*—(i) *In general.* Except as otherwise provided in this paragraph (f), a person that participates in a corporate transaction is a covered health insurance provider for the taxable year in which the corporate transaction occurs and any subsequent taxable year if it would otherwise be a covered health insurance provider under paragraph (b)(4) of this section for that taxable year. For example, if a member of an aggregated group purchases a health insurance issuer that is a covered health insurance provider (so that the health insurance issuer becomes a member of the aggregated group), each member of the acquiring aggregated group generally will be a covered health insurance provider for the taxable year in which the corporate transaction occurs and each subsequent taxable year in which the health insurance issuer continues to be a member of the group, unless the *de minimis* exception applies. For purposes of this paragraph (f), the term *corporate transaction* means a merger, acquisition of assets or stock, disposition, reorganization, consolidation, or separation, or any other transaction (including a purchase or sale of stock or other equity interest) resulting in a change in the composition of an aggregated group.

(ii) *Transition period relief for persons becoming covered health insurance providers solely as a result of a corporate transaction*—(A) *In general.* Except as provided in paragraph (f)(1)(ii)(B) of this section, a person that is not a covered health insurance provider before a corporate transaction, but would (except for application of this paragraph (f)(1)(ii)(A)) become a covered health insurance provider solely as a

result of the corporate transaction, is not treated as a covered health insurance provider subject to the deduction limitation of section 162(m)(6) in the taxable year of that person in which the corporate transaction occurs (the transition period).

(B) *Certain applicable individuals.* The transition period relief described in paragraph (f)(1)(ii)(A) of this section does not apply with respect to the remuneration of any individual who is an applicable individual of a health insurance issuer that is a covered health insurance provider during its taxable year in which the corporate transaction occurs, even with respect to remuneration attributable to services performed by the applicable individual for a person that is eligible for the transition period relief described in paragraph (f)(1)(ii)(A) of this section. Therefore, each member of an acquiring aggregated group that would become a covered health insurance provider solely as a result of a corporate transaction, but is not treated as a covered health insurance provider under the transition period relief described in paragraph (f)(1)(ii)(A) of this section, is still subject to the deduction limitation of section 162(m)(6) for a taxable year during the transition period with respect to applicable individual remuneration and deferred deduction remuneration attributable to services performed by anyone who is an applicable individual of the acquired health insurance issuer that is a covered health insurance provider.

(iii) *Short taxable years*—(A) *Taxable year ending as a result of a corporate transaction.* As a result of a corporate transaction, a covered health insurance provider's taxable year may end, resulting in a short taxable year. For example, the taxable year of the covered health insurance provider ends if it becomes, or ceases to be, a member of a consolidated group by reason of § 1.1502–76(b)(1)(ii)(A)(1). A covered health insurance provider whose taxable year ends as a result of a corporate transaction is treated as a covered health insurance provider for that short taxable year if the covered health insurance provider is a covered health insurance provider within the meaning of paragraph (b)(4) of this section for the short taxable year that ends as a result of the corporate transaction, provided that, for purposes of this paragraph (f)(1)(iii)(A), the *de minimis* exception set forth in paragraph (b)(4)(iii)(A) of this section is available for that short taxable year only if it applied to the covered health insurance provider for the preceding taxable year.

(B) *Taxable year beginning as a result of a corporate transaction.* As a result of a corporate transaction, a covered health insurance provider may begin a new taxable year. For example, if as a result of a corporate transaction, a health insurance issuer that is a covered health insurance provider joins a consolidated group within the meaning of § 1.1502–1(h), or a covered health insurance provider ceases to be a member of an aggregated group as a result of a distribution to which section 355 applies, the covered health insurance provider begins a short taxable year. A health insurance issuer that is a covered health insurance provider whose taxable year begins as a result of a corporate transaction is treated as a covered health insurance provider for the taxable year that begins as a result of the corporate transaction if the covered health insurance provider is otherwise a covered health insurance provider within the meaning of paragraph (b)(4) of this section for the taxable year that begins as a result of a corporate transaction, even if it becomes a member of an acquiring aggregate group the other members of which are not treated as covered health insurance providers during that taxable year by reason of the transition period relief under paragraph (f)(1)(ii)(A) of this section, provided that, for purposes of this paragraph (f)(1)(iii)(B), the one-year grace period set forth in paragraph (b)(4)(ii)(B) of this section is available for that short taxable year.

(C) *Deduction limitation not prorated for short taxable years.* If a corporate transaction results in a short taxable year for a covered health insurance provider, the $500,000 deduction limitation for the short taxable year is neither prorated nor reduced. For example, if a corporate transaction results in a short taxable year of three months, the deduction limitation under section 162(m)(6) for that short taxable year is $500,000 (and is not reduced to $125,000).

(2) *Application to partnerships.* The rules in paragraph (f) of this section apply by analogy to transactions involving entities treated as partnerships for purposes of federal taxation.

(3) *Examples.* The following examples illustrate the principles of this paragraph (f). For purposes of these examples, each corporation has a taxable year that is the calendar year unless stated otherwise, and none of the corporations qualify for the *de minimis* exception under paragraph (b)(4)(iii) of this section.

Example 1. (i) Corporation J merges with and into corporation H on June 30, 2015, such that H is the surviving entity. As a result of the merger, J's taxable year ends on June 30, 2015. For its taxable year ending June 30, 2015, J is a covered health insurance provider. For all taxable years before the taxable year of the merger, H is not a covered health insurance provider. However, solely as a result of the merger, H becomes a covered health insurance provider for its 2015 taxable year.

(ii) Corporation J is a covered health insurance provider for its short taxable year ending June 30, 2015. Corporation H is not treated as a covered health insurance provider for its 2015 taxable year by reason of the transition period relief in paragraph (d)(1)(ii)(A) of this section. However, H will be a covered health insurance provider for its 2016 taxable year and all subsequent taxable years for which it is a covered health insurance provider under paragraph (b)(4) of this section.

Example 2. (i) On January 1, 2016, corporations D, E, and F are members of a controlled group within the meaning of section 414(b). F is a health insurance issuer that is a covered health insurance provider under paragraph (b)(4)(i)(B) of this section. D and E are not health insurance issuers (but are treated as covered health insurance providers pursuant to paragraph (b)(4)(i)(C) and (D) of this section). F's taxable year is a fiscal year ending on September 30. P is an applicable individual of F for all taxable years. On May 1, 2016, a controlled group within the meaning of section 414(b) consisting of corporations C and B purchases all of the stock of corporation F, resulting in a controlled group within the meaning of section 414(b) consisting of corporations C, B, and F. C and B are not health insurance issuers. The C, B, and F controlled group is a consolidated group within the meaning of § 1.1502–1(h). Thus, F's taxable year ends on May 1, 2016 by reason of § 1.1502–76(b)(1)(ii)(A)(*1*), and F becomes part of the C, B, and F consolidated group for the taxable year ending December 31, 2016.

(ii) D and E are covered health insurance providers for the taxable year ending December 31, 2016 because they were in an aggregated group with F for a portion of their taxable year. Accordingly, D and E are subject to the deduction limitation under section 162(m)(6) for their taxable years ending December 31, 2016. C and B are not treated as covered health insurance providers for their taxable year ending December 31, 2016, by reason of the transition period relief of paragraph (d)(1)(ii)(A) of this section. F, however, is a covered health insurance provider for its taxable year ending May 1, 2016, and for its taxable year ending December 31, 2016.

(iii) P is an applicable individual whose remuneration is subject to the deduction limitation under section 162(m)(6) for F's short taxable year ending May 1, 2016. In addition, remuneration for services by P for C, B or F after May 1, 2016, during the taxable year of the consolidated group ending December 31, 2016, is subject to the deduction limitation under section 162(m)(6), even though C and B are not

treated as covered health insurance providers for their taxable year ending December 31, 2016 by reason of the transition period relief of paragraph (d)(1)(ii)(A) of this section.

Example 3. (i) The same facts as *Example 2,* except that E is a health insurance issuer that is a covered health insurance provider under paragraph (b)(4) of this section, and F is not a health insurance issuer.

(ii) F is a covered health insurance provider for its short taxable year ending May 1, 2016. However, because F is not a health insurance issuer that is a covered health insurance provider, F is not treated as a covered health insurance provider for its short, post-acquisition taxable year ending December 31, 2016, during which it is a member of the consolidated group comprised of C, B, and F.

(iii) P is an applicable individual whose remuneration is subject to the deduction limitation under section 162(m)(6) and paragraph (c) of this section for F's short taxable year ending May 1, 2016. However, because F is not a health insurance issuer, remuneration for P's services for C, B or F after May 1, 2016, during the taxable year of the consolidated group ending December 31, 2016, are not subject to the deduction limitation under section 162(m)(6).

(g) *Coordination*—(1) *Coordination with section 162(m)(1).* If section 162(m)(1) and section 162(m)(6) would both otherwise apply with respect to the remuneration of an applicable individual, the deduction limitation under section 162(m)(6) applies without regard to section 162(m)(1). For example, if an applicable individual is both a covered employee of a publicly held corporation (see sections 162(m)(2) and (3); § 1.162–27) and an applicable individual within the meaning of paragraph (b)(7) of this section, remuneration earned by the applicable individual that is attributable to a disqualified taxable year of a covered health insurance provider is subject to the $500,000 deduction limitation under section 162(m)(6) with respect to such disqualified taxable year, without regard to section 162(m)(1).

(2) *Coordination with disallowed excess parachute payments*—(i) *In general.* The $500,000 deduction limitation of section 162(m)(6) is reduced (but not below zero) by the amount (if any) that would have been included in the applicable individual remuneration or deferred deduction remuneration of the applicable individual for a taxable year but for being disallowed by reason of section 280G.

(ii) *Example.* The following example illustrates the rule of this paragraph (g)(2).

Example. Corporation A, a covered health insurance provider, pays $750,000 of applicable individual remuneration to P, an applicable individual, during A's disqualified taxable year ending December 31, 2016. Of the $750,000, $300,000 is an excess parachute payment as defined in section 280G(b)(1), the deduction for which is disallowed by reason of that section. The excess parachute payment reduces the $500,000 deduction limitation to $200,000 ($500,000—$300,000). Therefore, A may deduct only $200,000 of the $750,000 in applicable individual remuneration, and $250,000 of the payment is not deductible by reason of section 162(m)(6).

(h) *Grandfathered amounts attributable to services performed in taxable years beginning before January 1, 2010*—(1) *In general.* The section 162(m)(6) deduction limitation does not apply to remuneration attributable to services performed in taxable years of a covered health insurance provider beginning before January 1, 2010. For purposes of this paragraph (h), whether remuneration is attributable to services performed in a taxable year beginning before January 1, 2010, is determined by applying an attribution method in paragraph (h)(2) of this section.

(2) *Identification of services performed in taxable years beginning before January 1, 2010*—(i) *Account balance plans.* Deferred deduction remuneration provided under an account balance plan (as defined in § 1.409A–1(c)(2)(i)(A) and (B)) is attributable to services performed in a taxable year beginning before January 1, 2010 if it is attributable to services performed before that date under paragraph (d)(3) of this section, without regard to whether that remuneration is subject to a substantial risk of forfeiture on or after that date.

(ii) *Nonaccount balance plans.* The amount of remuneration attributable to services performed in taxable years beginning before January 1, 2010 under a nonqualified deferred compensation plan that is a nonaccount balance plan (as defined in § 1.409A–1(c)(2)(i)(C)), equals the present value of the remuneration to which the applicable individual would have been entitled under the plan if the applicable individual voluntarily terminated services without cause on the last day of the first taxable year of the covered health insurance provider beginning before January 1, 2010 and received a payment of the benefit available from the plan on the earliest possible date allowed under the plan to receive a payment of benefits following the termination of service, and received the benefit in the form with the maximum value. Notwithstanding the foregoing, for any subsequent taxable year of the covered health insurance provider, this amount may increase to equal the present value of the benefit the applicable individual actually becomes entitled to receive, in the form and at the time actually paid, determined under the terms of the plan (including applicable limits under the Code) as in effect on the last day of the first taxable year beginning before January 1, 2010 without regard to any further services rendered by the individual after that date or any other events affecting the amount of, or the entitlement to, benefits (other than the applicable individual's election with respect to the time or form of an available benefit). For purposes of calculating the present value of remuneration under this paragraph (h)(2)(ii), reasonable actuarial assumptions and methods, determined as of the date the remuneration is valued, must be used. The present value as of the last day of the first taxable year beginning before January 1, 2010 is determined without regard to whether the remuneration under the nonaccount balance is subject to a substantial risk of forfeiture on or after that date.

(iii) *Equity-based remuneration.* For purposes of this section, all remuneration resulting from a stock option, stock appreciation right, restricted stock, or restricted stock unit and the right to any associated dividends or dividend equivalents (together, referred to as *equity-based remuneration*) granted before the first day of the taxable year of the covered health insurance provider beginning on or after January 1, 2010, is attributable to services performed in taxable years beginning before January 1, 2010, regardless of the date on which the equity-based remuneration is exercised (in the case of a stock option or SAR), the date on which the amounts due under the equity-based remuneration are paid or includible in income, or whether the equity-based remuneration is subject to a substantial risk of forfeiture on or after the first day of the taxable year of the covered health insurance provider beginning on or after January 1, 2010. For example, appreciation in the value of restricted shares granted before the first day of the taxable year beginning on or after January 1, 2010 is treated as remuneration that is attributable to services performed in taxable years beginning before January 1, 2010, regardless of whether the shares are vested at that time.

(i) *Transition rules for certain deferred deduction remuneration*—(1) *Transition rule for deferred deduction remuneration attributable to services performed in taxable years of the covered health insurance provider beginning after December 31, 2009 and before January 1, 2013.* The deduction

limitation under section 162(m)(6) applies to deferred deduction remuneration attributable to services performed in a disqualified taxable year of a covered health insurance provider beginning after December 31, 2009 and before January 1, 2013, only if that remuneration is otherwise deductible in a disqualified taxable year of the covered health insurance provider beginning after December 31, 2012. However, if the deduction limitation applies to deferred deduction remuneration attributable to services performed by an applicable individual in a disqualified taxable year of a covered health insurance provider beginning after December 31, 2009 and before January 1, 2013, the deduction limitation is calculated as if it had been applied to the applicable individual's applicable individual remuneration and deferred deduction remuneration deductible in those taxable years.

(2) *Example.* The following examples illustrate the principles of this paragraph (i). For purposes of these examples, each corporation has a taxable year that is the calendar year, and deferred deduction remuneration is otherwise deductible by the covered health insurance provider in the taxable year in which it is paid.

Example 1. (i) Q is an applicable individual of corporation Z. Z's 2010, 2011, and 2012 taxable years are disqualified taxable years. Z's 2013, 2014, and 2015 taxable years are not disqualified taxable years. However, Z's 2016 taxable year and all subsequent taxable years are disqualified taxable years. Q receives $200,000 of applicable individual remuneration from Z for 2012, and becomes entitled to $800,000 of deferred deduction remuneration that is attributable to services performed by Q in 2012. Z pays Q $350,000 of the deferred deduction remuneration in 2015, and the remaining $450,000 of the deferred deduction remuneration in 2016. These payments are otherwise deductible by Z in 2015 and 2016, respectively.

(ii) Deferred deduction remuneration attributable to services performed by Q in Z's 2010, 2011, and 2012 taxable years that is otherwise deductible in Z's 2013, 2014, or 2015 taxable years is not subject to the deduction limitation under section 162(m)(6) by reason of the transition rule under paragraph (i)(1) of this section. However, deferred deduction remuneration attributable to services performed in Z's 2010, 2011, and 2012 taxable years that is otherwise deductible in a later taxable year that is a disqualified taxable year (in this case, Z's 2016 and subsequent taxable years) is subject to the deduction limitation under section 162(m)(6). Accordingly, the deduction limitation with respect to applicable individual remuneration and deferred deduction remuneration attributable to services performed by Q in 2012 is determined by reducing the $500,000 deduction limitation by the $200,000 of applicable individual remuneration paid to Q by Z for 2012 ($500,000–$200,000). Under the transition rule of paragraph (i)(1) of this section, no portion of the reduced deduction limitation of $300,000 for the 2012 taxable year is applied against the $350,000 payment made in 2015, and accordingly, the deduction limitation is not reduced by the amount of that payment. The reduced deduction limitation is then applied to Q's $450,000 of deferred deduction remuneration attributable to services performed by Q in 2012 that is paid to Q and becomes otherwise deductible in 2016. Because the reduced deduction limitation of $300,000 is less than the $450,000 otherwise deductible by Z in 2016, Z may deduct only $300,000 of the deferred deduction remuneration, and $150,000 of the $450,000 payment is not deductible by Z in that taxable year or any taxable year.

Example 2. (i) R is an applicable individual of corporation Y, which is a covered health insurance provider for all relevant taxable years. During 2010, Y pays R $400,000 in salary and grants R a right to $200,000 in deferred deduction remuneration payable on a fixed schedule in 2011, 2012, and 2013. Pursuant to the fixed schedule, Y pays R $50,000 of deferred deduction remuneration in 2011, $50,000 of deferred deduction remuneration in 2012, and the remaining $100,000 of deferred deduction remuneration in 2013.

(ii) Because the deduction limitation for deferred deduction remuneration under section 162(m)(6)(A)(ii) is effective for deferred deduction remuneration that is attributable to services performed by an applicable individual during any disqualified taxable year beginning after December 31, 2009 that would otherwise be deductible in a taxable year beginning after December 31, 2012, only the deferred deduction remuneration paid by Y in 2013 is subject to the deduction limitation. However, the limitation is applied as if section 162(m)(6) and paragraph (c)(2) of this section were effective for taxable years beginning after December 31, 2009 and before January 1, 2013. Accordingly, the deduction limitation with respect to remuneration for services performed by R in 2010 is determined by reducing the $500,000 deduction limitation by the $400,000 of applicable individual remuneration paid to R for 2010 ($500,000–$400,000). The reduced deduction limitation of $100,000 is further reduced to zero by the $50,000 of deferred deduction remuneration attributable to services performed by R in Y's 2010 taxable year that is deductible in each of 2011 and 2012 (($100,000–$50,000–$50,000). Because the deduction limitation is reduced to zero, none of the $100,000 of deferred deduction remuneration attributable to services performed by R in Y's 2010 taxable year and paid to R in 2013 is deductible.

(j) *Effective/Applicability dates.* These regulations apply to taxable years that begin after December 31, 2012, and end on or after April 2, 2013. These regulations are effective on publication of final regulations in the **Federal Register**.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

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